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# The Forgotten Unitary Executive Power: The Textualist, Originalist, and Functionalist Opinions Clause

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## The Forgotten Unitary Executive Power: The Textualist, Originalist, and Functionalist Opinions Clause

Zachary J. Murray\*

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## I. Introduction

How do we define executive power in the Constitution of the United States? Throughout our history, this question has been hotly contested, including among the framers themselves. At the Philadelphia Convention in 1787, George Mason thought that the executive branch should be headed by a council of three, with one member from the northern, middle, and southern states respectively.<sup>1</sup> Alexander Hamilton, on the other hand, argued that the best safeguard for liberty and security would be an elected monarch with life tenure.<sup>2</sup> Less than a decade later, Alexander Hamilton once again found himself in a dispute over the scope of the executive power, this time with fellow framer James Madison, who argued that President Washington's Neutrality Proclamation was an unconstitutional usurpation of Congress' power to declare war.<sup>3</sup> Alexander Hamilton disagreed,

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1. THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 23 (Ralph Ketcham ed. 1986) ("If the [e]xecutive is vested in three [p]ersons, one chosen from the northern, one from the middle, and one from the [s]outhern [s]tates, will it not contribute to quiet the [m]inds of the [p]eople, [and] convince them that there will be proper attention paid to their respective [c]oncerns?").

2. *Id.* at 54–55 ("As to the [e]xecutive . . . [t]he [e]nglish model was the only good one on this subject. The [h]ereditary interest of the King was so interwoven with that of the Nation, and his personal emoluments so great, that he was placed above the danger of being corrupted from abroad, and at the same time was both sufficiently independent and sufficiently controled [sic], to answer the purpose of the institution at home. . . . Let the [e]xecutive also be for life.").

3. NOAH FELDMAN, THE THREE LIVES OF JAMES MADISON 375–84 (2017).

arguing that because the power was neither legislative nor judicial, it was executive under the Constitution.<sup>4</sup> Given that two of the framers disagreed so strongly on the meaning of “executive power” in the text of the Constitution that they helped write only six years earlier, we can safely assume that the Constitution leaves much of the executive power to be determined in political fights and decisions over time.

In the first clause of Article II of our Constitution, the framers wrote that the “executive Power shall be vested in a President of the United States of America.”<sup>5</sup> This opening line settled a key debate between the framers at the convention: whether to have an executive council or a single unitary executive, with the latter winning.<sup>6</sup> However, while the Constitution settles this debate over a singular or plural executive, it does not specifically define executive power. It does, however, enumerate powers and duties in Sections Two and Three.<sup>7</sup> These powers and duties are undeniably vested in the president, and thus we owe it to the text to examine their scope and implications for any broader executive power advocated by some scholars.

This article is focused on the Opinions Clause, which empowers the president to “require the Opinion, in writing, of the principal Officer in each of the executive Departments upon any Subject relating to the Duties of their respective Offices.”<sup>8</sup> The Opinions Clause is the only power set forth in Article II that speaks to the president’s role in the day-to-day administration of the civilian government.<sup>9</sup> Clearly, it assumes a president that is at the top of the executive branch hierarchy with respect to the flow of information.<sup>10</sup> The president may demand opinions

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4. *Id.* at 377.

5. U.S. CONST. art. II, § 1, cl. 1.

6. *See supra* notes 1–2 and accompanying text (outlining the disagreements).

7. U.S. CONST. art. II, §§ 2–3.

8. U.S. CONST. art. II, § 2, cl. 1.

9. Of course, modern unitary scholars will argue that the Vesting Clause and the Take Care Clause speak to the president’s day-to-day role in the administration to an even greater degree than the Opinions Clause. However, as this article explains, those clauses leave great ambiguity in the exact powers of the Presidency, while the Opinions Clause is undeniably clear and specific.

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

on *any subject* related to the duties of the particular executive agency, meaning that there is nothing within the executive branch that he cannot discover. Professor Akhil Amar wrote that the clause yields “rich insights into the scope, limits, and nature of the American Presidency, with implications both timely and timeless.”<sup>11</sup> Amar’s statement has never been timelier, and we should answer the call to examine in greater detail those important implications.

Given Alexander Hamilton’s position on an elected monarch, it is perhaps not surprising that he called the clause a “mere redundancy.”<sup>12</sup> Many unitary scholars, or those who believe in a strong and broad substantive reading of the Vesting Clause, agree.<sup>13</sup> Contrary to Alexander Hamilton’s view, however, the Opinions Clause is in no way redundant. It serves an important purpose for the presidency and our constitutional structure as a whole. Although it is a limited power that implies further limits on the broader executive power, it is not a power to be dismissed. In fact, the Clause vests the president with the authority to access any and all information within the duties of the federal government. What the president can do with this information depends on what laws congress has passed and, perhaps more importantly, the political skill of the particular president. If, for example, congress delegated broad unrestricted authority to the president over a particular statutory framework, then the president can use the Opinions Power to become more informed of the proposed actions of his officers, and then correct any actions he wishes.<sup>14</sup> However, the Opinions Clause is limited by what it does *not* say: it does not give the president an absolute power to issue orders, to fire officers, or, as is important in the modern debates on

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11. *Id.* at 647.

12. THE FEDERALIST NO. 74 (Alexander Hamilton).

13. See, e.g., Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 YALE L. J. 991, 1004 (1993); see also Amar, *supra* note 10, at 648–49 (arguing that it is acceptable to have constitutional redundancies and, thus, we should not seek a meaning for the sake of meaning).

14. Here, the President may take any corrective action because Congress has delegated *unrestricted* authority to the President. As this article will show, the Opinions Clause allows Congress to place certain restrictions on what corrective actions the President may take. See *infra* Part III(B),

presidential overreach into the FBI, to demand direct communications with inferior officers.<sup>15</sup> Thus, the Opinions Clause represents a compromise by the framers: the nuts and bolts of the executive power will shift based on the political battles of the day—just as we saw in the dispute between Alexander Hamilton and James Madison over the constitutionality of the Neutrality Proclamation—but the one constant embodied in the Opinions Clause is the president’s authority to arm himself with information.<sup>16</sup>

This article will analyze the Clause’s text, its history and intent, and its potential functions as a power. Part II catalogues much of the prior scholarship on the Opinions Clause, which generally fits into two categories: the anti-unitary approach, which argues that a substantive reading of the Vesting Clause renders the Opinions Clause redundant,<sup>17</sup> and the unitary response, which essentially accepts that redundancy.<sup>18</sup> To some extent, both sides miss the mark. The unitary approach misreads the text, assigning great substantive weight to the descriptive Vesting Clause, while assigning descriptive status to the substantive Opinions Clause. The anti-unitary approach, on the other hand, neglects to analyze the substantive powers of the Opinions Clause and what they mean for the constitutional nature of the presidency. As a result, while anti-unitary

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15. Cf. Amar, *supra* note 10, at 667 (arguing that the power over principal officers contains the power over the inferior officers).

16. The same argument applies to the Decision of 1789, in which the First Congress voted to grant the President the power of removal. Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 642–62 (1994) (discussing the disagreements in Congress on the merits, the need, and the decision to grant the President with removal authority). This decision was a political decision made by Congress that can be reversed by a future Congress. To some extent, the debate itself answers the question of whether the Constitution solved the removal problem.

17. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 31–38, 72 (1994); see also Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1795–98 (1996); Morton Rosenberg, *Congress’s Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration’s Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 689 (1989) (stating “[a] broad reading of the Take Care Clause would have the effect of reducing the Opinions Clause . . . to surplusage”).

18. See generally Calabresi & Prakash, *supra* note 16; see also THE FEDERALIST NO. 74, *supra* note 12; Amar, *supra* note 10, at 648–49.

scholars are correct in that the Opinions Clause refutes a substantive reading of the Vesting Clause, their position is undermined by their failure to advocate for a definable alternative. This article fills this space.

Part III focuses on the text of the Opinions Clause and analyzes its implications for the Presidency. The text vests the president with discretionary power to inform himself of the workings of the entire executive branch. On the other hand, the limited nature of this power suggests that the Constitution does not vest the president with unenumerated powers. For example, the Opinions Clause grants the president the authority to require a principal officer report to him, but it does not grant the president the power to remove that officer. To close this argument, the Opinions Clause and the broader structure of Article II is used to refute the unitary argument that the Vesting Clause fills in any of the gaps in power left by the Opinions Clause.

Part IV assigns the Clause its historical significance by analyzing its introduction and adoption at the Philadelphia Convention. Then, it is shown that the Clause serves James Madison's and the framers' purpose of the presidency: to be a republican check on a factious legislature. To illustrate, Part V analyzes President Washington's use of the Opinions Clause to prepare and execute a response to the Whiskey Rebellion. From this historical example, an inference is made of three Opinions Clause powers vested uniquely in the president: the Unitary Political and Legislative Power, the Unitary Judicial Power, and the Unitary Executive Power. These three powers enable the president to protect the executive branch from both legislative and judicial encroachments, garner political support amongst the electorate, and unify the executive branch even in situations where congress has restricted the president's legal authority.

Finally, Part VI examines the recent practices of President Trump through the lens of the Opinions Clause, namely, President Trump's attempt to use the Opinions Clause for his initial justification for the firing of former FBI Director James Comey. This Part includes the discovery of potentially troubling facts centered around the current President's actions which tend to compromise the independence of the Department of Justice. In contrast to President Washington, who used the power of the

Opinions Clause to further his legislative, judicial, and executive policies in crushing the Whiskey Rebellion, President Trump's actions suggest a reason the framers granted the president this more limited power—to allow Congress the flexibility to regulate the execution of the law and prevent presidential abuse of power. Additionally, after documenting the evidence as we now know it, this Section turns to the steps congress can take on the basis of the correct reading of Article II. Congress can insulate inferior officers such as the FBI Director from reporting directly to the president, prevent presidents from ordering politically motivated investigations, and protect any officer, including Special Counsel Robert Mueller, from at-will removal.

Generally speaking, this article analyzes an often-ignored clause in our Constitution and finds a significant power grant. In so doing, the wisdom of the Opinions Clause emerges. It is a great power, but it is limited, and its limitations grant us and our representatives the flexibility to strike the right balance between preserving presidential power and enabling congress' power to ensure fair and independent law enforcement.

## II. Previous Scholarship on the Opinions Clause

Although there is little scholarship that focuses solely on the Opinions Clause,<sup>19</sup> scholars have used the Clause as a pawn in the broader arguments over executive power. This broader debate generally centers around what it means to have a unitary executive. The key textual hook for the unitary executive theory is Article II's Vesting Clause: “the executive Power shall be vested in a President of the United States of America.”<sup>20</sup> On one side, proponents of a strong Unitary Executive believe that this Vesting Clause grants all federal executive powers to the

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19. The only other article focused solely on the Opinions Clause is Akhil Amar's work, *Some Opinions on the Opinions Clause*. See generally Amar, *supra* note 10. Amar usefully breaks down the text of the clause and assigns certain principles to each of its key phrases. *Id.* at 661–62. For instance, the word “respective” presents a hub and spoke model for the President and the executive branch. *Id.* The word contemplates many different spokes, or principal officers responsible for their one executive department, with the President serving as the hub responsible to the American people for the whole branch. *Id.*

20. U.S. CONST. art. II, § 1, cl. 1.



president alone, unless otherwise restricted by the Constitution.<sup>21</sup> The anti-unitary scholars, on the other hand, believe that the Vesting Clause is a naming clause—settling the debate that there will be one president—rather than granting any substantive powers. A naming function allows congress to create agencies independent of the president's will; for example, removal restrictions.<sup>22</sup> Within this broader debate, the Opinions Clause is generally first cited by anti-unitary scholars as evidence that the Vesting Clause is not a substantive power grant, with the unitary scholars limiting their analysis of the clause to rebuttal of this argument.

#### A. The Anti-Unitary Approach

The anti-unitary scholars use the presence of the Opinions Clause to negate any substantive meaning in the Vesting Clause. If the Vesting Clause actually granted all executive power in the president (as the unitary scholars argue), there would be no need to enumerate the powers later listed in Article

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21. See generally Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377 (1994).

22. Lessig & Sunstein, *supra* note 17, at 9; see also Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1166 (1992) (explaining how, as a result of the lack of debate, the Constitution does not vest the power in any one body, and thus the authority must either come from the Vesting Clause, the Take Care Clause, the Appointments Clause, or perhaps even the Necessary and Proper Clause). Alternatively, the power may come from a law passed by Congress and signed by the President. *Id.* To illustrate the power's importance, Professors Calabresi and Rhodes, unitary executive theorists, list the removal power with one of the three executive powers that must be vested in the President through the Vesting Clause *Id.*; see also Michael W. McConnell, *The Logical Structure of Article Two 67* (unpublished manuscript) (on file with Buffalo Law Review), [http://www.law.northwestern.edu/research-faculty/colloquium/constitutionallaw/documents/2016\\_Fall\\_McConnell\\_Art.pdf](http://www.law.northwestern.edu/research-faculty/colloquium/constitutionallaw/documents/2016_Fall_McConnell_Art.pdf) (explaining that limitations on the President's constitutionally guaranteed executive power have many implications for the function of our government). The removal power is the most commonly cited power in these debates precisely because we've come to believe that ultimate accountability lies with removal from office. *Id.* Thus, from the first Congress, to the Andrew Johnson impeachment proceedings, up to the modern-day dispute over the independent Consumer Financial Protection Bureau, the President's right to remove officers has been hotly contested. *Id.* It's a striking mystery, as Professor McConnell has pointed out, that the framers at the convention did not speak clearly to which branch would be vested with the Removal power. *Id.*

II, including the Opinions Clause. The Opinions Clause is noteworthy because it is such a seemingly strange power to be singled out in writing when most readers would assume it to be encompassed by executive power.<sup>23</sup> Indeed, it seems obvious. Professors Sunstein and Lessig, in *The President and The Administration*, build on this argument by pointing to the history of the Clause at the convention, which originally included the chief justice alongside executive officers as subject to this power.<sup>24</sup> The chief justice was ultimately removed from the Clause, thus leaving the president without the Opinions Power over the chief justice.<sup>25</sup> From this, Sunstein and Lessig deduce that the Opinions Clause is necessary as a power grant, thus negating a substantive Vesting Clause.<sup>26</sup> Underlying this argument is the interpretative canon that redundant readings, particularly of constitutional clauses, should be avoided. Anti-unitary scholars have thus cautioned against overly broad readings of both the Vesting Clause and the Take Care Clause that render the Opinions Clause (and the other power-grants in Article II, Section Two) surplusage.<sup>27</sup>

Still, the anti-unitary argument contains a trace of a unitary executive theory: the Opinions Power is vested in the president alone and cannot be restricted by congress. Professors Sunstein and Lessig, in their conservative reading,<sup>28</sup> state that the

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23. THE FEDERALIST NO. 74, *supra* note 12 (considering it “a mere redundancy” that comes with the office).

24. Lessig & Sunstein, *supra* note 17, at 33–34.

25. While this seems clear, President Washington requested the opinion of Chief Justice John Jay, who cited the Opinions Clause and the removal of the Chief Justice from it as reason that he could not offer his opinion to the President. Letter from John Jay et al., Supreme Court Justices, Supreme Court of the U.S., to George Washington, U.S. President (August 8, 1793), <https://founders.archives.gov/documents/Washington/05-13-02-0263>.

26. Lessig & Sunstein, *supra* note 17, at 34; *see also* Calabresi & Prakash, *supra* note 16, at 627. Professors Calabresi and Prakash reject this analog; of course the executive power in the Vesting Clause does not cover the Chief Justice who is in a coequal branch of government, but we should not infer from this natural and constitutionally-mandated assumption that the President then also needs the Opinions Clause to have substantive power over executive officers.

27. Rosenberg, *supra* note 17, at 689; *see also* Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 343–44 (2016); Edward H. Stiglitz, *Unitary Innovations and Political Accountability*, 99 CORNELL L. REV. 1133, 1142–43 (2014).

28. *See* Lessig & Sunstein, *supra* note 17, at 32–38. (offering two readings

Opinions Clause at least serves as the line that congress cannot cross (as opposed to other lines congress may cross such as, say, restricting presidential power to fire the officer).<sup>29</sup> In this sense, they argue that the Opinions Clause establishes a unitary administration with one line of executive officials who are all responsible to the president through the Opinions Power.<sup>30</sup> Professors Sunstein and Strauss classify the power as procedural, allowing a president to establish a coherent regulatory agenda, even if other substantive powers are limited.<sup>31</sup> Professor Strauss subsequently compares the clause to the Commander-in-Chief Clause, which clearly establishes a direct and affirmative presidential power. The Opinions Clause, by contrast, provides for officers with *duties*, suggesting that the president will play a more passive and managerial role over the

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of the Opinions Clause: the conservative and the radical). While the conservative reading is described above and built upon in this article, the radical reading construes the Opinions Clause together with the Inferior Officer Appointments Clause to establish a fourth branch beyond the President's reach. *Id.* The Opinions Clause refers to "Principal Officers" while the Inferior Officer's Clause refers to the heads of departments. *Id.* These two terms imply two separate officers, and thus the heads of departments are part of some headless fourth branch not subject to the president's Opinions Power. *Id.* Both anti-unitary and unitary scholars alike have rejected this argument, it is doubted that the framers intended an entire branch of government to be implied by the difference between two terms, particularly because Articles I, II, and III lay out a strong structural assumption that there will only be three branches. *Id.*; see also Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (attributing the different terms to unsophisticated drafting on behalf of the framers).

29. Lessig & Sunstein, *supra* note 17, at 34.

30. See *infra* note 59 and accompanying text.

31. Cass R. Sunstein & Peter L. Strauss, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 200 (1986); see also Strauss, *supra* note 28, at 574. In this second article, Professor Strauss traces the Opinions Power thread through the modern era of presidents beginning with President Kennedy, and then picking up force with Presidents Carter, Reagan, Bush, and Clinton, who each utilized the Opinions Power by establishing the Office of Management and Budget and then requiring that each agency report proposed regulations through it. Strauss, *supra* note 28, at 574. Strauss comments that the Clause suggests that the information could be received prior to the action being taken, even if the president may be powerless to stop an independent agency from taking such an action. *Id.* Nevertheless, the president must be able to know that the action is coming. *Id.* Part III will expand on the Opinions Clause and its unitary function with respect to independent agencies.

civilian administration.<sup>32</sup>

In sum, while the anti-unitary scholars argue that the Opinions Clause establishes a line congress cannot cross, they maintain that its existence in the Constitution negates a substantive reading of the Vesting Clause.

## B. The Unitary Response

In response, unitary scholars first assert that it is okay for the Opinions Clause to be redundant. Professor Amar cautions against inventing meanings for the sake of avoiding redundancy, citing the entire Bill of Rights as potentially redundant.<sup>33</sup> In fact, Alexander Hamilton in Federalist No. 74 called the clause a “mere redundancy.”<sup>34</sup> Unitary scholars further insist that the Clause’s redundancy does not suggest that it serves no purpose. Professors Calabresi and Prakash argue that the Clause is a truism emphasizing the Vesting Clause’s hierarchy.<sup>35</sup> Perhaps most importantly, they argue that the Clause served a historical purpose at the Convention, easing the harmful effects of a unitary executive to those in favor of an executive council. The Clause aimed at alleviating fears that a single president would lack advice, an impetus for a clause that ensured the president would have a cabinet.<sup>36</sup>

In *Hail to the Chief Administrator*, Prakash further argues that the historical context of the Clause’s proposal and debate at the Convention indicates the Vesting Clause confers all executive power to the president.<sup>37</sup> As he and Calabresi

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32. See generally Peter L. Strauss, *A Softer Formalism*, 124 HARV. L. REV. F. 55, 59 (2011).

33. Amar, *supra* note 10, at 648–49; see also Calabresi & Prakash, *supra* note 16, at 585 (pointing to the Tenth Amendment as a constitutional redundancy).

34. THE FEDERALIST NO. 74, *supra* note 12.

35. Calabresi & Prakash, *supra* note 16, at 585; see also Amar, *supra* note 10, at 651 (arguing that the Clause serves to “clarify and exemplify”).

36. Calabresi & Prakash, *supra* note 16, at 629, n.393. (“Ellsworth, writing as The Landholder, pointed to the Opinions Clause to assuage the fears of those who felt that the President would be bereft of advice”).

37. Prakash, *supra* note 13, at 1005 (stating “the Framers arguably included this provision to facilitate presidential control of discretion. The President may demand opinions in order to determine how *he should execute federal law.*”) (emphasis in original).

highlight, the Clause was introduced by Gouverneur Morris and Charles Pinckney—two framers strongly in support of a unitary executive—leaving them to doubt any reading of the clause that interprets it as a limit instead of a truism restating the power granted in the Vesting Clause.<sup>38</sup> In addition to language closely resembling the Opinions Clause,<sup>39</sup> the original proposal provided for a council of state who would “assist the President” in his final decision-making responsibility, suggesting to Prakash an expansive view of presidential power.<sup>40</sup> Although the Committee of Eleven deleted the provisions Prakash cites here, he argues that the finalized text of the Opinions Clause mirrors the original proposal, and thus we should not read it as divorced from Morris and Pinckney’s original intent.<sup>41</sup>

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38. Calabresi & Prakash, *supra* note 16, at 630–31.

39. Prakash, *supra* note 13, at 1006, n.107 (pointing out similarities between the original proposal, which stated “he may require the written opinions of any one or more of the . . . members . . . and every officer abovementioned shall be responsible for his opinion on the affairs relating to his particular Department” and the language which states “he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices”).

40. *Id.* (explaining that, under the original proposal, the president would be the chief administrator with the authority to command all of the executive department heads).

41. *Id.*; *see infra* notes 115–36 and accompanying text for an interpretation of this history. While it is true that the Opinions Clause mirrors one phrase in the original proposal, *see* Prakash, *supra* note 13, Prakash argues that because one portion of the Clause is the same, we should attach the meaning of the other original portions, such as cabinet members serving “at the pleasure of the president,” even though these parts were removed. However, they were removed for a reason. Prakash argues that the context explains their removal and the other provisions were removed because the framers were afraid that providing for a council in the Constitution would allow the president to escape accountability, hence the removal of “Council of State” from the Clause. *Id.* To support this argument, he cites the simultaneous motion by George Mason for a plural executive, which was rejected by the same Committee of Eleven that revised the Opinions Clause. *Id.*, at 1006. The revisions were about preserving presidential accountability, according to Prakash, further supported by James Iredell’s statements at the North Carolina ratifying convention: essentially that the Opinions Clause maintains that it is the President who is accountable for the executive branch, not a Council of State. *Id.*

This argument might explain why the framers removed the Council of State provision from the original proposal, but it fails to explain why they removed provisions like *assist the president*, *serve at the pleasure of the president*, or that the president’s decision was final. Each of these three proposals seems to

All in all, the unitary scholars argue that the Opinions Clause is largely redundant, restating the truism already found in the Vesting Clause. Almost as an afterthought, they state that the Clause could plausibly foreclose the president from exercising the King's prerogative to have his officers tend to his personal affairs.<sup>42</sup> But otherwise, they disregard the limits on constitutional executive power that the Opinions Clause embodies.

### C. Finding the Clause's True Meaning

To a certain extent, both camps miss the true implications of the Opinions Clause for presidential power. The unitary scholars misread the text of Article II. They assign substantive powers to the Vesting Clause and prefer to read the far more limited Opinions Clause as a redundancy or a restated truism. However, this argument strains credulity. Although some readers may find the Opinions Clause a strange presidential power to single out in the Constitution, it is an even stranger truism to repeat just for emphasis. Assuming a substantive Vesting Clause, why would the framers choose to reiterate the power to require opinions from only principal officers and not the power to fire anybody at will or the power to issue directives? Surely, the latter two hypothetical redundancies would better support the unitary scholars' vision of the Constitution.

There is a far more plausible explanation that is more in line with the structure of Article II. The Vesting Clause solves the

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uphold presidential accountability, so why would it make sense for the framers to strike them in the name of accountability? Perhaps replacing "Council of State" with "principal officers" is significant for the reason Prakash states (though perhaps not). However, if the framers truly wanted to preserve accountability, they would have said *he may require the opinion, in writing, of the principal officers, who shall assist and serve at the pleasure of the president, and the president's decision shall be final.* However, they did not say this, and not because it did not occur to them; similar language was in Morris and Pinckney's original proposal. See *infra* notes 103–106 and accompanying text. The framers actually decided against including these strong powers.

42. Amar, *supra* note 10, at 654 (describing how the framers included "duties of their . . . offices" to suggest that the president lacked the King's authority to have a privy council tend to his personal affairs); Calabresi & Prakash, *supra* note 16, at 584–85.

key historical question whether there should be one president.<sup>43</sup> It is located in Section One, which we will call the Naming Section because it is surrounded by clauses that name the office and its characteristics.<sup>44</sup> This context implies a non-substantive and naming Vesting Clause, not an all-encompassing power grant. The Opinions Clause, by contrast, is located in Section Two, surrounded by the president's other constitutional powers. The Opinions Clause not only refutes a substantive reading of the Vesting Clause, but it also becomes the very important substantive power grant detailed in this article.

On the other hand, while the anti-unitary approach correctly identifies a non-substantive Vesting Clause, it fails to acknowledge the significance of the Opinions Clause aside from its worth in defeating any substantive reading of the Vesting Clause. Yes, the Opinions Clause's mere existence undermines the notion that the Vesting Clause grants any substantive executive powers, but this is not a strong enough argument to fully refute the unitary scholars' approach. Any reading of Article II that is based in part on the existence of the Opinions Clause needs to define the powers that the Clause actually vests in the president, not just describe what powers the Clause leaves out.

In *Some Opinions on the Opinion Clause*, Professor Amar admirably offered several plausible interpretations of the Clause. This textual analysis is built upon in Part III, *infra*. But, in some sense, the text does not tell the complete story. While the text strongly favors the substantive Opinions Clause reading, one needs to engage the unitary scholars on the original republican intent of the Presidency and how the Opinions Clause furthers that intent. This is accomplished in Part IV,

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43. See *infra* Part IV for a discussion of the framers' concern over having one President or a plural executive council.

44. U.S. CONST. art. II, § 1. This article refers to Section One as the naming section because it identifies *who* will be vested with executive power (the president); the term of his office; the vice president; the manner for his election including naming the electors; the citizenship, age and residency requirements; the removal process (since amended by the Twenty-Fifth Amendment); and the president's compensation. Section One closes with the oath of office, naming the moment when the citizen assumes the office of president and possesses the powers and duties subsequently vested by Section Two ("powers") and Section Three ("duties"). *Id.*

*infra*. The analysis also needs to answer legitimate concerns about a more limited presidential power in practice, including, for instance, that executive branch accountability will suffer from a restricted removal power. Part V, *infra*, analyzes how the Opinions Clause serves the president's interests in these concerns and may even be better for the president than the "Damocles' sword of removal."<sup>45</sup> Finally, analysis of the substantive Opinions Clause invites an example of the flexibility and safeguards it empowers us to design. This constitutional flexibility is illustrated in Part VI, *infra*, rejecting the notion that congress is powerless to prevent presidential overreach with the FBI.

### III. The Textual Opinions Clause: Its Powers and its Limitations

A proper analysis of the Opinions Clause should begin with its text and its place in the overall structure of Article II. The first three sections of Article II divide into three distinct categories: the *Naming* Section One, the *Powers* Section Two, and the *Duties* Section Three. Each of the clauses within these three sections fits within this taxonomy, and each clause should be read in light of the company it keeps. The Opinions Clause is located in the Powers Section, and thus we should analyze it as an important substantive power. Part A examines the text of the Clause to describe the discretionary power that the Clause vests in the president and highlight how it is the only explicit textual power grant related to the president's role over the day-to-day administration. Part B acknowledges the Opinions Clause is a limited power and examines the three negative implications for the broader executive power: (1) the president does not have an absolute power to issue directives to officers, as the Clause only vests the president with the power to require opinions from those officers, (2) the president does not have an absolute power to require inferior officers report to him directly, as the Clause only vests the president with the authority over the principal officers, and (3) the president does not have an absolute power to remove executive officers. Given that this

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45. *Wiener v. United States*, 357 U.S. 349, 356 (1958).



third implication has been so often debated throughout our history, the unitary scholars' counterarguments are then refuted—particularly that removal and other powers are granted by the Vesting Clause or other clauses in Article II.

A. The Opinions Clause and its Undeniable Unitary Executive Power

Regardless of one's views of the Vesting Clause, the Opinions Clause is a clear power vested in the president alone. Stating that the president “may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject related to the Duties of their respective Offices,”<sup>46</sup> the Clause establishes that the president has a textually-enumerated grant of power to require any principal officer to report to him. Before turning to the specific text, it is important to reiterate the anti-unitary argument outlined above: congress cannot contravene, restrict, or regulate the ability of the president to have a principal officer give his or her opinion.<sup>47</sup> In this sense, it is what unitary scholars think of the Vesting Clause: a textual power grant that cannot be infringed by the other branches.

Article II's overall structure and its other clauses also shed light on the interpretation of the Opinions Clause. The Clause is located in Section Two, or the Powers Section, surrounded by the other enumerated power grants vested in the president. The Clause's neighbors, the Commander in Chief Clause, the Pardon Clause, the Treaty-Making Clause, and the Nominations and Vacancy Appointment Clause, are all important power grants that presidents often cite when taking each respective action.<sup>48</sup>

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46. U.S. CONST. art. II, § 2, cl. 1.

47. See Lessig & Sunstein, *supra* note 17, at 32–38 (exploring a conservative reading of the Clause); see also Amar, *supra* note 10, at 657–59 (finding that “may require” signifies the president is in a unique constitutional position, as he is the top of the informational food chain within the executive branch). Additionally, the State of the Union Clause, by comparison, grants the president the discretion to pick and choose what he shares with Congress, thereby tipping the balance between the three branches to the president regarding facts on the ground. Amar, *supra* note 10, at 657–59.

48. U.S. CONST. art. II, § 2; see also Amar, *supra* note 10, at 652 (collectively referring to the Clauses as the “opening triad” of power).

Interestingly, the Opinions Clause is the only one of these power grants that speaks to the president's role in the day-to-day administration of the non-military executive branch.<sup>49</sup> In this sense, the Opinions Clause represents the most important power for the unitary executive: the ability to have the entire executive branch responsible to him through opinions.

Building on this context, the Opinions Clause's text indicates that it confers on the president a substantive discretionary power. He may require the principal officer to report to him, but, in line with the Clause's location in Section Two, it places no duty on the president to take action.<sup>50</sup> The president thus has unlimited discretion to exercise this authority when he sees fit. Generally speaking,<sup>51</sup> the president need not share an opinion that would negatively reflect on his administration or which is contradictory to his stated position. As a result, the president can only benefit from requiring an opinion. However, as the unitary scholars point out, this clause implicates the president's accountability for the flow of information within the executive branch.<sup>52</sup> By telling us that the president has this power, the Constitution also tells us to hold the president accountable for informational breakdowns. In other words, the president cannot stick his head in the sand to

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49. As argued further below, the Appointments Clause deals exclusively with the picking of personnel. Beyond choosing like-minded individuals, it does not explicitly grant any substantive control over those officers.

50. U.S. CONST. art. II, § 2, cl. 1.

51. There are three potential wrinkles to the president's complete discretion over the release of these opinions. Firstly, the Freedom of Information Act could force disclosure of these opinions. *See* *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1120 (D.C. Cir. 2004) (finding that executive privilege under FOIA does not apply to the attorney general, even if the attorney general is advising the president). Secondly, these opinions could be subject to congressional or judicial subpoena. The president could assert executive privilege to protect the opinions, but this strategy is not absolute. *See, e.g., United States v. Nixon*, 418 U.S. 683 (1974). Finally, the negative opinion could leak, a recurring problem from administration to administration. One might argue that these officers violate their oaths of office when they leak, but the political harm to the president will be difficult to reverse. In sum, while the opinion is mostly there for the president's benefit, there could be situations where a president's decision to sit on an opinion could backfire.

52. *See infra* Part IV(B) notes 145–47 and accompanying text for an illustration of this accountability; *see also* Amar, *supra* note 10, at 658–59; Prakash, *supra* note 13, at 1005.

shield himself.<sup>53</sup> Furthermore, as Professors Prakash and Amar state, this discretionary power establishes the president as the chief administrator.<sup>54</sup> The president's discretionary authority to require that principal officers report to him suggests that he is above them in the executive hierarchy, at least in respect to the information in the executive branch.

Relatedly, the Clause establishes an accountability on behalf of the executive officer. By allowing for opinions *in writing*, the Clause enables the president to require the officer to provide a more thorough opinion, knowing that it could be memorialized with the officer's name on it.<sup>55</sup> However, most importantly, *in writing* suggests that the president will have this information in the form of evidence that he has the discretion to share as he sees fit. Under a knowledge-is-power theory, the president can then use these reports as political evidence, either taking the fight to congress, or taking the report to the people to then hold congress responsible.<sup>56</sup> As other scholars have pointed out, an opinion in writing can assist the president in a removal battle over an independent officer,<sup>57</sup>

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53. As explained below, the unitary scholars wrongly suggest that this means the president must also have unrestricted authority to take the action or overrule the action taken by the officer. Rather, the accountability here is that the president must *know* about the fact at issue, and then either take the action under legal authority or inform us, his voters, to demand Congress put a stop to the action in question. *Contra* Prakash, *supra* note 13.

54. *See* Amar, *supra* note 10, at 659; *see also* Prakash, *supra* note 13. At the North Carolina ratifying convention, James Iredell stated that "in writing" would prevent presidential collusion with the Officer to falsify an opinion. JONATHAN ELLIOT, 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 108–10 (1888). Potential exposure of the written evidence would chill such improper influence by the President. While this is a valid point, it also shows that the clause contemplates potential limits on presidential ability to improperly influence the officers charged with executing the law.

55. *See* Amar, *supra* note 10, at 662. This is not to say that the Opinions Power must always be in writing or have the officer's name on it. *See id.* at 670.

56. *See infra* note 63 and accompanying text (explaining that "in writing," so understood, is a greater power than private briefings in cabinet meetings, so we should not read a negative implication from this Clause that Congress could prohibit a principal officer from having a conversation with the president about such information). The greater includes the lesser doctrine applies here. *Id.*; *see also* Sheldon v. Sill, 49 U.S. 441, 449 (1850).

57. *See infra* Part V(B)(3); *see also* J. Gregory Sidak, *The*

either providing the cause itself, or giving the president evidence for the advice and consent of the Senate or the ruling of an Article III judge. Such written opinions may also shield the president from any Take Care challenges in court, giving him the ammunition to justify whatever actions his administration takes.<sup>58</sup>

This power applies to the “principal Officer in each of the executive Departments,”<sup>59</sup> meaning that the president must be able to seek opinions from *all* executive agencies, independent or otherwise. Congress may not establish an agency and then rely on Professors Sunstein and Lessig’s “radical reading” of the Opinions Clause to suggest that the agency is headed by a head of department rather than a principal Officer and, therefore, is insulated from the president’s authority under the Opinions Clause.<sup>60</sup> This is too fine of a textual line to support an entire fourth branch of government, particularly when the rest of the Constitution so strongly suggests the three branches.<sup>61</sup>

Instead, the Opinions Clause guarantees the president the absolute power to inform himself of law-enforcement’s inner-workings. The Clause vests a discretionary power, not a duty, and it is a great power for the president in executing an agenda. It arms the president with evidence, in writing, for political

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*Recommendation Clause*, 77 GEO. L.J. 2079, 2087 (1989) (stating “the President can remove those who produce faulty or injudicious opinions”).

58. See *infra* Part V(B)(2) (discussing the Clause’s negative implication for presidential power). This Section considers the idea that we should not read the word opinion so strictly so as to exclude any factual information or report. The Clause is meant to provide the President with adequate advice and guarantee that he is responsible for all information in the executive branch. See *infra* notes 143–147 and accompanying text.

59. U.S. CONST. art. II, § 2, cl. 1.

60. See Lessig & Sunstein, *supra* note 17, at 35–38, 72, 113 (putting forth a radical reading of the Opinions Clause and the Inferior Officer’s Appointment Clause by stating that (1) the difference between the principal officer of the Opinions Clause and the heads of departments of the Inferior Officers Appointment Clause actually represents two different sets of people, and (2) the Opinions Clause only extends to the principal officer, thus creating a “fourth branch” under the heads of departments that is outside the president’s power, or at least outside the Opinions Power).

61. As this article will expand upon in Part B, the Clause applies to all principal officers, but not all inferior officers. See *infra* notes 69–75 and accompanying text. Congress could limit the President’s ability to demand reports from an inferior officer. See *infra* notes 280–83 and accompanying text; *contra* Amar, *supra* note 10, at 667.

fighters with congress, litigation in the Judiciary, and policy fights within the executive branch.<sup>62</sup> As discussed in the next section, the Clause implies limitations on presidential power. But even with these limitations, the Opinions Clause is an undeniable unitary executive power.

#### B. The Opinions Clause and its Undeniable Limitation on Executive Power

While the Opinions Clause undeniably vests the president with the discretionary power defined above, it also presents several implied negatives on the president's constitutional powers, particularly in relation to congress's ability to regulate the executive branch. In other words, the Opinions Clause is significant not only for what it says, but also for what it does not say.

First, the Opinions Clause vests the president with an absolute power to require principal officers report to him, but, by implication, this grant does not give the president the absolute power to issue directives and orders to those officers. Thus, congress can limit or restrict the president's authority to direct a principal officer to take a specific action. The same reasoning applies to the second negative implication: by granting the president the opinions power over the *principal* officer, the Opinions Clause denies the president the absolute authority to require opinions from *inferior* officers. To be clear, the first implication allows congress to limit the president's authority to issue orders *to* officers, while the second implication contemplates a limitation on the president's authority to require opinions *from* inferior officers. Finally, the Opinions Clause negates any broader readings of the president's absolute powers over the day-to-day administration under the Vesting Clause, the Take Care Clause, or even the Appointments Clause. One important example of a power that is not absolutely vested in the president is the removal power, which has long been justified on the basis of these generic clauses.

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62. See *infra* Part IV(B).

1. Requiring Opinions “From” Does Not Include Issuing Orders “To”

By granting the president the absolute power to require opinions from principal officers, the Opinions Clause implies that the president does not have an absolute power to order those same officers take specific actions. As stated above,<sup>63</sup> the Opinions Clause prohibits congress from interfering with the president’s power to receive and require reports from his principal officers on any subject related to the duties of the executive branch. But this absolute power to seek opinions does not encompass the power to issue directives.<sup>64</sup> Of course, this is not to say that all executive orders heretofore have been unconstitutional. On the contrary, insofar as congress has delegated authority over a statutory scheme to the executive branch, the president derives a default authority to issue such directives both from the statutory delegation and from his duty under the Take Care Clause.<sup>65</sup> However, as explained below in Section Four, the Take Care Clause is a passive-voiced duty to follow the law, and thus this authority can be regulated by

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63. See *supra* notes 49–60 and accompanying text.

64. It is also worth rebutting some other possible negative implications of the Clause. As explained above, a strict reading of the word opinion to exclude reports or facts does not make sense, particularly given the history of the Clause. This is not to deny the originalist argument, which states that the Clause serves a historical purpose by alleviating contemporary fears that the newly-created President would go without advice. Surely, facts and reports fall into this category. In fact, President Washington often informed Congress of reports and statements he had received from his officers in his letters urging legislative action. See Letter from George Washington, U.S. President, to the U.S. Senate & U.S. House of Representatives, (Aug. 7, 1789), <http://founders.archives.gov/documents/Washington/05-03-02-0236> (“I have, therefore, directed the several statements and papers, which have been submitted to me on this subject by General Knox to be laid before you”). Additionally, Professor Amar contemplated in *Some Opinions on the Opinion Clause*, that the phrase *in writing* might suggest Congress could restrict in-person briefings, requiring that all executive communications be in writing. See *generally* Amar, *supra* note 10 (emphasis added). However, an opinion in writing, with all of the accountability placed on the officer, is surely a greater power than one-on-one or cabinet meeting conversations. Thus, a greater includes the lesser theory suggests verbal communications are covered by this Clause.

65. Importantly, this reading of the Opinions Clause applies exclusively to the civilian, non-military government. The President has a clear directive power over the national defense, and possibly even generic intelligence or national security through the Commander-in-Chief Clause.

congress.<sup>66</sup> If congress feels the need to insulate a particular executive department from political pressure, it can restrict the president's ability to order that department to take specific actions.<sup>67</sup>

This first negative implication is further supported by comparing the Opinions Clause to the Commander-in-Chief Clause. The Commander-in-Chief Clause undoubtedly vests the president with a directive power over military and national security officers, particularly in times of war. The Clause also overlaps with the Opinions Clause, in that "principal Officers" certainly include the Secretary of Defense.<sup>68</sup> But the comparison illustrates the substantive difference between the two clauses with respect to the civilian officers. As Peter Strauss points out in *A Softer Formalism*, the Opinions Clause contemplates that there will be officers who have *duties* delegated to them.<sup>69</sup> Thus, even though the Opinions Power is itself an active and discretionary power, it establishes a relationship with the civilian officers that is far more passive than the relationship established under the Commander-in-Chief Clause. For the military, the president's orders are the officer's duties. By contrast, for the civilian administration, the officer's duties are defined by congress, and then subsequently reported to the president. These roles are mirror images of each other, illustrating that for the civilian government, the principal officer is actually the active executive official and the president an overseer.

## 2. The Principal Does Not Include the Inferior

Second, the Opinions Clause vests the president's authority

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66. See *infra* text accompanying notes 77–82.

67. Because of this default deference to the president, congress should follow a clear statement rule if they choose to regulate the president's ability to issue these orders.

68. The original proposal of the Opinions Clause put forth by Gouverneur Morris and Charles Pinckney at the convention listed the individual members of the cabinet, and it included the Secretaries of War and Foreign Affairs. This portion of the clause was scrapped, leaving it up to Congress to structure the executive branch how it saw fit. 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 342 (1911).

69. Strauss, *supra* note 32, at 59.

to seek opinions from all principal officers, but it does not extend to the inferior officers. Now, some may argue that a greater-includes-the-lesser argument applies here: the power to have a principal officer report to you is greater than the power to have inferior officers report to you, and thus the president has the latter because of the granting of the former.<sup>70</sup> However, this argument should not apply here. In this context, the power to require opinions from inferior officers would be a greater power than the authority over the principal officers. This balance of powers rests on two assumptions: (1) the inferior and civil officers are the persons actually executing the laws in individual matters, whereas the principal officers are more managerial, and (2) the president, by virtue of the office, imposes tremendous political weight in every interaction, particularly with subordinates within the executive branch. Given these assumptions, the power to require inferior officers to report directly to the president risks allowing a president to use the political clout of the office to improperly influence the otherwise faithful execution of the law in a specific matter. This risk is not as great when interacting with the managerial principal officer; thus, the power over inferior officers is in fact greater than the textually granted power over the cabinet.

In fact, in the early days of our Nation, President Washington recognized the imposing presence of his office and its potential negative effects on proper governmental functions. President Washington and the First Senate discussed the proper process for both the shared Appointments and Treaty-Making powers.<sup>71</sup> In these discussions, both branches acknowledged that the President's presence in the Senate chambers could result in a chilling effect on the Senate's deliberations. They decided that President Washington would not be present for the debate on nominees, citing improper influence imposed by "his presence [on] the fullest and freest enquiry into the Character of

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70. See *Sheldon v. Sill*, 49 U.S. 441, 449 (1850), for an example of the Supreme Court applying a greater-includes-the-lesser logic to interpret constitutional power grants, where the Court held that Congress's greater power to create the lower federal courts includes the lesser power to restrict their jurisdiction.

71. *Conference with a Committee of the United States Senate, 8 August 1789*, NAT'L ARCHIVES: FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-03-02-0239> (last visited Oct. 12, 2018).



the Person nominated.”<sup>72</sup> Remarkably, President Washington showed great self-awareness of the political powers of his office and the potential it created for improperly influencing the Senate—a coequal branch with respect to the Appointments and Treaty-Making power. Surely, a president could have an even greater impact on the inferior officers *within* the executive branch.

More recently, the executive branch instituted guidelines aimed at guarding against this improper presidential influence on matters handled by inferior officers. The post-Watergate Department of Justice (DOJ) issued memos restricting the White House from contacts with the civilian and inferior officers within the DOJ, a strong reaction to the constitutional moment of presidential overreach. Beginning with the Carter administration, the Department of Justice issued a policy memo to insulate attorneys and investigative officers from presidential or White House inquiry, reflecting the notion that such inquiries could improperly influence individual investigations.<sup>73</sup> Instead, these memos established a process for presidential inquiry: the White House Counsel must submit the inquiry to the Attorney General, who then screens out such inquiries that may be improper from reaching the lower inferior or civil officer pursuing the case.<sup>74</sup>

This process mirrors the principal-versus-inferior negative implication in the Opinions Clause. Although the Opinions Clause vests the president with absolute power to require principal officers report to him “upon any Subject relating to the Duties of the respective Offices,” the Clause does not mention inferior officers,<sup>75</sup> implying that the president does not have the same absolute power over them. Here, the DOJ policies reflect this hierarchy. The president maintains his constitutional right

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72. *Id.*

73. Griffin B. Bell, U.S. Attorney Gen., *Address at the Great Hall Before Department of Justice Lawyers* 7–8 (September 6, 1978) (transcript available at <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/09-06-1978b.pdf>); Memorandum from Eric Holder, U.S. Attorney Gen., to Heads of Dep’t Components: All U.S. Attorneys (May 11, 2009), <https://lawfare.s3-us-west-2.amazonaws.com/staging/2017/2009%20Eric%20Holder%20memo.pdf> (referencing a memo by 2007 Attorney General Michael Mukasey).

74. Bell, *supra* note 73, at 7–8.

75. U.S. CONST. art. II, § 2, cl. 1.

to inquire or communicate with the principal officer, in this case the Attorney General. However, the Attorney General can then screen these communications from reaching the inferior officers within the DOJ. This process enables the Attorney General to maintain the political independence in law enforcement, a benefit to this reading of the Opinions Clause.

Part V will expand on the DOJ policy, but it is used as an example here to preempt the argument that the principal officer inherently encompasses direct reporting from the inferior officer. Thus, the negative implication stands: by limiting the textual grant of power to the president to principal officers, the Clause implies that the president does not have unlimited constitutional authority to reach into the executive departments for one-on-one interactions with the inferior officers. As one example of the practical significance of this limitation on the Opinions Power, Article II and the Opinions Clause would not bar Congress from codifying the Holder Memo into law, should it wish to. Of course, Congress is not authorized to pass such a law under Article II, but rather would need an Article I, Section 8 justification for the law. It should not be controversial, insofar as Congress has the power to create the Department of Justice to enforce the laws passed by Congress; it is necessary and proper to ensure those laws are enforced independently and not corruptly.<sup>76</sup>

### 3. The Removal Power

Relatedly, the Opinions Clause and Section Two as a whole negate reading an absolute removal power for the president. To be clear, the first two executive power limitations are implied by the text of the Opinions Clause, whereas the negative implication on the president's absolute removal power stems from the lack of a removal clause in Section Two.<sup>77</sup> The framers

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76. See Charles N. Steele & Jeffrey H. Bowman, *The Constitutionality of Independent Regulatory Agencies Under the Necessary and Proper Clause: The Case of the Federal Election Commission*, 4 YALE J. ON REG. 363, 367–68 (1987) (summarizing *Buckley v. Valeo* as recognizing the need for Congress to insulate the FEC from the President due in large part to the FEC's "sensitive role in the oversight and possible prosecution of political candidates").

77. Again, as with the power to issue directives, the default rule derived from both the statutory delegation and the Take Care Clause is that the

granted the president the limited Opinions Clause power, but they did not grant the president an absolute removal power through a Removal Clause. In fact, the original proposal for the Opinions Clause at the convention made the Cabinet serve “at the pleasure of the president,”<sup>78</sup> but the framers removed this phrase when they drafted the final Opinions Clause.<sup>79</sup> Thus, not only is there no Removal Clause, but we also know the framers considered and rejected including such a phrase within the Opinions Clause, signifying that the text of Section Two should be read as denying the president an absolute removal power.

Vesting the president with an unlimited and unenumerated removal power renders the limited Opinions Clause redundant.<sup>80</sup> To illustrate, the textually granted Opinions Power versus the textual removal power evokes the inverse of the constitutional theory discussed above: the lesser power excludes the greater power.<sup>81</sup> One would assume that the power to remove an officer for any reason would include the power to require that officer report to the president. On the other hand, the power to require an officer’s opinion does not include the power to then fire that officer, particularly if the opinion reflects a faithful execution of the law.<sup>82</sup> Because no other power listed in Article II, Section Two grants the removal power, the only argument for the power rests on the unitary scholars’ reading of the Vesting Clause, which will now be analyzed and refuted.

#### 4. The Rebuttal of the Unitary Scholars’ Argument

Unitary scholars insist that either the Vesting Clause or the

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President can remove any officer. *See supra* notes 64–66 and accompanying text. Here, Congress needs to meet the clear statement rule by including phrases, such as *for good cause only*. *Id.*

78. FARRAND, *supra* note 68, at 342. At the “pleasure” of the President signifies that the President could remove the officials as he pleases.

79. *See infra* Part IV(A) notes 102–24 and accompanying text for a more detailed discussion of the debate at the Convention; *see also supra* note 41 for more on this revision.

80. *See* A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787, 800 (1987).

81. *See supra* note 69 and accompanying text.

82. U.S. CONST. art. II, § 3 (assigning to the president a duty to “take Care that the Laws be faithfully executed”).

Take Care Clause grant the president the powers excluded by the limited Opinions Clause. For instance, if the Vesting Clause actually grants the president with a textually unlimited executive power, then surely the president has the absolute power to issue directives, require opinions from the inferior officers, and remove at-will any executive branch official.<sup>83</sup> As explained above, this reading requires accepting the Opinions Clause as redundant. However, the text and structure of Article II negate this broad and textually unlimited reading of executive power. This Section considers and rejects any arguments that other clauses override the three limitations of the Opinions Clause, and then consider and reject the unitary scholars' argument that the three Vesting Clauses<sup>84</sup> all serve as substantive power grants.

Before refuting the Take Care Clause and the Vesting Clause arguments, consider that the Opinions Clause is the only textually granted power vested in the president encompassing the day-to-day administration of the executive branch. That is, it is the only clause in Section Two, the *powers* section, that enumerates the president's power in the general administration of the Government.<sup>85</sup> Presumably, the Nominations Power (with the full Appointment Power shared with the senate), indicates at least partial presidential authority over the selection of personnel.<sup>86</sup> Although it implies that the president will select officers who agree with his views on law execution, it does not directly speak to nor give the president authority to ensure those officers follow his views in their subsequent tenures. In other words, the Opinions Clause applies to the appointed officials once they are confirmed and sworn-in.

Outside of the Powers Section, unitary scholars would point to the Take Care Clause as requiring the president have the

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83. See generally Calabresi & Prakash, *supra* note 16.

84. U.S. CONST. art. I, § 1, cl. 1; U.S. CONST. art. II, § 1, cl. 1; U.S. CONST. art. III, § 1, cl. 1; see generally *supra* note 21.

85. This generally contrasts the Opinions Clause with the Pardon Clause or the Commander-in-Chief Clause. The pardon power is specific to the criminal justice system and the Commander-in-Chief Clause is specific to the military. U.S. CONST. art. II, § 2, cl. 1. By contrast, the Opinions Clause generally applies to the entire executive branch, including both the military and pardons. *Id.*

86. See U.S. CONST. art. II, § 2, cl. 4.

power to circumvent any of the limitations implied in the Opinions Clause,<sup>87</sup> but the Take Care Clause differs from the Opinions Clause in two key ways. First, it is a duty, located in the Duties Section of Article II. As Justice Scalia noted in *Zivotofsky v. Kerry*, the imbalance between the *duty* of the Take Care Clause and the *power* of the Necessary and Proper Clause tips the balance of power towards congress.<sup>88</sup> Just as the Necessary and Proper Clause is a power, so too is the Opinions Clause. It is a power located in Article II, Section Two,<sup>89</sup> thus it bars congress from regulating how or if the president can “require the Opinion, in writing, of the principal Officer.”<sup>90</sup> Second, not only is the Take Care Clause a duty unlike the power given by the Opinions Clause, it is written in the passive voice: “[the president] shall take Care that the Laws *be faithfully executed*.”<sup>91</sup> Justice Scalia correctly identified how this passive voice suggested a power imbalance between the Take Care Clause and the Necessary and Proper Clause.<sup>92</sup> Likewise, the same imbalance exists between the passive Take Care Clause and the active Opinions Clause. The Opinions Clause is an affirmative and discretionary power grant that cannot be regulated by congress. By contrast, the Take Care Clause is a duty that can be regulated by congress. Therefore, the argument for presidential power based on the absolute Opinions Clause beats an argument based on the regulable Take Care Clause.<sup>93</sup>

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87. See Calabresi & Prakash, *supra* note 16 at 583, 621 (arguing that while it is a duty, the Take Care Clause confirms that the President has the executive power granted from the Vesting Clause).

88. 135 S.Ct. 2076, 2125 (2015) (Scalia, J. dissenting) (stating “[i]t turns the Constitution upside-down to suggest that in areas of shared authority, it is the executive policy that preempts the law, rather than the other way around. Congress *may* make laws necessary and proper for carrying into execution the President’s powers, Art. I, § 8, cl. 18, but the President *must* ‘take Care’ that Congress’s legislation ‘be faithfully executed,’ Art. II, § 3”) (emphasis in original).

89. U.S. CONST. art. II, § 2, cl. 1.

90. *Id.*; *McCulloch v. Maryland* is another example of the Supreme Court’s reading a clause in light of its placement in the powers section. Chief Justice John Marshall rejects the state of Maryland’s narrow reading of the clause because it is placed in Article I Section 8 – the “powers” section for Congress. 17 U.S. 316, 419 (1819).

91. U.S. CONST. art. II, § 3 (emphasis added).

92. See *Zivotofsky*, 135 S.Ct. at 2125.

93. The Opinions Power cannot be regulated by Congress, unlike the

After the Take Care Clause, we are left with the most often debated clause, the Vesting Clause, as a potential grant of power in the negative spaces left by the Opinions Clause. The three negative implications discussed in this section—the absolute power to issue orders, the absolute power to require opinions from inferior officers, and the absolute power to remove officers—would likely be covered by a substantive Vesting Clause.<sup>94</sup> For instance, a president with an all-powerful executive power would surely be able to speak to or require the opinion of any officer, civil, inferior, principal, or otherwise, within the executive branch. However, as summarized in Part II(A), *supra*, past scholars have aptly pointed out that the Opinions Clause by itself implies a non-substantive reading of the Vesting Clause.<sup>95</sup> Most obviously, the Opinions Clause is a specific power and, as shown here, it is a limited power. Not only would a substantive vesting clause render the Opinions Clause redundant, it would render it absurd. Why include in Section Two an explicit and limited grant of power if some implicit and yet unlimited power contained in the Vesting Clause would

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Take Care duty. *See id.* at 2116–26, (Scalia, J., dissenting). As this debate centers on what Article II bars Congress from regulating, the Opinions Clause is a far stronger Clause.

94. Still, none of these powers are covered by the text. Thus, even if you assume the Vesting Clause is a substantive grant of power beyond the enumerated powers, you still need to argue why a certain power is executive in nature. Professors Calabresi and Prakash included the unrestricted constitutional right to remove all executive officials, to act in their stead, and to overrule any of their decisions. *See Calabresi & Prakash, supra* note 16, at 595. It is assumed, for the purposes of this article, that they and other classic Unitary Executive scholars would argue that all of the negative implications of the Opinions Clause would be covered by the Vesting Clause. This would be a safe assumption because Professors Calabresi and Prakash argued that the Opinions Clause itself was likely redundant. Still, the executive power is open to debate, and because it is so divorced from the text, it can be used to justify a quasi-suspensions power, suspending Habeas Corpus, and even torture. *See Memorandum from John C. Yoo, Deputy Assistant Att. Gen., U.S. Dep’t of Justice, to William J. Haynes II, Gen. Counsel, Dep’t of Def. (Mar. 14, 2003) (on file with the Fed’n of Am. Sci.)*.

95. *See supra* Part II(A). Again, the structural argument is important here; the Vesting Clause is in the “naming” section, or Section One. U.S. CONST. art. II, § 1, cl. 1. Every other clause in that section describes the office of the presidency while not vesting any substantive powers. Reading the Vesting Clause as a substantive power grant decontextualizes the Clause from its surroundings. The Opinions Clause, by contrast, is a specified power right in the opening of Section Two, the Powers Section.

render nugatory the limits of the expressly delegated power?<sup>96</sup>

Furthermore, this redundancy reading<sup>97</sup> contravenes the constitutional maxim that, where powers are listed and others are excluded, the exclusion is meaningful. This constitutional *expressio unius* canon dates back to *Marbury v. Madison*, wherein the Court rejected its power to issue a mandamus to certain officers because it was not enumerated in Article III's original jurisdiction.<sup>98</sup> Chief Justice Marshall wrote that "[a]ffirmative words are often, in their operation, negative of other objects than those affirmed; and . . . a negative or exclusive sense must be given to them or they have no operation at all."<sup>99</sup> Marshall also cautioned that "it cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it."<sup>100</sup> In this case, the unitary reading of the Vesting Clause denies the Opinions Clause its exclusive sense, leaving it with no operation at all.

Luckily, there is a more natural reading of Article II. The Vesting Clause is in the naming section,<sup>101</sup> establishing the office of the Presidency vested with the powers listed in Section Two, home of the Opinions Clause. The unitary scholars' theory requires us to decontextualize these two clauses: the Vesting Clause as a power grant in the naming section and the Opinions Clause as a descriptive redundancy in the powers section. If one removes the Vesting Clause from Article II, Section One and then reads through the remaining clauses that name the

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96. While, in practice, citing Vesting Clause authority may be how presidents exercise an opinions-like power, that does not mean that we should take a president's word for it because any branch given blanket authority will aggrandize power.

97. *See supra* notes 33–43 and accompanying text.

98. 5 U.S. 137, 174–75 (1803).

99. *Id.* at 174.

100. *Id.*

101. U.S. CONST. art. II, § 1. Article Two Section One's other clauses establish the term of office, the vice president, the mode and date of election, citizenship and age requirements, compensation and emoluments, and finally the Oath of Office. *Id.* None of these clauses vest any substantive powers in the president; instead, they describe the office. *Id.* The Vesting Clause also describes the office, stating that it will be held by one person. *Id.* To make it clearer, the Removal Clause, since amended by the Twenty Fifth Amendment, refers to the power and duties of the office, a phrase that maps nicely onto the powers and duties sections. *Id.*

characteristics of the office, one does not expect the next clause to vest any substantive powers. Rather, the next clause logically should name another characteristic of the office. In this case, that characteristic is that we have one president. By contrast, reading Section Two's other clauses, one is not expecting to see a clause merely describing the office of the Presidency. Instead, one is looking for the next power to be vested in the president. Here, that power is the Opinions Clause.

In sum, the text of the Opinions Clause vests the president with a discretionary, but limited, power. It implies that the president does not have absolute powers to remove officials, issue directives, or reach into the executive departments and demand reports from the inferior officers. Through these limitations, it rebuts the unitary scholars' theory that the Vesting Clause or Article II in general grant the president with plenary but textually unlimited executive powers. A substantive Opinions Clause and a non-substantive Vesting Clause is the far more natural reading of Article II's text, and it matches the history of the Opinions Clause at the convention and the framers' republican intent for the executive power.

#### IV. The Original Opinions Clause: The Framers and Their Republican Intent

The textual argument set forth in Part III is supported by the history and the intent of the Constitution, particularly in the framing of the Presidency. In the past, unitary scholars have pointed to the Clause's introduction at the Convention by Charles Pinckney and Gouverneur Morris, two framers strongly in favor of a unitary executive, as evidence in support of that theory. But, in Part A, the history of the proposal is reexamined, showing that the significant revisions made by the separate Committee of Eleven speak to the meaning of the actual clause the framers adopted. Then, Part B recounts the republican intent of the presidency, namely that the executive power serves as a sufficient check on the legislature. It is argued that the Opinions Clause as written serves this purpose.



A. Fitting the Opinions Clause in the Convention's History and Intent

Throughout the convention, the debate over the executive power mirrored the debate scholars have to this day: what does it mean to have a unitary executive? The Vesting Clause solves this debate to the extent that at least the executive powers defined in Article II would be vested in a single officer: the president.<sup>102</sup> As other scholars have pointed out,<sup>103</sup> the Opinions Clause was introduced near the end of the convention, representing the moment where it was finally settled that we would have one president in place of a council.

There are two key moments for interpreting the Opinions Clause on the basis of the framers' original intent. First, Gouverneur Morris and Charles Pinckney proposed an Opinions Clause that was much broader than the final version left in the Constitution. From this proposal, we can safely assume that Morris and Pinckney thought it necessary to enumerate the Opinions Power, suggesting that they did not believe such a power was encompassed in the already-written Vesting Clause. Second, the Committee of Eleven revised the Clause and eliminated the broad provisions from the Morris and Pinckney proposal. These revisions imply that the framers did not want to vest the president with the absolute powers and duties inherent in the original proposal. Instead, they wanted to leave these questions open for us to decide through statutes.

The proposal introduced by Gouverneur Morris and Charles Pinckney was a broad and detailed plan for the president's powers over the executive branch.<sup>104</sup> The proposal vested the

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102. See *infra* Part I, notes 1 and 2 for Mason and Hamilton's disagreements (explaining how the naming function actually serves the greatest historical significance). The debate at the convention over executive power centered more on whether to have one executive or to have a council, and not whether that executive would have an unchecked removal power, for instance. Thus, if we take their structure to mean that the powers are listed in Section Two, then we can read the Vesting Clause as solving the actual debate at the Convention by vesting *those* powers in the President, and not in a Council. The President has the authority to require the opinions, in writing, of the principal officers; a council does not. U.S. CONST. art. II, § 2, cl. 1.

103. Prakash, *supra* note 13, at 1005.

104. FARRAND, *supra* note 68, at 342.

president with the power to “submit any matter to the discussion of the Council of State, and he may require the written opinions of any one or more of the members: But he shall in all cases exercise his own judgment, and either Conform to such opinions or not as he may think proper.”<sup>105</sup> Additionally, the proposal stated each of the secretaries, with the exception of the Chief Justice, “shall be appointed by the President and hold his office during pleasure”<sup>106</sup> while also including an impeachment clause for “neglect of duty, malversation, or corruption.”<sup>107</sup>

The introduction of the Opinions Clause at the convention implies that its powers were not assumed in the Vesting Clause, which had already been written. Professors Prakash and Calabresi argue to the contrary: the two delegates behind the Opinions Clause proposal, Gouverneur Morris and Charles Pinckney, were pro-unitary executive, supposedly undermining the Clause’s implied restrictions on executive power.<sup>108</sup> However, that pro-unitary executive framers introduced this Clause suggests they felt the need to explain the executive framework they envisioned; a particularly significant suggestion considering the opposing viewpoints at the Convention. Pinckney and Morris weren’t the only framers. Although they were strongly in favor of a unitary executive, others, like George Mason, were strongly opposed to one president.<sup>109</sup> Though they favored the Virginia Plan that envisioned a president with great unitary powers, others favored the New Jersey Plan for a plural executive.<sup>110</sup> Of course, those in favor of a unitary executive won out in the end,<sup>111</sup> but it is important to remember these disputes when determining the extent to which they won. Given that the Vesting Clause establishing a singular president had already

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105. *Id.* at 343–44. The “Council of State” included the Secretaries of Domestic Affairs, Commerce, Foreign Affairs, War and the Chief Justice. *Id.*

106. *Id.* at 342. In some sense, this also serves to rebut Sunstein and Lessig’s argument that the removal of the chief justice from this Clause and the subsequent lack of authority over the chief justice carries any weight. The chief justice was recognized even in the original proposal as a separate and distinct figure. *See* Lessig & Sunstein, *supra* note 17, at 33–34.

107. FARRAND, *supra* note 68, at 343–44.

108. *Id.* at 630–31; *see also supra* notes 37–41 and accompanying text.

109. THE ANTI-FEDERALIST PAPERS, *supra* note 1, at 23.

110. *Id.* at 39.

111. U.S. CONST. art. II, § 1, cl. 1.

been written at the time, Morris and Pinckney's proposal could be read as these unitary framers' next big play to define what powers a singular president would have.<sup>112</sup> Under their proposal, the president would have complete powers over a constitutionally-created cabinet. Though perhaps Morris and Pinckney believed such powers were inherent in the executive power in the Vesting Clause, at the very least, they thought it ambiguous enough to submit this proposal in the Convention's final month.<sup>113</sup>

Furthermore, Morris and Pinckney's views do not explain the motives behind the revision and the ultimate clause that we have today. The Opinions Clause is the result of revisions by the Committee of Eleven, of which Gouverneur Morris, but not Charles Pinckney, was a member.<sup>114</sup> To illustrate the varied opinions on the Committee, Hugh Williamson, another member, stated that he strongly opposed "Unity in the Executive" and instead wished the power would be "lodged in three men taken from three districts into which the States would be divided."<sup>115</sup> Another member, Roger Sherman, was on the record as preferring an executive branch that was "nothing more than an institution for carrying the will of the Legislature into effect,

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112. The Opinions Clause proposal was met with George Mason's last-ditch effort for a plural executive, suggesting that even this fight was not over with. Prakash, *supra* note 13, at 1005–06. The Convention rejected Mason's proposal, and then revised the Opinions Clause. *Id.* Still, one must weigh the opposing viewpoints to a strong unitary executive in deciphering exactly what unitary powers the framers vested in the President.

113. The proposal was submitted in August, and the Convention adjourned in September. NOAH FELDMAN, *THE THREE LIVES OF JAMES MADISON 167–70* (1st ed. 2017). As has been documented, the framers in favor of the Constitution were anxious to break from the Convention and get to the ratification fights. *Id.* Any additional proposals at the end of the Convention could have risked losing the emerging consensus, thereby threatening the Constitution altogether. That such a proposal be made at this time suggests that the sponsors thought it very important. On September 13th, Madison made a reasonable suggestion that the other framers voted down in a lopsided vote, as they were "in no mood for a hairsplitting debate." *Id.* at 166. Randolph moved for a new convention, which was rejected unanimously. *Id.* at 168.

114. *Committees at the Constitutional Convention*, U.S. CONSTITUTION.NET (Jan. 24, 2010), <https://www.usconstitution.net/constcmte.html> (listing the Third Committee of Eleven for August 31st).

115. JONATHAN ELLIOT, *5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787*, at 358 (1845).

that the person or persons ought to be appointed by and accountable to the Legislature only.”<sup>116</sup> We have no explanation for what motivated their revisions, and thus are only left to speculate based on the final text of the Constitution. Textually, the Committee of Eleven’s revisions are more important than the original proposal because, not only were the revisions quite significant, but they also represent the most proximate debate on the true meaning of the Opinions Clause and its impact on the rest of Article II. The Committee of Eleven’s revisions are the text that was adopted and ratified, and so we turn to them now.

Although it is acknowledged that parts of the original proposal, particularly the *at the pleasure* service and the Presidential Discretion Clause suggest a broader power for the president, these broader presidential power provisions are what the Committee of Eleven ultimately struck. The Committee of Eleven eliminated the president’s authority over the chief justice, the *at the pleasure of the President* service of the cabinet, and that the president must act on his own judgment.<sup>117</sup> First, the Committee of Eleven’s decision to strike the Chief Justice from the president’s authority likely reflected a hesitancy with blending the two separate branches of government. Professors Sunstein and Lessig, on the other hand, cite the removal of the chief justice from the president’s authority as evidence that the Opinions Clause is a necessary power grant.<sup>118</sup> Because we acknowledge the president does not have the authority to require the opinion from the chief justice, they argue we can infer the president does not have any other powers that are not otherwise expressly granted.<sup>119</sup> In other words, because the

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116. *Id.* at 140.

117. Compare FARRAND, *supra* note 68, at 342–44 with U.S. CONST. art. II, § 2, cl. 1. The “shall in all cases exercise his own judgment and either conform to such opinions or not as he may think proper” could read as imposing a duty on the president to always analyze the opinions given by the officer. See FARRAND, *supra* note 68 at 342. By striking this language, it is possible the framers wanted to ensure the president had the freedom to defer to the principal officer’s opinion without having to do legwork on every question. However, the proposal still enabled the president to conform to the opinions when proper. Also, the duty to exercise individual judgment is likely imposed on the president by the Take Care Clause.

118. See Lessig & Sunstein, *supra* note 17, at 33–34.

119. *Id.*

Committee of Eleven removed both the chief justice and the at-will clauses, we can analogize the president's lack of authority over the chief justice to his arguable lack of authority to remove officers at will.<sup>120</sup> Professors Calabresi and Prakash rebut this argument by stating that these are two separate and coequal branches of government, and thus we need a clear statement in the Constitution to enable the president to have authority over the chief justice.<sup>121</sup> By contrast, they argue we do not need it spelled out that the president has such authority over subordinate officers within the executive branch.<sup>122</sup>

Professors Calabresi and Prakash are correct insofar as the removal of the Chief Justice from the Opinions Clause does not affect the executive power under Article II, but instead exemplifies the framers' recommitment to the Separation of Powers. Rather than focus on that revision, we should focus on the key revision shedding light on executive power: the removal of the *at the pleasure of* language. This revision shows that the framers considered vesting the president with an absolute power to remove Cabinet officials, but instead decided that this issue should not be resolved by the Constitution for all officials. Thus, congress, assuming it has the power to pass a law under the Necessary and Proper Clause,<sup>123</sup> can regulate the president's removal authority. Under the Take Care Clause, the president must faithfully abide by that law.

Of course, one could argue that the elimination of the *at the pleasure of the President* language implies that the framers thought this was redundant given the Vesting Clause. However, this redundancy argument is undercut by what they left: if they truly thought stating presidential ability to remove the officers at will was redundant, then why did they leave the ability to require the opinion in writing from these same officers? Surely, an all-powerful executive power that includes the plenary removal power also includes the ability to ask those fired-any-day-now officers' opinions. In other words, the proposal and its revision undermine the substantive Vesting Clause argument. Why strike the *at the pleasure of the President* language while

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120. *Id.*

121. Calabresi & Prakash, *supra* note 16, at 627.

122. *Id.*

123. *See* Steele & Bowman, *supra* note 76.

leaving in the current Opinions Clause? Of all the phrases in Gouverneur Morris and Charles Pinckney's original proposal, the Opinions Clause as revised and ratified seems like the weakest presidential power, and, therefore, the strangest truism to restate.

This history indicates that the framers and the Committee of Eleven intended to leave to future congresses the issue of the president's power to remove officers, and, by extension, to issue directives.<sup>124</sup> To further illustrate, the Committee of Eleven removed the specified Secretaries from the original proposal, leaving us with the principal officers. In effect, this decision avoided having a constitutionally-created cabinet, and instead left it up to congress to structure the executive branch through laws, which congress has continuously done throughout our history without any claim that it is intruding on the executive power.<sup>125</sup> Similarly, they did not want to settle the question of at-will removal, preferring to leave the question up to congress. By analogy to congress' subsequent structuring of the executive departments, congress can also regulate the president's ability to remove the officers.<sup>126</sup> In other words, the Committee of Eleven balked at a constitutionally-created cabinet subject to absolute direction and removal by the president.

#### B. The Republican Intent for the Presidency Served by the Opinions Clause

Throughout the drafting and ratification process, James Madison and other framers made it clear that the Constitution aimed to guard against the tyranny of the majority. In

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124. The absolute removal power certainly includes the power to issue directives to officers. Therefore, both questions are left unsettled by the Committee of Eleven's decision to remove the at the pleasure of the President language.

125. Note that Congress does not have an explicit power grant to structure the executive branch as it does in Article III. Yet, it is still up to Congress to provide for the executive departments. *Compare* U.S. CONST. art. III, § I, *with* U.S. CONST. art. II, § 2, cl. 2.

126. This is also a form of a greater-includes-the-lesser argument; the greater power to create and structure the executive branch through law implies the lesser power to define those officer's status. This same argument applies to Congress' authority to create the lower federal courts; *see generally* U.S. CONST. art. III, § I.

Federalist No. 10, James Madison wrote that the greatest threat in a democracy was the threat of faction—interest groups and political parties that captured the legislature and gained unlimited political power to enact their policies.<sup>127</sup> James Madison believed a strong national government would quell what he saw as a local problem.<sup>128</sup> James Madison and the framers chose a unitary executive in part to have the energy and vigor to combat the majoritarian congress.<sup>129</sup> The Pre-Constitution state governments had taught them this key lesson.<sup>130</sup> In the early days of American independence, anti-aristocratic populists hungered for a responsive democracy represented by a legislature, rather than a strong executive resembling the King they detested.<sup>131</sup> Pennsylvania's 1776 Constitution is perhaps the best example of this first wave of state constitutions. Pennsylvania had a plural executive council instead of a unitary governor, and the council had no veto power over the legislature. As a result, the Pennsylvania legislature quickly wrote the executive branch effectively out of the constitutional framework by law.<sup>132</sup> The council was left with dwindling authority over the law's execution, no powers to

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127. THE FEDERALIST NO. 10 (James Madison).

128. *Id.* (writing that one of the principles of a republic that can control faction is the “greater number of citizens, and greater sphere of country, over which the [elected representatives] may be extended”).

129. MADISON DEBATES, [http://avalon.law.yale.edu/18th\\_century/debates\\_721.asp](http://avalon.law.yale.edu/18th_century/debates_721.asp). James Madison on July 21, 1787, responding to an objection to the sharing of the executive and the judiciary in the veto power, stated “[i]t was much more to be apprehended that notwithstanding this co-operation of the two departments, the Legislature would still be an overmatch for them. Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions; & [he] suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles.” *Id.*

130. *Id.*

131. Robert F. Williams, *Evolving State Legislative and Executive Power in the Founding Decade*, 496 ANNALS OF AM. ACAD. OF POL. & SOC. SCI. 43, 45 (1988).

132. See CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY* 33 (Johns Hopkins Press 1923). Despite it being unconstitutional, the Pennsylvania legislature appointed officers outside the council to manage the treasury and even command the militia. Both powers were vested in the executive council by the constitution, but the lack of a veto and a politically powerful executive rendered the question moot. *See id.*

combat the legislature, and no single voice with which to speak to the people.<sup>133</sup>

Runaway legislatures paved the way for the second wave of state constitutions: those based more on republican principles.<sup>134</sup> The key to these constitutions was the strengthening of the executive branch, equipping it with the tools necessary to protect itself from encroachment by the state legislatures. New York's Constitution created the strongest state executive as of that point. The governor, with the help of a council, had the power to veto laws for either policy or constitutional reasons. The governor also shared with his council the power to appoint officers and judges of the courts.<sup>135</sup> As a result, New York's governorship was a politically powerful office and, as many scholars have pointed out, the first state-level model for the federal Presidency.<sup>136</sup>

Unsurprisingly, given the experience in the states, the framers feared an overly powerful legislature on the federal level. In fact, Madison believed that the legislative power could result in tyranny equally dangerous to that of a king. In Federalist No. 48, he wrote:

The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex. The founders of our republics have so much merit for the wisdom which they have displayed, that no task can be less pleasing than that of pointing out the errors into which they have fallen. A respect for truth, however, obliges us to remark, that they seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an [sic] hereditary magistrate, supported and fortified by

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133. See Williams, *supra* note 131, at 45–46; see also THACH, *supra* note 132, at 33–35 (discussing the executive council's failing efforts to write letters to the legislature).

134. Williams, *supra* note 131, at 47.

135. *Id.* at 47–48, 51.

136. McConnell, *supra* note 21, at 4; see also THACH, *supra* note 132, at 40–41.



an [sic] hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.<sup>137</sup>

In other words, James Madison recognized that state framers had been so opposed to the executive power that they failed to realize the authoritarian potential of the legislature.

This fear of a runaway legislature is reflected in the structure and text of our government. For instance, the framers created a bicameral legislature to lessen the potential influence of factions, varying the terms and the constituencies of the individual members of each body.<sup>138</sup> They vested the president with veto power, a fundamental and necessary check on the legislature. At various times throughout the Convention, they contemplated joining the president and the Judiciary in a dual-branch Council of Revision to combat the congress.<sup>139</sup> Already, we see that the framers had effectively addressed many of the concerns presented by the experience in Pennsylvania and the other early state constitutions. Still, it's not enough to have one president with the power to veto the laws passed by congress, particularly when congress can then override that veto with a two-thirds majority. The concerns of the Pennsylvania executive's lack of a singular voice and lack of authority over the law's execution still required a further remedy.

Similar to the Council of Revision, the original Opinions Clause proposal included the chief justice as part of the president's Council of State, again suggesting that the framers were so worried about the all-powerful legislature that they considered breaking their separation of powers norm to protect

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137. THE FEDERALIST NO. 48 (James Madison).

138. THE FEDERALIST NO. 51 (James Madison). "In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit." *Id.*

139. MADISON DEBATES, *supra* note 129 (referring to Madison's comments).

the president and the Judiciary.<sup>140</sup> Although we do not have evidence from the convention for the original reason that Gouverneur Morris and Charles Pinckney included the chief justice in the president's Council of State, we can infer from the debates over the Council of Revision that they likely wanted to guard against the powerful legislature. Gouverneur Morris previously supported connecting the president with the Judiciary in the exercise of the veto power in the form of a Council of Revision.<sup>141</sup> In debating the Council of Revision, Nathaniel Gorham motioned to join the judges with the president; Oliver Ellsworth seconded the motion, stating that the "aid of the Judges will give more wisdom & firmness to the Executive. They will possess a systematic and accurate knowledge of the Laws, which the Executive can not [sic] be expected always to possess."<sup>142</sup> Ellsworth's concerns are the same as those addressed by the Opinions Clause: the president will need adequate information to check congress.

The Opinions Clause, even read in its narrowest light, provides the president with the power to effectuate this republican check against the tyranny of the majority. The unitary executive gives us an executive branch responsible to the entire country. However, this accountability does not require the president be able to direct any or all of the law's execution, nor does it require him to have the plenary power of removal. Instead, it requires the president to be able to speak to us, his voters, with a unitary voice. With the Opinions Clause, the framers effectively guaranteed that the president would be in the unique constitutional position to be able to know everything in the executive branch on behalf of us. No individual senator, congressperson, or even majority party in the Senate or House has this power. In a conflict, they have to conduct messy investigations with majoritarian votes required to subpoena individuals and information. Alternatively, they have to pass laws, getting bills out of committee with majority votes, through each house, and then through the Conference Committee to then present the law to the president to sign. Then, of course, is the issue of speaking with one voice—even should the Senate or

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140. FARRAND, *supra* note 68, at 342–43.

141. Calabresi & Prakash, *supra* note 16, at 633.

142. THE ANTI-FEDERALIST PAPERS, *supra* note 1, at 107.

House gain access to the key information, they will first need to reach at the very least a majoritarian consensus on how to read and communicate that information to us.<sup>143</sup>

By contrast, the president may require reports on any subject within the executive branch—there is nothing of note within the executive branch that the president cannot effectively investigate. In Pennsylvania, the state legislature could completely usurp the executive power from the council and cut them out of the loop. In effect, this left the council without the power to obtain opinions from these non-executive officers, and thus they could not adequately defend themselves to the people.<sup>144</sup> For the president, the indefeasible power ensured by the Opinions Clause grants the ability to provide the check that was absent in Pennsylvania. Herein lies true republican constitutional accountability: the president, elected by the entire nation, can demand the report from the principal officer overseeing any facet of the law's execution. Then, if the

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143. A recent example illustrates the disadvantage Congress faces as opposed to the Opinions Power: the Republican majority in the House Intelligence Committee released a memo discrediting the FBI's Russia-related investigation into American citizens. However, political pressure then forced a vote to release the Democratic minority memo that directly refuted the Republicans' claims. *Compare* Memorandum from the U.S. House Permanent Select Comm. on Intelligence Majority Staff to the U.S. House Permanent Select Comm. on Intelligence Majority Members (Jan. 18, 2018) (on file with the U.S. House of Representatives), *with* Memorandum from the U.S. House Permanent Select Comm. On Intelligence Minority to the House of Representatives (Jan. 29, 2018) (on file with the U.S. House of Representatives). No such dissent exists for the President, who has the unitary authority to speak with an opinion in hand. U.S. CONST. art. II, § 1, cl. 1.

144. *See generally* THE FEDERALIST NO. 48 (James Madison); THACH, *supra* note 132. The Pennsylvania executive council complained to the legislature that the laws passed, such as vesting defense of the Delaware River in a non-executive officer, violated the Constitution. Presumably, the executive council did not possess the authority to require reports from that non-executive officer. *Id.* Interestingly, the Pennsylvania State Constitution vested an Opinions-like power in the Council of Censors, which was a quasi-convention to be elected for a one-year term, every seven years, to review the Constitution. *Id.* The Clause stated: “[f]or these purposes they shall have power to send for persons, papers, and records; they shall have authority . . . to recommend to the legislature the repealing such laws as appear to them to have been enacted contrary to the principles of the constitution.” PA. CONST. of 1776, § 47. This is perhaps the earliest known precursor to the Opinions Clause, but it suggests that the power serves as a conational and republican check on legislative abuses.

president has the legal authority, he can direct a specific policy change or even remove a poorly performing officer. However, even if the president is confined by law in such a way that pro-unitary scholars fear, the president still has the ability to take these reports to congress or his voters and call on us to hold our congressperson's or senator's feet to the fire.

In addition to the power to hold congress accountable, the Opinions Clause also demands accountability from the president as it denies him the ability to hide behind the Cabinet. The Opinions Clause makes it clear: the president is responsible to the voters for all actions taken by the executive branch.<sup>145</sup> In other words, if the executive branch fails in its duty and the president says he didn't know about it, the voters can point to the clause and demand an explanation for the informational breakdown. Even in situations where the president lacks the legal authority to take immediate corrective action, the vision of a republican check on congress outlined here demands that the president explain his lack of authority to us with the help of an opinion.

For example, President Trump recently blamed the FBI for their failure to act on tips on the shooter at Marjorie Stoneman Douglas High School in Parkland, Florida.<sup>146</sup> However, these situations are exactly the type that the Opinions Clause lays at the president's feet. President Trump, through the Opinions Clause, is responsible for all information within the executive branch, which certainly includes the FBI's efforts to protect us from violent actors. After prior shootings, the President could

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145. In this sense, the Opinions Clause serves the accountability interests behind having a unitary executive. See THE FEDERALIST NO. 70 (Alexander Hamilton) ("But one of the weightiest objections to a plurality in the Executive, and which lies as much against the last as the first plan, is, that it tends to conceal faults and destroy responsibility. Responsibility is of two kinds to censure and to punishment . . . the multiplication of the Executive adds to the difficulty of detection in either case."); see also Amar, *supra* note 10, at 661; Prakash, *supra* note 13, at 1006–07.

146. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2018, 8:08 AM), [https://twitter.com/realDonaldTrump/status/965075589274177536?ref\\_src=twsrc%5Etfw&ref\\_url=https%3A%2F%2Fwww.wsj.com%2Farticles%2Ftrump-weekend-tweetstorm-responds-to-mueller-indictment-1518967910](https://twitter.com/realDonaldTrump/status/965075589274177536?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.wsj.com%2Farticles%2Ftrump-weekend-tweetstorm-responds-to-mueller-indictment-1518967910) (stating "[v]ery sad that the FBI missed all of the many signals sent out by the Florida school shooter. This is not acceptable. They are spending too much time trying to prove Russian collusion with the Trump campaign – there is no collusion. Get back to the basics and make us all proud!").

have required the “Opinion, in writing” from either the Attorney General or the FBI Director (provided that no law prevents such an inquiry to an inferior officer) about the FBI’s tips and reporting process or even demand a weekly summary of particularly noteworthy tips, undoubtedly a *subject* related to the *duties* of the Department of Justice and FBI.<sup>147</sup> Given this authority, the President cannot hide behind the failings of individual officers on the ground without at least showing the steps taken to ensure such informational breakdowns do not occur. The flow of information, including tips to the FBI, is expressly within the President’s discretion. The Opinions Clause says so.

In essence, this vision of accountability in the Constitution’s text can meet our republican needs while also avoiding the accretion of power in the executive branch. Even James Madison, who so strongly supported a vigorous unitary executive at the convention, and even, much to the Unitary scholars’ delight, voted to vest the president with removal authority in the Decision of 1789, realized the unchecked potential of the executive he helped create. In the Neutrality Proclamation and his losing effort in the fight over executive power with Alexander Hamilton, James Madison recognized that in his obsession over the potentially tyrannical legislature, he had created a singular branch of government that could, in fact, pose a great danger to the republic.<sup>148</sup> In other words, James Madison had made the inverse of the error he attributed to the early state constitutions who empowered the legislature at the expense of the executive. Thankfully, both the Decision of 1789 and the Neutrality Proclamation are examples of post-Constitution policy debates, and we will always have the authority to course-correct through the law.

#### V. The Functional Opinions Clause: President Washington and the Three Key Powers

In the immediate aftermath of the Constitutional Convention, President Washington used the Opinions Clause to

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

148. See FELDMAN, *supra* note 3, at 375–84.

aid his efforts to cement the newly formed federal government. President Washington faced the nation's first crisis in the Whiskey Rebellion and used the Opinions Clause to inform himself and the Congress of the measures that needed to be taken to quash the rebellion. Part A recounts this story through the lens of the Opinions Clause, beginning with Washington's reports on the need for a militia from Secretary of War Henry Knox to the opinions from Secretary of Treasury Alexander Hamilton and Attorney General Edmund Randolph on how to stop the crisis. Each of the opinions recounted below served the president's interests in congress, in the courts, and in popular opinion. From this story, three key Opinions Clause powers are inferred for subsequent and future presidents. These powers are outlined in Part B. The first power is the Unitary Political Tool, which allows the president to use opinions from the cabinet to further political and legislative goals both in congress and with the American people. The second power, the Unitary Judiciary Tool, enables the president to defend executive actions or take offensive actions in court. Finally, the third power is the Unitary Executive Tool, which is a recognition that the Opinions Clause allows the president to unite the executive into a coherent, uniform and law-abiding branch.

A. President George Washington, the Whiskey Rebellion, and the Complete Picture of the Opinions Clause

At the founding of our republic, President George Washington understood the role and the powers of the Presidency provided by the Opinions Clause. Before the First Congress designed the executive branch, Washington availed himself of the expertise of the acting department heads left over from the Continental Congress.<sup>149</sup> As Professors Calabresi and Yoo highlight, President Washington consistently asked the first principal officers for written reports of their respective departments to acquaint himself of the country's situation.<sup>150</sup>

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149. STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 40–41 (Yale Univ. Press 2008).

150. *Id.* (“A mere five days after Washington’s inauguration, he asked Acting Secretary of War Henry Knox to examine and provide a summary report

Gradually, these communications turned to asking the cabinet for their opinions on the policies and the constitutionality of proposed acts by Congress.<sup>151</sup> President Washington's correspondence with his Cabinet reveals a pattern of the presidency textually depicted in the Opinions Clause: the president requires the principal officers to report to him, and then, after careful consideration of their opinions, he takes the action authorized by law. In particular, the Opinions Clause enabled each of President Washington's actions in crushing the Whiskey Rebellion, a seminal moment establishing the strength and longevity of the newly-created federal government.<sup>152</sup> Most importantly, each of these actions show that the Opinions Power provides the president with a unitary legislative and political tool, judicial tool, and executive tool as described in Part B below.

The story of President Washington's Opinions-enabled victory over the Whiskey Rebellion begins in 1789 with his effort to get Congress to legalize the militia under the new Constitution. In this example, we see the Opinions Clause acting as a unitary legislative tool for the President, arming him with evidence and opinions that he uses to get his agenda

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on papers regarding a treaty with the Cherokee Indians that he was forwarding to Knox. A little more than a month later, Washington asked the Board of the Treasury, the acting postmaster general, and the acting secretaries of war and foreign affairs to prepare a written report that would provide him with 'an acquaintance with the real situation of the several great Departments' and a 'full, precise, and distinct *general idea* of the affairs of the United States' connected with their particular departments.'" (footnote omitted) (emphasis in original); Letter from George Washington to the U.S. Senate and House of Representatives, *supra* note 64. Washington went on to attach the report from Secretary Knox on the treaty with the Cherokee Indians in his letter to the Senate and the House of Representatives on August 7, 1789. *Id.* Washington writes to Congress that he thinks it "proper to suggest the consideration of the expediency of instituting a temporary Commission for [the purpose of negotiating a treaty], to consist of three persons, whose authority should expire with the occasion." *Id.*

151. CALABRESI & YOO, *supra* note 149, at 41 (showing that Washington recognizes the link between the Opinions Power and the legislative role of the Presidency, particularly with respect to the Veto Power). The President seeks the advice of his Cabinet on the constitutionality and policy considerations in acts of Congress, giving him ammunition to file his "Objections" should he decide to veto. *Id.*; see also U.S. CONST. art. I, § 7.

152. See generally Richard H. Kohn, *The Washington Administration's Decision to Crush the Whiskey Rebellion*, 59 J. AM. HIST. 567 (1972).

through Congress.<sup>153</sup> On August 10, 1789, President Washington directed a report to Congress on the status of the troops left over from the Continental Congress, adding his opinion on the continued importance of the troops to protecting the nation.<sup>154</sup> Through this policy position, he urged Congress to legalize the militia under the new Constitution and to grant him a procedure for calling these troops into action.<sup>155</sup>

Perhaps disheartened by Congress's delay, President Washington sent Secretary of War Henry Knox a letter containing initial plans for a nationalized militia, and asked Secretary Knox to report back with a detailed proposal for Congress to consider.<sup>156</sup> A month later, on January 18, 1790, Secretary Knox sent President Washington his "plan for the arrangement of the militia of the United States," along with his recommendation that the "events . . . require that the government should possess a strong corrective arm."<sup>157</sup> To be clear, this correspondence between President Washington and his principal officer is the incarnation of the text of the Opinions Clause. President Washington required the opinion of Secretary Knox, who then fulfilled his duty to supply that opinion.<sup>158</sup> Then, three days later, President Washington wrote to Congress with his own opinion that creating a national militia was "of the highest importance to the welfare of our Country," and sent Congress the detailed plan devised by Secretary Knox for Congress to consider.<sup>159</sup> Still frustrated, President Washington reminded Congress of these previous communications and the importance of the militia in his 1791 address to Congress.<sup>160</sup>

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153. *See infra* Part V(B)(I).

154. Letter from George Washington, U.S. President to the U.S. Senate and House of Representatives (Aug. 10, 1789), <https://founders.archives.gov/documents/Washington/05-03-02-0251-0001#>.

155. *Id.*

156. George Washington, Diary Entry (Dec. 19, 1789), <http://founders.archives.gov/documents/Washington/01-05-02-0005-0004-0019>.

157. Letter from Henry Knox, U.S. Secretary, Dep't of War, to George Washington, U.S. President (Jan. 18, 1790), <http://founders.archives.gov/documents/Washington/05-05-02-0009>.

158. *Id.*

159. Letter from George Washington, U.S. President, to the U.S. Senate & U.S. House of Representatives (Jan. 21, 1790), <http://founders.archives.gov/documents/Washington/05-05-02-0020>.

160. *See generally* Letter from George Washington, U.S. President to the



Finally, on May 2, 1792, Congress gave President Washington what he wanted: the 1792 Militia Act vested President Washington with the emergency power to call the militia into action provided that Congress was on recess and that a federal judge certified that control of the situation was beyond the judiciary's capabilities.<sup>161</sup> Again, the Opinions Clause provided President Washington with the authority to inform himself, and then use that information as evidence to push his agenda through Congress—an early example of a president using Article II's unitary legislative tool.

As the Whiskey Rebellion heightened, President Washington utilized the Opinions Clause to collect diverse and at times contentious advice from his Cabinet and then formed a unitary executive policy that the administration acted on.<sup>162</sup> On August 2, 1794, President Washington and his Cabinet met with officers from the state of Pennsylvania in an effort to inform them of the situation facing the federal government and to enlist their help in response.<sup>163</sup> In this meeting, President Washington presented the Pennsylvanians with communications from officers on the ground in Western Pennsylvania to Secretary of Treasury Alexander Hamilton and Secretary Knox.<sup>164</sup> These papers and this meeting support both a key potential power and an important reading of the Opinions Clause. First, the President used the opinions and reports from the executive branch in an attempt to build political support.<sup>165</sup> Although the Pennsylvania officials are not what we may think of as the People, the end goal is the same: President Washington wanted a politically palatable method to achieve his policy of quashing the rebellion and collecting the excise tax. Second, these papers reinforce the hierarchy contemplated by the Opinions Clause,

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U.S. Senate and House of Representatives (Oct. 25, 1791), <https://founders.archives.gov/documents/Washington/05-09-02-0062>.

161. See Kohn, *supra* note 152, at 572; see also Act of May 2, 1792, ch. 28, 1 Stat. 264, 264–65 (1792).

162. See *infra* Part V(B)(3).

163. See *Conference Concerning the Insurrection in Western Pennsylvania, [2 August 1794]*, NAT'L ARCHIVES: FOUNDERS ONLINE, <http://founders.archives.gov/documents/Hamilton/01-17-02-0009> (last visited Oct. 25, 2018).

164. *Id.* at n. 3–8.

165. See *infra* Part I(B).

namely that a president need not reach into the inferior and civil officers in the individual departments, but instead can gather the information through the filter of his principal officers.<sup>166</sup> While there was no statute preventing President Washington from communicating directly with the officers who wrote to Secretaries Knox and Hamilton, if such a statute did exist, as is contemplated in the discussion below around President Trump,<sup>167</sup> President Washington still would have been able to carry out his plan in this meeting.

Unfortunately, President Washington, in the meeting with the Pennsylvania state officials, failed to garner enough political and actual support from the state government, thus leaving him to consider any and all options available to the federal government.<sup>168</sup> Within a few days of the meeting, Secretary Hamilton reported to President Washington the entire factual history of the Whiskey Rebellion as it was known to the federal government.<sup>169</sup> This detailed report reinforces the hierarchy contemplated by the Opinions Clause, as each of the factual assertions come from communications by the inferior officers to Secretary Hamilton.<sup>170</sup> In a later letter, Secretary Hamilton wrote to Washington that it would be politically advantageous to release this detailed factual report to the citizens at large.<sup>171</sup> Two days later, President Washington submitted Secretary Hamilton's factual report to Attorney General Edmund Randolph, seeking his opinion on the merits of releasing the

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166. *See infra* Part III(B)(2) (this hierarchy refers to the negative implication analysis).

167. *See infra* Part VI(B).

168. *See* Kohn, *supra* note 152.

169. *See* Letter from Alexander Hamilton, U.S. Secretary of the Treasury, to George Washington, U.S. President (Aug. 5, 1794), <http://founders.archives.gov/documents/Washington/05-16-02-0357>.

170. *Id.* ("The reality of the danger to the Deputy was countenanced by the Opinion of General Neville, the Inspector of the Revenue, a man who before had given and since has given numerous proofs of a steady and firm temper. And what followed, as announced in a letter of that Officer of the 27th of October 1791, is a further Confirmation of it." (footnote omitted)). Hamilton's opinion to Washington contains numerous references to correspondence from Inspector Neville, an inferior officer reporting to Hamilton. *Id.*

171. Letter from Alexander Hamilton, U.S. Secretary of the Treasury, to George Washington, U.S. President (Aug. 16, 1794), <http://founders.archives.gov/documents/Washington/05-16-02-0387>.

report to the people.<sup>172</sup> Attorney General Randolph cautioned President Washington on the optics of naming names, and, remarkably, even suggested that Secretary Hamilton may be picking and choosing his targets based on personal rivalries.<sup>173</sup> Here, President Washington relied on two of the Opinions Clause's powers outlined below in Part B. He attempted to unify the executive branch's message on the best way to respond to Pennsylvania's intransigence and the Whiskey Rebellion, essentially cross-checking the Secretary of Treasury's wishes with the opinion of the Attorney General.<sup>174</sup> Additionally, President Washington quite amazingly used the Opinions Clause to solicit the advice from two of his principal officers about the merits of one of the Opinions Clause's key uses: releasing an opinion to garner political support from the people.<sup>175</sup> Secretary Hamilton was chomping at the bit to name and shame the rebels, while General Randolph suggested this may backfire politically.<sup>176</sup> On this debate, President Washington leaned towards Attorney General Randolph, sending commissioners to the region to appear politically cautious while he also began to ready the militia.<sup>177</sup>

President Washington also effectively utilized the Opinions Power as a tool for engaging in confrontations with the judiciary.<sup>178</sup> In the days immediately following the meeting, President Washington asked his principal officers to "give, in [w]riting, their opinion on the measure[s] proper to be pursued by the [e]xecutive."<sup>179</sup> Secretary Knox, in response, reminded

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172. See Letter from Edmund Randolph, U.S. Sec. of State, to George Washington, U.S. President (Aug. 18, 1794), <http://founders.archives.gov/documents/Washington/05-16-02-0395>.

173. *Id.* ("The specifying of names in the third page, and the omission of all names, except Cannon and *Gallatin* . . . will be interpreted into a kind of warfare waged by the President against individuals in the former case, and a desire of selecting for odium *Gallatin*, whose hostility against the Secretary of the treasury is well known.")

174. See *infra* Part V(B)(3) (Unitary Executive Tool).

175. See *infra* Part V(B)(1) (Unitary Political Tool).

176. See Kohn, *supra* note 152, at 574–75.

177. *Id.*

178. See *infra* Part V(B)(2) (Unitary Judicial Tool).

179. Letter from Henry Knox, U.S. Sec. of War, to George Washington, U.S. President (Aug. 4, 1794), <http://founders.archives.gov/documents/Washington/05-16-02-0354>. It should be noted that the request mirrors the

the President of the statutory test laid out in the Militia Act of 1792: he had to convince a federal judge that restoring order to the region was beyond the “ordinary course of judicial proceedings.”<sup>180</sup> Thus, Secretary Knox presented the evidence submitted to him by the inferior officers, particularly Thomas Butler and Isaac Craig, who described the lawless state of the area and the violence inflicted on the Inspector of the Revenue’s home.<sup>181</sup> As a result of this communication from his inferior officers, Secretary Knox offered President Washington his opinion on the militia force that may be required, provided the President got the certification from the federal judge.<sup>182</sup>

President Washington gathered this information laid out by his Cabinet and submitted it as evidence to Justice James Wilson, seeking the certification required by the Militia Act of 1792.<sup>183</sup> In response, Justice Wilson issued the order stating that the insurrection was too powerful “to be suppressed by the ordinary Course of judicial Proceedings, or by the Powers vested in the Marshal of that District.”<sup>184</sup> More importantly for our purposes, Justice Wilson expressly based this decision on the “[e]vidence, which has been laid before me.”<sup>185</sup> Here, President Washington effectively used the Opinions Power to produce evidence submitted to a court, and it was that evidence that allowed him to further his policy goal. Additionally, this

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text of the Opinions Clause itself. President Washington often mirrored the Constitution’s text in his letter without explicitly citing a particular clause. *See also* Letter from George Washington, U.S. President, to the U.S. Senate & U.S. House of Representatives (Jan. 8, 1790), <https://founders.archives.gov/documents/Washington/05-04-02-0361> (reporting what is “necessary to convey to you that information of the state of the Union, which it is my duty to afford”). It is inferred from President Washington’s use of the exact same language that he was citing the constitutional clause in question; in the case for this article, the Opinions Clause.

180. Letter from Henry Knox to George Washington, *supra* note 179.

181. *Id.* at n.3.

182. *Id.* “[T]he Opinion is submitted that good consequences will arise from having even a super abundant force. The interests of humanity and good order will be combined by preventing the deluded people from entertaining hopes of a successful resistance. The power of the Government to execute the laws will be demonstrated both at home and abroad.” *Id.* (explaining that Knox would also provide an accounting of militias and equipment of the Pennsylvania and the surrounding states).

183. *Id.* at n.4.

184. *Id.*

185. *Id.*

particular episode highlights that President Washington obeyed the law as it was passed by Congress. He did not base his actions on a protective power or other non-textual executive power inherent in the Constitution. The Congress placed a limit on the President's authority over the militia, and he used the Opinions Clause to comply with it.

In sum, President Washington achieved a great victory for his administration and for the early survival of the federal government through the intended use of the Opinions Clause. He convinced Congress to pass a law authorizing his use of the militia, arming himself with the opinion of the Secretary of War on the status and need for such a militia. He united the executive branch, settling differences in opinion and ensuring that he acted only after having the best advice. He then followed the congressional mandate in the Militia Act of 1792 and used the opinions as evidence to convince Justice Wilson to certify the need to call the militia into action. He even contemplated the political pros and cons of potentially releasing his Cabinet's opinions to the American people. Importantly, he did not need to reach into the executive departments and communicate directly with the inferior officers, instead he relied on the filter and the expertise of his principal Officers. In the end, the administration successfully crushed the rebellion.<sup>186</sup>

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186. See Letter from George Washington, U.S. President, to the U.S. Senate & U.S. House of Representatives (Nov. 19, 1794, <http://founders.archives.gov/documents/Washington/05-17-02-0125>). As mandated by law, President Washington reported his success to the next session of Congress in his State of the Union, and requested they authorize the continued presence of troops in the region. Interestingly, President Washington did not rely on his executive power to unilaterally keep the militia in Western Pennsylvania. *Id.* Rather, he used the information provided to him by his Cabinet Secretaries to request Congress grant him a continuing authorization. *Id.* On the one hand, the Opinions Power armed President Washington with the evidence to convince Congress. *Id.* On the other hand, the limited reading of executive power allowed Congress to debate the merits of the standing militia, providing a check on the President's agenda. *Id.* Just ten days after the President's State of the Union, the Third Congress passed a continuing authorization statute for the militia in Western Pennsylvania, perfectly illustrating the strength of the Opinions Power for a politically skilled President. *Id.*; see also Act of Nov. 29, 1794, ch. 1, 1 Stat. 403, 403 (1794).

## B. Don't Fret: The Unitary Executive Powers Vested by the Opinions Clause

As detailed above, President Washington made extensive use of the power vested in him by the Opinions Clause, requiring his cabinet to report advice to him and then using that advice to take action on behalf of the country.<sup>187</sup> From President Washington's actions on the Whiskey Rebellion, there are three potential uses of the Opinions Clause: The Unitary Political Tool,<sup>188</sup> The Unitary Judicial Tool,<sup>189</sup> and The Unitary Executive Tool.<sup>190</sup> This Section focuses on these three particular powers, expanding on both recent examples and potential uses. Both the political and judicial tools cover the president's relationship with the two other co-equal branches of government. The Unitary Executive Tool represents the president's unitary authority over the executive branch, with the Opinions Power enabling him to unite his agenda, exercise or support for-cause removals, and to force independent agencies to justify their actions. Importantly, each of these potential powers vested in the president under the Opinions Clause is vested in the president alone, and thus this article will call them "unitary" powers.

### 1. Unitary Political Tool

As Professors Amar and Prakash have stated, the Opinions Clause vests the president with the unique authority vis-à-vis the other branches over information in the executive branch.<sup>191</sup> In this sense, the Clause establishes the president as a chief information officer, one who will never be denied advice or opinions.<sup>192</sup> The president can use this advantage in political fights, both by taking such opinions or reports to the congress to push his legislative agenda, or, if congress fails to respond, taking the opinions to the people to *vote the bums out*.

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187. See CALABRESI & YOO, *supra* note 149, at 40–41.

188. See *infra* Part V(B)(1).

189. See *infra* Part V(B)(2).

190. See *infra* Part V(B)(3).

191. See Amar, *supra* note 10, at 658–59; Prakash, *supra* note 13, at 1005.

192. *But cf.* Prakash, *supra* note 13, at 991–92 (describing the "Chief Administrator" theory).

The history of the proposal at the convention supports this vision of a president as a legislative leader. The original proposal included the chief justice, who would “from time to time recommend such alterations of and additions to the laws of the U. S. [sic] as may in his opinion be necessary to the due administration of [j]ustice, and such as may promote useful learning and inculcate sound morality.”<sup>193</sup> Quite obviously, the framers contemplated that the Opinions Clause would give the president the weaponry with which to engage in legislative fights. As stated above, the framers so wanted the president to have this confidence that they nearly united the president and the chief justice, contravening the separation of powers norm.<sup>194</sup> By removing this passage from the final Opinions Clause, the Committee of Eleven appears to have made the judgment call that advisory opinions and the political involvement of the judiciary would outweigh the benefits given to the stronger Presidency.<sup>195</sup> Still, they accomplished their original goal: the Opinions Clause vests the president with the power to utilize the vast scope of the executive branch to make his case to the congress or the people. Several examples are provided below.

Because this article also argues for the Opinions Clause’s negative implications for the executive power, it’s important to analyze the value of the Opinions Clause in situations where the president does not have unilateral or unrestricted authority. To best illustrate the Opinions Clause as a strong political tool, hypotheticals in which the president must go through congress to achieve his ultimate policy objective are explored, *supra*.

Early in his administration, President Trump issued an executive order seeking to prevent sanctuary cities from receiving federal grants.<sup>196</sup> In *County of Santa Clara v. Trump*, the District Court found that the executive order violated separation of powers principles, the President’s duty under the Take Care Clause, and the Spending Clause.<sup>197</sup> While the

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193. FARRAND, *supra* note 68, at 342–43.

194. *Id.*; see also *supra* Part IV(B).

195. See *supra* Part IV(A); Prakash, *supra* note 13, at 1005–06 (referring to the complete timeline).

196. See Exec. Order No. 13,768, 82 Fed. Reg. 8799, § 9(a) (Jan. 25, 2017).

197. 275 F. Supp. 3d 1196 (N.D. Cal. 2017), *remanded by City & Cty. of S.F. v. Trump*, 897 F.3d 1225 (9th Cir. 2018).

Trump administration has appealed this decision, this analysis will continue under the assumption that such unilateral executive action is unconstitutional. Additionally, this article will posit that the intended action fits within the constitutional framework of the Spending Power established in *South Dakota v. Dole* and *NFIB v. Sebelius*, namely that congress can condition some federal funds on state actions so long as the sum is not so great so as to be coercive.<sup>198</sup> In other words, this analysis assumes that the only limitation on the president's desired action is the separation of powers: the conditions must originate in congress.

Despite these constitutional restrictions, President Trump need not halt his effort to defund sanctuary cities—he only needs to follow his constitutional role. If issuing an executive order threatening the removal of federal funds on the city's failure to enforce federal immigration laws is invalid because Congress has the power of the purse, then the President should turn to Congress. Here, the Opinions Clause would help the President make his case to the Congress, and if they fail to act, to the American people. The President should use the same justification given for the executive order in the first place: Sanctuary Jurisdictions supposedly place their citizens at greater risk for violent crime.<sup>199</sup>

At an event in Miami, Attorney General Jeff Sessions commended Miami-Dade County for complying with federal immigration laws before he chastised Chicago for, in his opinion, failing to protect its citizens.<sup>200</sup> General Sessions linked Chicago's high violent crime-rate in part to its continuing sanctuary policies.<sup>201</sup> He stated broadly that “[e]very year too many Americans [sic] lives are victimized as a result of sanctuary city policies whether it be theft, robbery, drugs, assault, battery, and even murder.”<sup>202</sup> Sessions even cited particular examples, including one of an alien who Chicago twice

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198. Compare 483 U.S. 203 (1987), with 567 U.S. 519 (2012).

199. See, e.g., Jeff Sessions, Attorney Gen., Dep't of Justice, Remarks on Sanctuary Policies (Aug. 16, 2017) (transcript <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-sanctuary-policies>).

200. *Id.*

201. *Id.*

202. *Id.*



refused to turn over to Immigration and Customs Enforcement for DUI arrests ultimately being sent back on the street to kill a victim.<sup>203</sup>

President Trump could easily take this opinion from his principal officer to Congress, demanding that they take action to impose conditions on federal funds. He could require General Sessions to further investigate and report the harms of Sanctuary City policies, citing to crime-statistics in such jurisdictions. Alternatively, he could require the legal opinion of the Office of Legal Counsel, or counsel at ICE, to provide legal basis for federal action. Either way, the President could use the bully-pulpit to build political pressure on the Congress. If high-profile crimes committed by aliens in sanctuary cities make the news, the ball would have been placed in Congress' hands, and they could take the political heat. If the President remains dissatisfied with congressional inaction, he could take the opinion to the American people on a campaign tour. He could inspire his base voters to demand their Congressperson take appropriate action, and if that doesn't work, he could demand and endorse new candidates to oppose incumbent representatives. This effort would not just be typical campaign rhetoric, easily dismissed by political opponents. Rather, the President could deploy the opinion of the nation's Chief Law Enforcement Officer—facts and opinions from the person who knows. At the very least, the President's political opponents will need to reply with facts of their own, but they will not have the luxury of the Opinions Power over the Attorney General.<sup>204</sup> In the end, voters hold their congressperson's feet to the fire at election day on an issue that the President has *no power* over other than the Opinions Clause. Speaking with a single, informed voice to the voters, he serves as a republican, nationally elected check on the factious Congress.

Of course, the Opinions Clause also supports the president's veto power, which is vital to the president's role of a republican

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203. *Id.*

204. They could file a FOIA request, or Congressional opponents could subpoena documents, but the process and time involved in such a request will put them at a distinct political disadvantage. These opponents will not have the same bully pulpit as the President, who will speak with one voice and likely command the attention of the nation.

check on the congress.<sup>205</sup> In the same manner as his affirmative legislative proposals, the president may require opinions of his cabinet to support his vetoing of any legislation passed by congress. In fact, there is a textual link between the Veto Clause in Article I, Section 7 and the Opinions Clause. The Veto Clause requires the president to return the bill “with his Objections,” which must be noted by the originating house of congress.<sup>206</sup> The opinion given by the principal Officer could either constitute the entirety of this objection, or it could serve as the basis for the president’s own policy-based objection. Either way, the veto clause pictures an informed president, which the Opinions Clause assures.<sup>207</sup>

## 2. Unitary Judicial Tool

The Opinions Clause also vests the president with unique abilities with respect to challenges in the judicial branch. The president’s Opinions Power is classified into two different categories: an offensive power and a defensive power. Under the offensive power, the president can use opinions to effectuate policy changes through the Courts, particularly in situations where he may be up against a binding statute and may not have a receptive congress. These opinions take many forms, including, for example, policy papers, legal opinions, and factual reports that could be cited by independent parties in challenging statutes that the president must otherwise enforce. These opinions, particularly if from the Office of Legal Counsel or the Attorney General, may also serve as establishing historical legal precedent, creating formal legal opinions that the Supreme Court can use as evidence of both historical practice and constitutional interpretation. Under the defensive power, the president either preemptively gathers opinions to support the legality of his actions, or he uses the Opinions Power to gather

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205. See *supra* Part IV(B) (explaining the historical comparison between the Council of Revision and the Opinions Clause).

206. U.S. CONST. art. 1, § 7, cl. 2.

207. See Amar, *supra* note 10, at 655–56. (explaining that his “coordinacy principle” states essentially that the Opinions Clause helps the president get on equal footing with the other branches, particularly the Congress through the Recommendation Clause, the State of the Union Clause, and the Veto with Objections Clause).

evidence to justify past actions being challenged in the courts.

While the offensive Opinions Power may be rarely used, an analysis of its use shows that it is a potentially important and untapped reservoir of presidential authority. For a recent high-profile example, President Obama and then Attorney General Holder decided not to defend the constitutionality of the Defense of Marriage Act,<sup>208</sup> a decision that arguably helped effectuate the Supreme Court's decision in *United States v. Windsor*, which held that the Defense of Marriage Act violated the Fifth Amendment's guarantee of equal protection by denying same-sex marriages federal benefits available to other legally-married couples.<sup>209</sup> General Holder sent a letter to Speaker of the House John Boehner stating that while the Department of Justice would continue to enforce the law, they would no longer defend it against a constitutional challenge.<sup>210</sup>

At first blush, this opinion has political and legislative value. President Obama wins political support from those in favor of marriage equality<sup>211</sup> despite previous instances where he waivered on the issue.<sup>212</sup> Undoubtedly, the letter enables a national conversation to gain even more steam and traction.<sup>213</sup> If the President had a receptive Congress, the letter would help

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208. See Charlie Savage & Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES (Feb. 23, 2011), <https://www.nytimes.com/2011/02/24/us/24marriage.html>.

209. See generally 570 U.S. 744 (2013).

210. See Letter from Eric H. Holder, Jr., Attorney Gen., to John Boehner, Speaker of the U.S. House of Representatives, on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011) (on file with the Dep't of Justice), <https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act>. By enforcing the law, the Administration staved off "Take Care" challenges. See also U.S. CONST. art. II, § 3.

211. See Emily Guskin, Scott Clement, & Darla Cameron, *While the Nation's Economy Recovered, 6 in 10 Americans Said the Country Was on the Wrong Track*, WASH. POST (Aug. 16, 2016), <https://www.washingtonpost.com/graphics/national/obama-legacy/public-opinion-social-change.html> (explaining public polling on same-sex marriage during the Obama presidency, with 61% approving by 2016).

212. See Hunter Schwarz, *Obama's Latest 'Evolution' on Gay Marriage: He Lied About Opposing It, Axelrod Says*, WASH. POST (Feb. 10, 2015), [https://www.washingtonpost.com/news/the-fix/wp/2015/02/10/axelrod-says-obama-lied-about-opposing-gay-marriage-its-another-convenient-evolution/?utm\\_term=.59fdac3cd304](https://www.washingtonpost.com/news/the-fix/wp/2015/02/10/axelrod-says-obama-lied-about-opposing-gay-marriage-its-another-convenient-evolution/?utm_term=.59fdac3cd304).

213. See ROBERTA A. KAPLAN, THEN COMES MARRIAGE: *UNITED STATES V. WINDSOR AND THE DEFEAT OF DOMA* (Recorded Books 2015).

snap Congress into action to repeal a law the President deemed unconstitutional.

But the opinion also serves the president's interests in court. In *Windsor v. United States*, the Plaintiffs cited the Holder letter in their successful motion for summary judgment, stating that as the "Attorney General has recognized [there is] 'a growing scientific consensus [that] accepts that sexual orientation is a characteristic that is immutable.'"<sup>214</sup> The Plaintiff's motion also cited General Holder's opinion that Congress did not have a sufficient governmental interest to justify the denial of federal benefits to married same-sex couples under the Fifth Amendment's Equal Protection doctrine.<sup>215</sup> It is quite powerful for the Chief Law Enforcement Officer of the federal government to state that the federal government does not have a strong enough interest to meet constitutional requirements. The Plaintiff not so subtly dropped the weight of the executive branch's determination on the trial judge. While the Trial Judge did not specifically refer to the letter, both she and the Second Circuit ruled that the statute was unconstitutional.<sup>216</sup> Roberta A. Kaplan, Edith Windsor's attorney, recognized the importance of the Holder opinion, writing that "[i]t is almost impossible to overstate how important this decision was for our side. . . . It is extremely unusual for the government to decline to defend federal laws, especially when doing so might come at a political cost."<sup>217</sup> Ultimately, the Supreme Court held the Defense of Marriage Act unconstitutional.<sup>218</sup> In all, the President used the offensive power inherent in the Opinions Clause to further a policy goal in the courts.

In addition to opinions challenging statutes the president hopes the Court will overturn, the president can also use the offensive power to generate constitutional interpretations and historical precedent in situations where the Court may not have

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214. Brief of Plaintiff at 18, 699 F.3d 169 (2d Cir. 2012) (Nos. 12-2335-cv(L), 12-2435(Con)), 2011 WL 3165327.

215. *Id.*

216. See *Windsor v. U.S.*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *aff'd*, 699 F.3d 169 (2d Cir. 2012).

217. KAPLAN, *supra* note 213, at 145.

218. See *Windsor*, 699 F.3d at 210.

a reason to weigh in.<sup>219</sup> Perhaps the most prevalent exercise of this power is the Office of Legal Counsel, which issues memos and opinions on the legality of executive branch actions.<sup>220</sup> Through these opinions, the president can build on the opinions of past administrations and develop a precedent of legal interpretation benefitting the office of the presidency. Although Courts do not consider OLC opinions binding authority, Sonia Mittal documents their role as persuasive authority of an historical practice, thus serving as gap-fillers in cases not yet settled by the Court.<sup>221</sup> To illustrate, the Court in *Noel Canning v. NLRB* adopted a broad interpretation of the Vacancy Appointments Clause based on the historical practice and balance reached by the political branches. In so doing, the Court cited opinions from past Attorneys General and OLCs authorizing such broad vacancy appointments,<sup>222</sup> giving significant evidentiary effect to these opinions.

From a big picture perspective, the Court's deference to these legal opinions written for presidents essentially cedes a portion of constitutional interpretation to the executive branch at the expense of both the judiciary and the congress. The Court posited two separate readings of the Vacancy Appointments Clause, a narrow, restrictive reading and a broad reading.

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219. See Sonia Mittal, *OLC's Day in Court: Judicial Deference to the Office of Legal Counsel*, 9 HARV. L. & POL'Y REV. 211 (2015); see also, John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 376 (1993) ("many of the opinions are the final word on the law because judicial resolution of the legal issue is unavailable").

220. Mittal, *supra* note 219, at 212. First, we should briefly summarize the role these opinions play within the executive branch. As Sonia Mittal points out, OLC memos serve as the legal authority for actions taken within the executive branch. *Id.* Oftentimes, this role requires the OLC to "resolve legal disputes *between* expert agencies," thus serving as a unifying tool for the executive branch. *Id.* (emphasis in original). If the President finds that two of the expert agencies are in dispute, he can direct the Attorney General to require an opinion from the Office of Legal Counsel. *Id.* In this sense, the Opinions Clause is a power the President may use to unify the executive branch's actions, even if he does not have the binding directive power over all of these agencies.

221. *Id.* at 218–19.

222. *NLRB v. Canning*, 134 S.Ct. 2550, 2562 (2014) (stating "[n]ot surprisingly, the publicly available opinions of Presidential legal advisers that we have found are nearly unanimous in determining that the Clause authorizes these appointments").

Unsurprisingly, presidents and their attorneys general wanted the broad readings of their own power, so they issued opinions calling this a *settled* question.<sup>223</sup> This particular case highlights how the unitary Opinions Clause gives the president a unique power to influence the Constitution through historical practices. The Court emphasized that the Senate has never taken any formal action to rebuke or contest the executive branch's constitutional interpretation, but it acknowledged several occasions where individual senators and senate committees disagreed.<sup>224</sup> On the other hand, the Court considered each individual opinion issued by an Attorney General or an Office of Legal Counsel to be formal enough to give it interpretive weight. In other words, the president's request for an opinion from the OLC is a formal action interpreting the Constitution, whereas an individual senator's or even senate committee's statement is not given the same weight. This imbalance gives the president a unique advantage based on the unitary power of the Opinions Clause. The president can simply exercise the enumerated Opinions Power to generate legal opinions that could over time establish constitutional precedent.

Furthermore, the Opinions Clause provides an effective defensive power for the president, allowing the president to gather written evidence to defend certain actions and achieve results in the courts. One example of this defensive power is illustrated by the case challenging the Obama Administration's designation of Anwar Al-Aulaqi on the Central Intelligence Agency's alleged kill list.<sup>225</sup> To defend the action brought by Al-Aulaqi's father, the United States cited a public declaration from then-Director of National Intelligence James Clapper, detailing factual findings of Al-Aulaqi.<sup>226</sup> The District Court then dismissed the case, citing the Clapper opinion as evidence that Al-Aulaqi was able to come to the U.S. and challenge his status in court, but that he had no intention of doing so, precluding the

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223. *Id.* at 2571 (citation omitted).

224. *Id.* at 2571–72.

225. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 11 (D.D.C. 2010).

226. Brief of Defendant at 1, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-1469(JDB)), 2010 WL 3863135 (stating that Al-Aulaqi was a leader of AQAP, setting strategies and directing terrorist attacks against the United States, including the attempted bombing of Northwest Airlines flight in 2009).

father from asserting next friend standing.<sup>227</sup> Although President Obama may not have directly requested this opinion from DNI Clapper, this example shows the kind of opinion a president could require and then deploy defensively in litigation.

As an additional hypothetical, President Obama could have required a report from the Secretary of Homeland Security on the need to set priorities for enforcement in advance of the DAPA case—*Texas v. U.S.*<sup>228</sup> The president could then release this opinion to the DOJ to use in defending the actions as valid and legitimate enforcement discretion delegated to the president and the Department of Homeland Security by law. Such facts on the ground might convince the Court that the actions are far more discretionary than they are actually suspending or rewriting the law. As these examples illustrate, the president can use the Opinions Clause to generate evidence to defend his policies and actions in court.

These two examples represent the power to generate evidence, but, recently, the Trump administration used the Opinions Clause to legitimate and give constitutional cover for otherwise corrupt motives. At oral argument in *Trump v. Hawaii*, the Trump administration argued that the Supreme Court should not consider Trump's anti-Muslim campaign statements in considering whether the travel ban was motivated by religious animus, in violation of the First Amendment.<sup>229</sup> To justify this argument, the Government cited the Opinions Clause as a constitutional moment, transforming President Trump's biased campaign opinions into presidential proclamations supported by the expert opinions of his Cabinet.<sup>230</sup> In fact, Solicitor General Noel Francisco opened his

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227. *Al-Aulaqi*, 727 F. Supp. 2d at 19.

228. *See generally* 809 F.3d 134 (5th Cir. 2015).

229. Transcript of Oral Argument at 28, 138 S.Ct. 2392 (2018) (No. 17-965).

230. *Id.* at 29 (stating “we are very much of the view that campaign statements are made by a private citizen before he takes the oath of office and before, under the Opinions Clause of the Constitution, receives the advice of his cabinet, and that those are constitutionally significant acts that mark the fundamental transformation from being a private citizen to the embodiment of the executive branch”). This argument is consistent with this article's view of executive power, as it's the oath that transforms Citizen Trump into President Trump—a Section One clause “naming” the President. Then, President Trump exercises his Section Two power—the Opinions Clause—to support his

argument by describing the detailed multi-agency review, framing the case as the President merely adopting the Homeland Security Secretary's recommendations.<sup>231</sup> Here, the Trump administration introduces a new formulation of the Opinions Clause's defensive power: Imbuing constitutionally questionable acts with the legitimate cover of expertise.<sup>232</sup>

### 3. Unitary Executive Tool: For Cause Removal and Independent Agencies

Perhaps most importantly for the broader debate over the executive power, the Opinions Clause grants the president with strong authority to unify the executive branch. The Clause enables the president to design a coherent and unified enforcement and regulatory agenda. The president can also use opinions he obtains under the Opinions Clause power as cause to remove even the most independent officers, or, at the very least, ensure that even the most independent agency is held accountable to the American people through their opinions. Again, because negative implications are inferred for the Vesting Clause and the broader executive power from the Opinions Clause, these powers are intentionally analyzed with respect to the unitary scholars' worst nightmare: an independent agency. Here, it is assumed that an independent agency is one where the director(s) cannot be removed at will by the president, and, as discussed above, the president may not direct specific action. If the agency is headed by an inferior officer, then one can also assume congress barred the president from requiring the inferior officer report directly to him. Still, this inferior officer will be subject to a principal officer's *duties* for purposes of the Opinions Clause.<sup>233</sup>

To begin, the Opinions Clause provides the president a tool

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proclamation, which the Government argues is authorized by 8 U.S.C. § 1182(f). *See id.*

231. *Id.* at 3.

232. Ironically, the Trump administration uses the Opinions Clause to hide behind his cabinet—the exact opposite reading that Professor Prakash and framer James Iredell stated. *See supra* note 54 and accompanying text.

233. The Opinions Clause grants the president the power to require the principal officer report to him “upon any Subject relating to the Duties of their respective Offices.” U.S. CONST. art. II, § 2, cl. 1.



to shape a coherent regulatory agenda.<sup>234</sup> Even if a president cannot direct an agency to take a certain action, the president is at least guaranteed the ability to know that such an action is about to be taken. As has been argued in the past, this procedural power allows the president to prepare the agencies he can direct to react and adapt to the incoming regime.<sup>235</sup> If the particular policy enacted by the independent agency is particularly egregious, the president can seek to mitigate the harms elsewhere. For instance, if the EPA<sup>236</sup> issues a new regulation under § 402 of the Clean Water Act creating more stringent requirements for permits, the president could seek to ease the regulatory burden on businesses by instructing the Army Corps of Engineers to ease its regulatory authority over § 404 permits under the same Act.<sup>237</sup>

As explained above, the Office of Legal Counsel serves this unifying role for the president and the executive branch writ large. The OLC steps in to resolve disputes between two competing agencies, delivering an opinion to the agency or the attorney general regarding the legal victor.<sup>238</sup> The president could take a more active role in this process, particularly if the two competing agencies included an independent agency over which he had little control. The president would have two procedural options to resolve these disputes. First, he can either require the opinion in writing from the officers of the individual agencies about the legality of their work, and they in turn can submit the request to the Office of Legal Counsel. Or, second, the president could make the request directly to the Office of Legal Counsel (or through the Attorney General).<sup>239</sup> Either way,

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234. See Sunstein & Strauss, *supra* note 31, at 200 (classifying the Opinions Clause as a procedural power allowing the President to consult and coordinate with the departments).

235. *Id.*

236. This hypothetical assumes, of course, that Congress has insulated the EPA from presidential authority.

237. See 33 U.S.C. §§ 1342, 44 (2012) (explaining that under the Clean Water Act, the EPA has authority for 402 permits issued to point sources, while the Army Corps of Engineers has authority over 404 permits for dredged or fill-material).

238. See Mittal, *supra* note 219, at 212.

239. See *id.*; see also Committee on Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.C.C. 2008). For the Office of Legal Counsel, the Attorney General serving as a buffer may be very

the Opinions Clause guarantees the president a constitutional power to settle disputes between actors in the vast executive branch.

More importantly, the Opinions Clause vests the president with the more classical executive powers. It provides the president with a backstop for the power to remove the independent officer: it is an opportunity to show cause. One can foresee two potential procedures congress could layout to protect an executive branch official. One, congress could grant the executive branch official the power to appeal the decision to an Article III court, requiring the executive branch to show cause.<sup>240</sup> Or, two, congress could require the president receive senate or congressional approval for the removal of the officer.<sup>241</sup> In either instance, the president will be able to use the opinion as evidence of cause for removal. As Professor Sidak pointed out, the refusal to give such an opinion would automatically provide cause for removal, as the individual officer would be violating their oath

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important. Much has been made since the infamous “Torture Memo” about the impartiality of the Office of Legal Counsel and whether it is just a “rubber stamp.” Mittal, *supra* note 219, at 212. Direct presidential involvement in the OLC’s decision-making process may exacerbate this problem, as the OLC may feel the pressure to approve the President’s actions when the request comes from the President. These concerns were not unfamiliar to the framers; at the North Carolina ratifying convention, James Iredell stated that the Opinions Clause would guard against President’s colluding with executive officers to corrupt their opinions, chiefly by having it in writing. See ELLIOT, *supra* note 54 at 108–10. Additionally, early in our nation’s history, President Washington and the Senate considered the proper forum for deliberations over the treaty-making process. See *supra* note 70 and accompanying text. The two parties acknowledged that both branches would be harmed by having the President present for the debate on the Treaty: the President may be embarrassed by the rejection of his proposal, and the Senate may be tempered in its deliberation in the presence of the powerful office. *Id.* Likewise, the OLC, like all executive officials, may feel the same political pressure over its deliberation.

240. See Tara Golshan, *What Republicans in Congress Say About Passing a Bill to Protect Robert Mueller*, VOX (Apr. 10, 2018, 2:54 PM), <https://www.vox.com/policy-and-politics/2018/3/29/17164408/constitutional-protecting-robert-mueller-job-congress> (explaining that this limitation is currently being contemplated by the proposed legislation to insulate Special Counsel Robert Mueller from President Trump’s removal authority).

241. See THE FEDERALIST NO. 69 (Alexander Hamilton) (describing senate advice and consent as the default practice for the displacement of executive officials and, although arguably wrong, this shows there was a greater deal of ambiguity over the removal power than the unitary scholars would like to admit).

of office.<sup>242</sup> Assuming the officer writes the opinion, the president can use it as evidence for cause, particularly if there are false statements, incorrect statements of law, evidence that the agency is not following the law, or potentially even the president's evaluation of the opinion and the officer's abilities.<sup>243</sup>

Admittedly, this removal-by-bad-opinion authority is weaker than the unitary scholars envision, but it recognizes the textual fact that the Take Care Clause imposes the duty on the president to see that the laws are faithfully executed.<sup>244</sup> Removing an officer who is protected by law and who is faithfully executing the laws passed by congress violates the president's constitutional duty. Thus, this forceful reading of the Opinions Clause and its implications for a more limited reading of executive power again reconciles Article II's structure. The president expressly has the Opinions Power while expressly having the Take Care duty. By tying removal under restrictive laws to the president's express constitutional power, we maintain the logic behind Article II. If the executive branch is following and enforcing the law, how can the president be said to uphold his duty to take care that the laws be faithfully executed if he removes a law-abiding officer who has not violated their duty?

Still, this restricted reading of the executive power through the Opinions Clause does not render the president completely powerless. In fact, as detailed in the legislative section above, the Opinions Clause vests the president with a great political tool that he can use to instill executive accountability that may be lost through restricted removal. Again, assuming the most independent agency, the president will still have the authority to get any and all information about the duties of the executive branch. Thus, the president will be able to apprise himself of the independent agencies proposed actions, current actions, and past policy directives. He could even require the other agencies

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242. Sidak, *supra* note 57, at 2087 (stating "the President can remove those who produce faulty or injudicious opinions").

243. This last element is obviously quite subjective and could be an exception that swallows the rule. But there are no rigid rules here, and the President will only be bound by their ability to convince whichever body is charged with providing the procedural check.

244. U.S. CONST. art. II § 3, cl. 5.

to report their opinions on the impacts on their fields of the independent agency's activity. The president can then use these opinions and go to congress or the American people to make the political case against the independent agency.

For instance, President Trump may have sympathetic ears in his base for arguments against the independent Consumer Finance Protection Bureau.<sup>245</sup> Under this vision of the Presidency, President Trump could require the CFPB to provide him with their opinions and reports on all of their proposed and current activity. President Trump then takes these opinions and reports to the American people on a cross-country tour against the overreaching and liberty-infringing CFPB, rallying his base to the point where they hold as a litmus test for potential candidates for Congress whether they support eliminating the CFPB or subjecting it to plenary presidential discretion.<sup>246</sup> In the end, the President can force an independent agency to sell their every move to any audience the President can muster, including the American people as a whole. If the President cannot make this case through the American people, then the law *should* not change as a constitutional matter. The constitutional system and its intended accountability has worked—the President provided a republican check on the potentially overreaching Congress by speaking with a singular voice to the American people about the evils of an independent CFPB. The CFPB essentially had to convince the American people that it adds value to our government. Also, Congress's previous decision to insulate the CFPB's mission and mandate from politically motivated direction was not violated. Through this vision, executive branch accountability, republican checks on Congress, and Congress's power to make the laws as representatives of the people were all upheld. By contrast, reading plenary removal power into the Presidency not only contradicts the text of the Constitution, but it would contradict the individual policy decisions made by the people's representatives in Congress.

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245. See, e.g., Diane Katz, *The CFPB in Action: Consumer Bureau Harms Those It Claims to Protect*, BACKGROUND, no. 2760, Jan. 22, 2013, <https://www.heritage.org/housing/report/the-cfpb-action-consumer-bureau-harms-those-it-claims-protect>.

246. See *supra* Part IV(B)(1).

## VI. The Current Opinions Clause: President Trump and the Independence of Law Enforcement

The Opinions Clause interpreted in this article has important implications for the current debate over the meaning of executive power. Without question, President Trump, in his interactions with former FBI Director James Comey, has sparked a debate over the proper role of the President with respect to the ideal of independent and apolitical law enforcement.<sup>247</sup> This section analyzes President Trump's firing of James Comey as a failed attempt at the proper use of the Opinions Clause and discusses President Trump's interactions with Director Comey and U.S. Attorney Preet Bharara, two inferior officers, including how those interactions contradict the longstanding norms of the Justice Department. Both of these discussions compare President Trump to President Washington, whose expert use of the Opinions Clause serves as a useful contrast. Finally, Part B outlines the legislative steps congress could take in light of the negative implications of the Opinions Clause to limit future presidential overreach with respect to the Department of Justice.

### A. President Trump, the Failed Attempt at the Opinions Power and Presidential Overreach

President Trump exercised the Opinions Power in his decision to remove FBI Director James Comey. Deputy Attorney General Rod Rosenstein testified to the Senate Judiciary Committee that President Trump sought his "advice and input"<sup>248</sup> on the decision to remove FBI Director Comey.<sup>249</sup>

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247. Compare Jack Goldsmith, *Independence and Accountability at the Department of Justice*, LAWFARE BLOG (Jan. 30, 2018, 2:16 PM), <https://www.lawfareblog.com/independence-and-accountability-department-justice>, with Robert Litt, *FBI Independence—Too Much of a Good Thing?*, LAWFARE BLOG (July 17, 2017, 10:00 AM), <https://www.lawfareblog.com/fbi-independence%E2%80%94too-much-good-thing>.

248. Rod J. Rosenstein, U.S. Deputy Att. Gen., Briefing for the Members of the United States Senate and House of Representatives, 2 (May 18–19, 2017) (transcript available at <https://assets.documentcloud.org/documents/3727183/Untitleddocument.pdf>).

249. See *Transcript: Jeff Sessions' Testimony on Trump and Russia*,

Rosenstein's memo to the Attorney General stated that the FBI needed new leadership based on his disagreement with the actions taken by Director Comey during the investigation into former Secretary of State Hillary Clinton.<sup>250</sup> Then, following the Unitary Executive Tool outlined above, President Trump attached the opinion from Deputy Attorney General Rosenstein as adopted by Attorney General Sessions to his letter to Director Comey, stating that he had "accepted their recommendation" and that Comey was "hereby terminated and removed from office, effective immediately."<sup>251</sup> President Trump also used these opinions as a unitary political tool—releasing Rosenstein's memo in the hopes that it would give him the political cover for firing Director Comey.<sup>252</sup>

In sum, President Trump seemingly showed expertise in his use of the Opinions Power in the immediate time of the firing of

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POLITICO (June 13, 2017, 7:45 PM), <https://www.politico.com/story/2017/06/13/full-text-jeff-session-trump-russia-testimony-239503>. It's unclear whether President Trump went directly to the Deputy Attorney General, an inferior officer, or instead went through the Attorney General. We know that the President asked Attorney General Jeff Sessions for his recommendation, and that Rosenstein sent the memo to the Attorney General, who then adopted the recommendations and submitted them to the President. *Id.* These facts suggest that the President followed the Opinions Clause hierarchy and went through the principal officer. Either way, there is no law on the books restricting the President's Opinions Power over DOJ inferior officers. However, even if there was such a law, the President would still have been able to gather the Department's recommendations through the principal officer, Attorney General Jeff Sessions.

250. Memorandum from Rod J. Rosenstein, Deputy Attorney Gen., to the Attorney General, Restoring Public Confidence in the FBI (May 9, 2017), <https://www.theatlantic.com/politics/archive/2017/05/rosenstein-letter-annotated/526116/>.

251. See William Cummings, *Full Text of Trump's Letter Telling Comey He's Fired*, USA TODAY (May 9, 2017, 9:06 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/05/09/full-text-trump-letter-comey-firing/101491982/>; Letter from Jeff Sessions, Attorney Gen., to Donald Trump, U.S. President (May 9, 2017), <https://www.usatoday.com/story/news/politics/onpolitics/2017/05/09/full-text-trump-letter-comey-firing/101491982/> (concurring in Rosenstein's judgment); see also *supra* Part IV(B)(3) for discussion on the Unitary Executive Tool.

252. See Peter Baker & Michael D. Shear, *Trump Shifts Rationale for Firing Comey, Calling Him a 'Showboat'*, N.Y. TIMES, (May 11, 2017), <https://www.nytimes.com/2017/05/11/us/politics/trump-comey-showboat-fbi.html>; see also *supra* Part IV(B)(1) for discussion on the Unitary Political Tool.

James Comey.<sup>253</sup> Just as President Washington requested the opinions of his Cabinet on the Whiskey Rebellion, Trump requested the opinions of his Cabinet on the merits of firing Comey. Additionally, like President Washington's use of his principal officers' opinions as evidence in intra-branch and inter-branch decisions, Trump claimed to act on such advice in his decision to fire Director Comey. Finally, much like the debate between Hamilton and Randolph on whether to name and shame the rebels, Trump and his administration ultimately decided to release Rosenstein's letter to give political cover for his decision to fire Comey. Unfortunately, unlike Washington, Trump directly contradicted this justification within 48 hours in an interview with NBC News, stating that he had already decided to fire Comey without Rosenstein's opinion and mentioning the Russia investigation as part of his thinking.<sup>254</sup>

Furthermore, President Trump has shown he is unwilling to rely on his principal officers, instead speaking directly to the inferior officer handling the individual matter. Early on in his administration, President Trump established the precedent of speaking privately with former FBI Director James Comey. These one-on-one communications run afoul of norms established in the justice system shortly after Watergate, norms intended to insulate the law enforcement community from improper influence.<sup>255</sup> These communications also show that President Trump does not share in President Washington's awareness of presidential power and its potentially corrupting influence, as exemplified by Washington's decision to abstain

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253. See Omnibus Crime Control & Safe Streets, Pub. L. No. 90-351, 82 Stat. 197 (1968), *amended by* Pub. L. No. 94-503, 90 Stat. 2407 (1976); Pub. L. No. 112-24, 125 Stat. 238 (2011). Confusingly, the authorizing statute for the FBI Director vests the appointment power in the Attorney General and, in the revision notes, the power is vested in the President. Either way, the statute does not clearly state that the President cannot remove the Director without cause, and, as discussed below, a clear statement rule likely applies to these restrictions.

254. See Baker & Shear, *supra* note 252; see also *supra* Part V(A) for discussion of Washington's use of the Opinions Clause.

255. See, e.g., Memorandum from Eric Holder, U.S. Attorney Gen., to Heads of Dep't Components to All U.S. Attorneys (May 11, 2009), <https://lawfare.s3-us-west2.amazonaws.com/staging/2017/2009%20Eric%20Holder%20memo.pdf>.

while the Senate debated nominees.<sup>256</sup> To reiterate, Washington recognized the power of the Presidency, and how the Constitution not only allowed for but perhaps necessitated the political branches to establish some safeguards for the proper exercise of government.

In the post-Watergate world, this same awareness of the potentially corrupting power of the presidency reappeared in the relationship between the President and Department of Justice. However, unlike Washington's inter-branch compromise with the Senate above, the post-Watergate Presidents have struck an intra-branch balance with their Attorneys General to guard against the improper political influence on the inner workings of the DOJ. As a result, Attorneys General issued guidelines that established walls between the White House and the inferior and civil officers in the Department of Justice.<sup>257</sup>

Attorney General Eric Holder's guidelines provide a useful illustration of the balance between presidential power and shielding against improper political influence.<sup>258</sup> The guidelines explicitly state that all initial communications from the White House should be directed exclusively to either the Attorney General or the Deputy Attorney General, and, if continued updates on a pending investigation are required, the Attorney General may designate a subordinate officer as the contact person, but that subordinate must regularly inform the Attorney General of these contacts.<sup>259</sup> Furthermore, Holder's guidelines regulate the President's requests for legal advice from the Office of Legal Counsel, stipulating that those requests must include the Attorney General in addition to the Assistant Attorney General for the Office of Legal Counsel, who must inform the General of any contacts from the White House deemed to be improper political influences.<sup>260</sup> Finally, Holder reiterates the

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256. See *supra* Part III(B), notes 70–71 and accompanying text.

257. See Massimo Calabresi, *The FBI Talked to the White House About Its Russia Probe. That Was Probably Against the Rules*, TIME (Feb. 25, 2017), <http://time.com/4682791/fbi-russia-reince-priebus-andrew-mccabe-justice-rules/>; Memorandum from Donald F. McGahn II, Counsel to the U.S. President, to All White House Staff (Jan. 27, 2017), <https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000>.

258. Memorandum from Holder, *supra* note 255.

259. *Id.* at 2.

260. *Id.* at 3.



purpose stated in the prior administration guidelines: “[w]hat these procedures are intended to do is route communications to the proper officials so they can be adequately reviewed and considered, free from either the reality or the appearance of improper influence.”<sup>261</sup>

Attorney General Griffin B. Bell’s 1978 address was even more explicit on the screening role of the Attorney General. Although Holder’s address expressly supersedes the prior memos,<sup>262</sup> it’s still useful to see how previous Attorneys General have seen their role as the principal officer in charge of the DOJ. Bell stated that it was his “job to screen these communications to insure [sic] that any improper attempts to influence a decision do not reach the Assistant Attorney General. Any relevant information or legal argument will, of course, be passed on.”<sup>263</sup> Although this is self-imposed discipline on behalf of the executive branch, Bell and President Carter established the restricted hierarchy allowed by the Opinions Clause by routing all communications through the Attorney General. Bell also played the role of a filter, intercepting and stopping communications from the White House that he deemed improper.<sup>264</sup>

In the initial examination of these guidelines, we see that the DOJ and by extension, the Executive Branch as a whole, restricted itself in a similar vein to the negative implications in the Opinions Clause. While the Holder memo does not cite the Opinions Clause, it clearly establishes that the President should direct inquiries to the principal officer rather than the inferior officers. The principal officer, in this case the Attorney General, then assumes the responsibility of reviewing the information requested and facilitating its communication to the White House in the least-improper way. Clearly, the post-Watergate Department of Justice guidelines reflect the same concern of improper influence that Washington shared with the First Senate. Although these restrictions are not imposed by

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261. *Id.* at 4.

262. *Id.* (superseding the 2007 memo issued by Attorney General Michael Mukasey).

263. Griffin B. Bell, U.S. Attorney Gen., Address before Department of Justice Lawyers 7–8 (Sept. 6, 1978) (on file with the Dep’t of Justice).

264. *Id.*

congress, they reflect a self-imposed decision that the executive power of the Vesting Clause should not include demanding inferior officers of the DOJ report directly to the President.<sup>265</sup>

President Trump, on the other hand, ignored these guidelines and norms with respect to two inferior Officers:<sup>266</sup> former FBI Director James Comey and Former U.S. Attorney Preet Bharara. Interestingly, the reactions of both individuals highlight the shaky ground President Trump stood on when he made these improper contacts. James Comey testified to the Senate that he “spoke alone with President Obama twice in person” during his tenure in the Obama administration, while he had “nine one-on-one conversations with President Trump in four months.”<sup>267</sup> Comey went on to describe one of the early meetings with President Trump – a one-on-one dinner with the President in which Comey felt that the President wished to “create some sort of patronage relationship.”<sup>268</sup> This meeting and such a patronage relationship concerned Comey “greatly, given the FBI’s traditionally independent status in the executive branch.”<sup>269</sup> Already, we see Comey’s instincts reflect the post-Watergate policies of a politically-independent FBI in which it would be inappropriate for a president to have a conversation with the Director, an inferior officer, alone.

Perhaps the most striking meeting occurred on February 14, 2017, when President Trump asked the Vice President, the Deputy Director of the CIA, the Director of the National Counter-Terrorism Center, Secretary of Homeland Security and the Attorney General to clear the room so that he could speak to Comey alone.<sup>270</sup> Tellingly, the Attorney General lingered next

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265. If imposed by Congress, such restrictions on the President’s authority would certainly be unconstitutional under the Unitary Executive theory. As Professors Calabresi and Prakash argued, one of the powers vested in the President by the Vesting Clause is the power to act in the inferior officer’s stead or to nullify any actions that officer takes. See Calabresi & Prakash, *supra* note 16.

266. Memorandum from McGahn, *supra* note 257 (which Trump apparently violated).

267. Read James Comey’s Prepared Remarks for Testimony, N.Y. TIMES (June 7, 2017), <https://www.nytimes.com/interactive/2017/06/07/us/politics/document-Comey-Prepared-Remarks-Testimony.html>.

268. *Id.*

269. *Id.*

270. *Id.*

to Comey, but Trump again instructed Sessions to leave the room.<sup>271</sup> Once alone, President Trump told Comey that he wants to talk about Michael Flynn, the recently fired National Security Advisor who has since pleaded guilty to lying to the FBI.<sup>272</sup> According to Comey's testimony, Trump told him that Michael Flynn "is a good guy and. . .I hope you can see your way clear to letting this go, to letting Flynn go."<sup>273</sup> Here, we see the exact type of communication that the post-Watergate memos sought to limit—the President using his Office and his political presence to influence an inferior officer in the investigation of a political friend of the President. Under the Griffin Bell and Eric Holder guidelines, such a communication should have been directed to the Attorney General, who would have then refused to pass along the request to the FBI.<sup>274</sup>

Comey's actions after this meeting underscore his discomfort and the questionable authority of the President to make such an order directly to the FBI Director. Comey testified that he shared the contents of the conversation with an immediate team of senior leadership at the FBI, and that they agreed that "it was important not to infect the investigative team with the President's request, which we did not intend to abide."<sup>275</sup> There are two takeaways from this portion of the testimony, which speak to the negative implications of the Opinions Clause. One, Comey and his leadership team decided to ignore the order of the President, clearly showing that the FBI Director did not recognize the President's authority to issue such a directive. Thus, either Comey was disobeying his Oath of Office to uphold the Constitution of the United States, or the Executive Power of the Vesting Clause does not fill in the gap left by the Opinions Clause – the top-down directive to an

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271. *Id.*

272. Michael D. Shear & Adam Goldman, *Michael Flynn Pleads Guilty to Lying to the F.B.I. and Will Cooperate with Russia Inquiry*, N.Y. TIMES (Dec. 1, 2017), <https://www.nytimes.com/2017/12/01/us/politics/michael-flynn-guilty-russia-investigation.html>.

273. *Read James Comey's Prepared Remarks for Testimony, supra* note 267.

274. Bell, *supra* note 263, at 7–8.

275. *Read James Comey's Prepared Remarks for Testimony, supra* note 267.

inferior officer.<sup>276</sup> Two, Comey and his team decided to not inform the investigators of the President's request, a decision that implicitly recognizes the potential for improper political influence on investigative matters.<sup>277</sup>

Comey also communicated his discomfort with the private conversation to Attorney General Sessions, illustrating his belief in the hierarchy set up by the DOJ guidelines. After the Flynn conversation, Comey

Took the opportunity to implore the Attorney General to prevent any future direct communication between the President and [him]. [He] told the AG that what had just happened—him being asked to leave while the FBI Director, who reports to the AG, remained behind—was inappropriate and should never happen.<sup>278</sup>

In other words, Comey understood that he, as an inferior officer, reported to the principal officer—Attorney General Sessions—and not directly to the President.

U.S. Attorney Preet Bharara shared Comey's concerns over the President's authority to communicate directly with him, a fellow inferior officer.<sup>279</sup> Interestingly, Bharara reports that while initial conversations after the election were uncomfortable, he answered the President-elect's phone calls because "he was not the President."<sup>280</sup> However, when President Trump called him again on March 9, 2017, Bharara did not

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276. This is not to say that Director Comey and his team believed the President lacked the constitutional authority to make such an order under the Vesting Clause or based on a belief on the Opinions Clause. Rather, it is intended to show that his actions fit with this article's reading of both the Opinions Clause and the Vesting Clause.

277. This recognition of the power of the Presidency to infect otherwise independent decision making is the same recognition that drove President Washington's absence from the First Senate's deliberations.

278. Read James Comey's *Prepared Remarks for Testimony*, *supra* note 267 (emphasis added).

279. Matthew Haag, *Preet Bharara Says Trump Tried to Build Relationship with Him Before Firing*, N.Y. TIMES (June 11, 2017), <https://www.nytimes.com/2017/06/11/us/politics/preet-bharara-trump-contacts.html> (calling Comey's testimony "deja vu").

280. *Id.*

return the phone call and instead reported the contact to the Attorney General.<sup>281</sup> Bharara's juxtaposition of his willingness to speak with citizen Trump with his unwillingness to speak with President Trump demonstrates his belief in the hierarchy established by the DOJ guidelines, a hierarchy that also fits with this article's reading of the Opinions Clause.<sup>282</sup>

Comey and Bharara quite clearly echo the concerns grounded in the DOJ guidelines in the post-Watergate world. To them, the President's attempt to influence inferior officers and their decisions on individual investigations was an inappropriate and overreaching exercise of executive power. Rod Rosenstein apparently agrees, appointing Special Counsel Robert Mueller to investigate the President's actions surrounding Comey's firing.<sup>283</sup> While Special Counsel Mueller's investigation continues, some scholars have argued that President Trump's constitutional authority immunizes him from prosecution or impeachment for this conduct.<sup>284</sup> Others have argued that legislation protecting Robert Mueller from President Trump's removal authority would be unconstitutional.<sup>285</sup> To some degree, both of these arguments rest on the modern unitary executive theory, namely that the Vesting Clause provides the President with an absolute power to fire or direct any officer within the executive branch. The next

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281. *Id.*

282. *Id.*

283. Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters, Order No. 3915-207 (2017) ("Special Counsel is authorized to conduct the investigation confirmed by then-FBI Director James B. Comey").

284. See Anna Giaritelli, *Alan Dershowitz: 'You Cannot Charge a President with Obstruction of Justice for Exercising His Constitutional Power,'* WASH. EXAMINER (Dec. 4, 2017, 8:14 AM), <https://www.washingtonexaminer.com/alan-dershowitz-you-cannot-charge-a-president-with-obstruction-of-justice-for-exercising-his-constitutional-power> (arguing that the President exercised his constitutional authority to fire Comey and to tell the DOJ who to investigate, and thus cannot be prosecuted).

285. Neal K. Katyal & Kenneth W. Starr, Opinion, *A Better Way to Protect Mueller*, N.Y. TIMES (Feb. 19, 2018), <https://www.nytimes.com/2018/02/19/opinion/protect-mueller-russia-prosecutor.html> ("The Constitution vests the President with the power over prosecutors, and it is hard to imagine courts permitting Congress to place serious restrictions on that power"). Instead, Katyal and Starr argue for a "Bork regulation," in which the Attorney General issues a regulation stating that the President will only be able to fire the Special Counsel with Congress' consent. *Id.*

section explains why both of these arguments are wrong and what congress can do to better guard against this form of presidential overreach.

B. Congress Can Protect Against Presidential Overreach in the FBI

The constitutional interpretation of both the Opinions Clause and Article II outlined in this article enables the congress to guard against the improper exercise of presidential power. To do so, congress can pass the DOJ guidelines discussed in Part A into law, insulating investigative officials from the political pressures of the White House. Although congress does not gain any authority from Article II, it can pass such restrictions under the Necessary and Proper Clause. As established in removal cases such as *Buckley v. Valeo*, congress has the power under the Necessary and Proper Clause to shield executive agencies from improper political influence.<sup>286</sup> Here, it is necessary and proper for Congress to insulate the Department of Justice to provide for the independent and non-corrupt execution of the laws—laws Congress clearly has the Article I Section 8 power to enact. Then, Article II, through the three negative implications of the Opinions Clause, allows for these protections. To reiterate, the Opinions Clause and the other power clauses within Article II Section Two mean that the president does not have an absolute power to take any action that is not expressly included. As outlined above, all other actions can be regulated. As a result, the Opinions Clause, by its limitations, means that the president does not have an absolute power to require inferior officers report directly to him, to remove at-will all officers, or to direct officers to take specific actions.<sup>287</sup>

Thus, congress can regulate the president's interactions with the inferior officers within the Department of Justice.<sup>288</sup> In

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286. See Steele & Bowman, *supra* note 76.

287. See *supra* Part III(B).

288. See Barry H. Berke, Noah Bookbinder, & Norman L. Eisen, *Presidential Obstruction of Justice: The Case of Donald J. Trump* BROOKINGS (2017), <https://www.brookings.edu/wp-content/uploads/2017/10/presidential-obstruction-of-justice-the-case-of-donald-j-trump-final.pdf>. Quite possibly, Congress has already regulated these interactions with the obstruction of

other words, congress could pass a statute codifying the regulatory guidelines issued by the post-Watergate Attorneys General, requiring that White House communications go through the Attorney General and not directly to the inferior officer in charge of the investigation. Of course, the Opinions Clause prevents congress from completely insulating the Department of Justice or insulating any particular matter from the president's review. The Clause gives the president the power to inquire about any subject within the particular executive department, thus giving the president an express textual power to inquire about any matters within the DOJ, so long as he communicates through the Attorney General.<sup>289</sup> Nevertheless, such a law would avoid the political pressures on the FBI Director or the U.S. Attorney, facilitating greater independence in the justice system.<sup>290</sup>

Congress can also pass a statute insulating the Special Counsel or the FBI Director from removal at the pleasure of the president. Again, because the Opinions Clause is a limited textual grant, the president cannot claim based on the text of the Constitution an absolute power to fire any officer within the executive branch. Of course, as outlined above, the president could use the Opinions Clause to find such cause for removal. For instance, President Trump likely could have gone to the Senate or to a court and submitted Rod Rosenstein's memo as evidence for cause to remove FBI Director Comey, but that process would have had the added potential of detecting the true reason behind the firing.

Finally, congress could pass a law restricting the president's authority to order or stop investigations into specific individuals. The Opinions Clause, by empowering the president with the absolute power *only* to require reports *from* the officers, does not expressly vest the power to issue orders *to* those officers. Therefore, in order to avoid politically motivated prosecutions and investigations, congress could deny the president the authority to order the FBI to investigate or not investigate a specific individual. Such a law avoids any future scenes like the

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justice statutes.

289. U.S. CONST. art. II, § 2.

290. See Haag, *supra* note 279; Read James Comey's Prepared Remarks for Testimony, *supra* note 267.

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one Director Comey described in the Oval Office, in which President Trump essentially instructed him to drop the Michael Flynn investigation.<sup>291</sup>

## VII. Conclusion

Professor Amar's statement that the Opinions Clause and its implications are "both timely and timeless" is as true today as ever.<sup>292</sup> By analyzing the text and context of the clause, we gain a greater sense of the executive power the framers designed, and, more importantly, a greater sense of what they left to us. President Washington knew the power of information within the executive branch, and we saw him use it to his and the nation's advantage in ending the Whiskey Rebellion. On the other hand, the Opinions Clause and its implications answer the questions raised about some of President Trump's actions. We need not concede this fight when scholars cloak presidential overreach in an ambiguous and vast reservoir of executive power. Instead, we can look to the Opinions Clause, the Constitution's only textual power grant for the president over the day-to-day administration of the federal government. We can understand its energy and vigor for a president seeking to further political goals. Nevertheless, perhaps most timely, we recognize its flexibility, and the safeguards it and the framers allowed us to design.

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291. *Id.*

292. Amar, *supra* note 10, at 647.