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Grand Unified (Separation of Powers) Theory: Examining the United States Marshals

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GRAND UNIFIED (SEPARATION OF POWERS) THEORY: EXAMINING THE UNITED STATES MARSHALS

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Abstract

This Article examines a novel separation of powers issue that the Supreme Court has never directly addressed: the existence and practices of the United States Marshals. The United States Marshals serve an executive branch function—law enforcement—yet are often directly overseen and commanded by the judicial branch. In the United States federal government system—in which the executive and judicial branches are designed to act independently—the control the federal courts exercise over the marshals raises separation of powers concerns. Since no court has decided what test should apply when federal courts vicariously exercise executive power, this Article applies several separation of powers tests to the organizational command structure of the marshals. These tests derive from unitary executive theory, the nondelegation doctrine, and the non-Article III adjudication doctrine. Each of these doctrinal areas involve circumstances where one branch exercises the power of another. By applying the various Court-created tests, this Article reveals the common features and parallel results of the various tests and discusses the broader implications of those similarities. Despite the different names the Court uses, each test fundamentally comes down to balancing convenience of governance against the danger of aggrandizing one of the three branches. It behooves the Court to consolidate the numerous tests and create a unified separation of powers doctrine.

I. INTRODUCTION

The establishment and existence of the United States Marshals pose separation of powers concerns that have never been directly addressed by the Supreme Court. The vesting clauses of Articles I, II, and III of the Constitution vest exclusive and inalienable powers in each of the three branches of government.[1] Yet even though the

1. *See* INS v. Chadha, 462 U.S. 919, 946 (1983) ("'[T]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787' . . . [t]he very structure of the articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers" (quoting Buckley v. Valeo, 424 U.S. 1, 124 (1976)); Bowsher v. Synar, 478 U.S. 714, 722 (1986) ("The Framers provided a vigorous Legislative Branch and a separate and wholly independent Executive Branch, with each branch responsible ultimately to the people. The Framers also provided for a Judicial Branch equally independent with '[t]he judicial Power . . . extend[ing] to all Cases, in Law and Equity, arising under this Constitution, and the Laws of the United States.'" (quoting U.S. CONST. Art. III, § 2) (alteration in

marshals are primarily law enforcement[2] (*i.e.*, executive branch) officials, they serve at the direction of the judicial branch.[3] Despite this apparent inconsistency, the marshals have existed since the first Congress,[4] and their constitutionality hasn't been credibly challenged. Analysis of the separation of power concerns inherent in the marshals may inform how other government actions could be analyzed.

There are four related doctrinal frameworks which can be used to analyze the constitutionality of the marshals: unitary executive theory, the nondelegation doctrine, governmental privatization doctrine, and administrative adjudication doctrine. Black-letter law does not call for the application of any of these doctrines to this specific situation.[5] But because there is no ready-made framework for analyzing the separation of powers issues inherent in the existence of the marshals, these different doctrinal frameworks are helpful by way of analogy.

Unitary executive theorists argue that any federal power which is not judicial or legislative is executive and therefore may be exercised only by the executive branch.[6] Specifically, unitary executive theory rejects the idea of independent executive agencies or officers.[7] Much of the case law on unitary executive theory focuses on appointments and removal, while the focus of this Article is on the

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original)).

2. *See Fact Sheet U.S. Marshals Service 2021*, U.S. DEPT. OF JUST. (Feb. 26, 2021), https://www.usmarshals.gov/duties/factsheets/overview.pdf.

3. *See* 28 U.S.C. § 566(a)–(b) (2015) ("It is the primary role and mission of the United States Marshals Service . . . to obey, execute, and enforce all orders of the United States District Courts, the United States Courts of Appeals, the Court of International Trade, and the United States Tax Court, as provided by law . . . and may, in the discretion of the respective courts, be required to attend any session of court.").

4. *See* An Act to Establish the Judicial Courts of the United States, ch. 20, § 27, 1 Stat. 73, 87 (1789) [hereinafter Judiciary Act of 1789].

5. The few times anyone has challenged actions related to the marshals on separation of powers grounds, courts seem to disregard the argument. *See, e.g.*, United States v. Trudell, 563 F.2d 889, 892, 892 n.5 (8th Cir. 1977) (Courts "may authorize and direct subordinate court officials and marshals to assure that such required order is observed . . . . Appellant's contention that the Standing Order, as enforced by the Deputy United States Marshals, violates the Separation of Powers doctrine, is clearly without merit."); Chabal v. Reagan, 841 F.2d 1216, 1222 (3d Cir. 1988) ("Two hundred years of history show that the President's plenary power to remove marshals from office has not jeopardized the independence and authority of the courts. Nothing about this case suggests a different conclusion. The separation-of-powers doctrine does not shield marshals from removal by the President at will.").

6. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J., 541, 560 (1994).

7. *See id.* at 566.

executive's directive authority. But, because a President can use the threat of removal to indirectly achieve directive authority, the removal power is also discussed.[8] Unitary executive theory is relevant in the marshals context because, to the extent that the marshals obey the courts rather than the executive, they are executive officers outside the Executive's control.

The nondelegation doctrine prohibits the legislative branch from delegating legislative power to another branch or regulatory agency without an "intelligible principle" to guide the delegee.[9] A few scholars have long pronounced the doctrine dead law, some have argued that it is being enforced by indirect means, and yet others argue that it should be explicitly abandoned by the Court.[10] Seemingly, the Supreme Court has only applied the doctrine to invalidate legislation in two cases, both decided in 1935.[11] But, in recent years, several Supreme Court justices, perhaps enough for a majority, have indicated a willingness to reassess the Court's application of the nondelegation doctrine.[12] As a result, some speculate that the Court may begin to enforce the doctrine more vigorously and invalidate legislative grants of authority to

8. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2327 (2001).

9. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935).

10. *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000); Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003 (2015); West Virginia v. EPA, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring) (explaining that "the Court routinely enforced 'the non-delegation doctrine' through 'the interpretation of statutory texts, and, more particularly, [by] giving narrow constructions to statutory delegations.'").

11. *See* A.L.A. Schechter Poultry Corp., 295 U.S. 495; Panama Refin. Co. v. Ryan, 293 U.S. 388 (1935). *See also* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down law on commerce clause grounds but in the course of its opinion it expressed hostility to delegation to nongovernmental actors).

12. *See* Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting); Paul v. United States, 140 S.Ct. 342, 342 (2019) (the Court denied the petition for writ of certiorari, and Justice Kavanaugh wrote separately that "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases"); *see also* Dep't of Transp. v. Ass'n of Am. R.R.s, 575 U.S. 43, 69, 84 (2015); Andrew Coan, *Eight Futures of the Nondelegation Doctrine*, 2020 WISC. L. REV. 141, 147 (2020); Nicholas, R. Parillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1294 (2021); Nat'l Fed. Indep. Bus. v. OSHA, 595 U.S. __ (2022) (Gorsuch, J. concurring) (reaffirming the role of the nondelegation doctrine in ensuring "democratic accountability").

administrative agencies.[13] This raises the question whether the Court will reassess other types of delegation, such as to the judiciary.[14] An additional question is whether the Court may be willing to apply the nondelegation doctrine to address delegations of non-legislative power.[15] This Article, therefore, analyzes how the nondelegation doctrine might apply to these other types of delegations by examining a congressional delegation of *executive*[16] authority to the *judicial*[17] branch—the creation of the United States Marshals.

Privatization is the delegation of government functions, usually executive, to private entities.[18] Literature and case law on privatization posit limits on the government's ability to privatize.[19] For instance, the Supreme Court has held that it is especially dangerous for Congress to give governmental power to private parties, and scholars argue that some powers cannot be privatized at all.[20] Although the judiciary is governmental, not private, the

13. *See* Coan, *supra* note 12, at 148; Alex Guillén & Paul Demko, *How the New Supreme Court Could Stymie a Biden Presidency*, POLITICO, (Sept. 25, 2020 6:32 PM), https://www.politico.com/news/2020/09/25/supreme-court-regulations-biden-421934; Hannah Mullen & Sejal Singh, *The Supreme Court Wants to Revive a Doctrine That Would Paralyze Biden's Administration*, SLATE, (Dec. 1, 2020, 12:56 PM), https://slate.com/news-and-politics/2020/12/supreme-court-gundy-doctrine-administrative-state.html.

14. In the past, the Court has upheld delegations of rulemaking authority to the courts. *See, e.g.*, Wayman v. Southard, 23 U.S. 1, 23 (1825).

15. By "non-legislative delegations," I refer to delegations of judicial authority, such as the creation of administrative law judges, or the delegation of executive authority such as control of law enforcement officers.

16. Black's Law Dictionary defines executive thusly: "The branch of government responsible for effecting and enforcing laws" *Executive*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See also* 1 ANNALS OF CONG. 481 (1789) ("[I]f any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws." (quoting James Madison)); Nixon v. Fitzgerald, 457 U.S. 731, 749–50 (1982) (explaining that "the enforcement of federal law" is a task the President has "supervisory . . . responsibilit[y]" for pursuant to the Vesting Clause).

17. Black's Law Dictionary defines judiciary as "[t]he branch of government responsible for interpreting the laws and administering justice." *Judiciary*, BLACK'S LAW DICTIONARY (11th ed. 2019).

18. *See* Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003); COMMISSION ON GOVERNMENT FORECASTING AND ACCOUNTABILITY, GOVERNMENT PRIVATIZATION: HISTORY, EXAMPLES AND ISSUES (2006), https://cgfa.ilga.gov/Upload/2006Gov_Privatization_Rprt.pdf ("Privatization is the process of transferring property from public ownership to private ownership and/or transferring the management of a service or activity from the government to the private sector.").

19. *See infra* Part I.B.

20. *See* Carter v. Coal Co., 298 U.S. 238, 311 (1936); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 424 (2006).

concept—that the President and Congress's power is nondelegable—is the same. Thus, the limits on privatizing government functions parallel and borrow the language of the nondelegation doctrine.[21]

The final analytical framework is the doctrine limiting Congress's ability to create non-Article III judicial tribunals. The Supreme Court has articulated limits with regard to what types of tribunals Congress may create consistent with the Constitution.[22] For the sake of clarity, this Article will call this analysis the "essential attributes" test because the Court has held that Congress may not deprive the federal courts of their "essential attributes."[23]

This Article does not come to any one conclusion about the constitutionality of the marshals but, rather, applies the different frameworks as a thought experiment to show ways the separation of powers issue could be addressed. Each of these frameworks restricts the federal government's ability to re-allocate constitutionally created powers. This Article hopes to demonstrate, by comparing the frameworks and their applications to a concrete example, how a single test for analyzing separation of powers issues may be derived.

Part I of this Article summarizes relevant court decisions and scholarship about the analytical frameworks for addressing separation of powers concerns. It also discusses cases about the marshals. Part II examines the history of the marshals, as well as their current and historical practices. The aim of Part II is to provide background showing why the marshals may pose a separation of powers issue. Part III analyzes the constitutional and practical issues that stem from the existence of the marshals. Part IV applies the separation of powers frameworks to the original organization of the marshals as well as to their current iteration. Part V examines some of the policy and functional considerations relating to the marshals. Part VI briefly addresses how the foregoing frameworks might implicate other separation of powers analyses. Specifically, Part VI notes the similarity between the different frameworks and suggests that one underlying test may be derived.

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21. *See* Verkuil, *supra* note 20, at 421–26; *see also* Metzger, *supra* note 18, at 1367; Dina Mishra, *An Executive-Power Non-Delegation Doctrine for the Private Administration of Federal Law*, 68 VAND. L. REV. 1509, 1539 (2015).

22. *See* Am. Ins. Co. v. Canter, 26 U.S. 511, 546 (1828).

23. Crowell v. Benson, 285 U.S. 22, 51 (1932).

II. COURT DECISIONS AND SCHOLARLY WORK RELATED TO THE SEPARATION OF POWERS

To demonstrate how the various doctrinal frameworks enumerated above can be applied to the establishment and existence of the U.S. Marshals, it is first necessary to provide some background on the various doctrines. Therefore, I provide a brief overview of court decisions on each doctrine as well as a short summary of particularly relevant scholarship.

A. Executive Control of Agencies

This Article focuses in part on the President's directive authority over executive officials.[24] The case law on directive control is sparse and the scholarship divided. No Supreme Court case has directly addressed the President's power to tell agency officials what to do. But, at any rate, the most relevant case is *Bowsher v. Synar*, in which the Supreme Court held the Comptroller General could not lawfully exercise executive powers assigned to him by statute because the Comptroller General was a subordinate of the legislature—rather than the executive.[25]

The case law on the amount of control the President can exercise over the administrative state most often focuses on the President's ability to remove and appoint officers. The Court has tended to use the President's ability to remove a particular officer as a litmus test for whether an executive agency is too independent of the executive and thereby violates the separation of powers.[26] Quintessentially, in *Myers v. United States*, the Court held that the power to remove executive branch subordinates is an inherent part of the executive power, which Article II § 1, of the Constitution vests "in a President of the United States."[27] By contrast, the Court stated in *Humphrey's*

24. Directive or decisional authority is "conceptually and legally distinct" from the President's ability to hire and fire. STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXTS, AND CASES 148 (8th ed. 2017). Directive authority relates to "the question of whether the president can tell executive officials what to do" rather than merely providing oversight. *Id.*

25. *See* 478 U.S. 714, 727–33 (1986).

26. *See* Myers v. United States, 272 U.S. 52, 119 (1926); *Bowsher*, 478 U.S. at 727–33; Morrison v. Olson, 487 U.S. 654, 671 (1988); Free Enter. Fund v. Pub. Acct. Oversight Bd., 561 U.S. 477, 484 (2010); Seila Law v. CFPB, 140 S.Ct. 2183, 2191–92 (2020).

27. 272 U.S. 52 *passim*.

Executor v. United States that, when an officer is not inherently executive, Congress can limit the President's ability to remove (but only a little).[28] The exact contours of when Congress can limit the president's removal power seems to be decided ad hoc rather than through any cross-applicable standard. The best summation may be that if the President wants to remove an executive officer, Congress must not make it too difficult for the President to do so.

There are fewer relevant cases in the appointment context, but the law seems clearer. "[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by" Article II.[29] Congress can "prescrib[e] . . . reasonable and relevant qualifications and rules of eligibility of appointees" so long as they do not limit the President's choices to such an extent that they "trench" on the executive power.[30] Because marshals are officers of the United States, the removal and appointment precedents apply to them.

Although Supreme Court precedent is lacking, there are some lower-court cases addressing the President's directive authority. For example, in *Building and Construction Trades Department v. Allbaugh,* the District of Columbia Circuit suggested that the Article II vesting and take care clauses mandate broad presidential power to direct agency officers.[31] *Allbaugh* relied on another District of Columbia Circuit case, *Sierra Club v. Costle*, which stated:

> The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the law which Article II of the Constitution evidently contemplated in vesting

28. *See* 295 U.S. 602, 630–32 (1935).

29. Buckley v. Valeo, 424 U.S. 126 (1976). *See also* U.S. CONST. art. II, §2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States . . . but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

30. *Myers*, 272 U.S. at 129.

31. *See* 295 F.3d 28 (D.C. Cir. 2002).

general executive power in the President alone.[32]

Aside from case law, there has been substantial scholarship devoted to this topic. "The traditional and mainstream position is that if Congress assigns a task . . . to the head of an agency, the president cannot dictate the substance of the decision."[33] That view is not shared by everyone.[34] Proponents of unitary executive theory, like Professor Steven Calabresi and Kevin Rhodes, have argued that the Constitution vests the President with the power to supplant decisions of agency officers, even when the statute creating those positions places policy-making authority solely with the official.[35] Presidents themselves have adopted this interpretation of their own authority.[36] In an article by then-professor Elena Kagan, Kagan relates how various presidents from Regan to Clinton took measures intended to solidify their directive control of the administrative state.[37] Kagan also argues that even if the Constitution does not give the President directive power, the threat of removal effectively leads to the same result.[38] Professor Peter Strauss has confirmed that recent presidents have also attempted to convey that they are responsible for all of the decisions of the administrative state during their presidency.[39] Despite that, Strauss argues that the text of the Constitution is ambivalent as to whether the President has directive authority.[40]

B. Nondelegation and Privatization

The nondelegation doctrine prohibits Congress from delegating its lawmaking authority to another branch without an "intelligible principle" to guide the coordinate branch.[41] As explained above, the Supreme Court has only applied the nondelegation doctrine to

32. 657 F.2d 298, 406 n. 524 (D.C. Cir. 1981).

33. BREYER ET AL., *supra* note 24, at 149.

34. *See, c.f.* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1166 (1992).

35. *See id.*

36. *See* Kagan, *supra* note 8, *passim*.

37. *See id.*

38. *See id.* at 2327–28.

39. *See* Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 702–04 (2007).

40. *See id.*

41. *See* Panama Refin. Co. v. Ryan, 293 U.S. 388, 415 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935); Gundy v. United States, 139 S. Ct. 2116, 2123 (2019).

invalidate two statutes, both times in 1935. In the first case, *Panama Refining Co. v. Ryan*, the Supreme Court held unconstitutional a statute which allowed the President to prohibit interstate transportation of petroleum in specific instances. It did so because the delegation to the President of that power did not provide clear standards for the President to follow.[42] In the second case, *A.L.A. Schechter Poultry Corp. v. United States*,[43] the Court declared unconstitutional a statute which had granted the President the power to approve codes of conduct set by the poultry industry for itself.[44] Again, the Court held that the statute did not sufficiently direct the President's discretion when enforcing the statute.[45] The Court has not invalidated a law on nondelegation grounds since.

Although the Court has only used the doctrine to invalidate a statute twice, multiple cases, both before and after 1935, have confronted the doctrine in various ways which are relevant to analyzing the nondelegation implications for the marshals.

The first case is *Wayman v. Southard*; there, the Court upheld a statute authorizing the judiciary to create its own procedural rules.[46] Although *Wayman* was about rulemaking and therefore involved a legislative delegation, some of Justice Marshall's statements are enlightening as to non-legislative delegations as well. Justice Marshall wrote that "[i]t will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."[47] So saying, Justice Marshall implies that it is constitutionally permissible for Congress to delegate powers which are not legislative, if Congress can exercise those powers.[48] Accordingly, *Wayman* is the first instance in which the Court recognized the possibility of non-legislative delegations.

The Court has also held that the extent to which or wisdom with which a delegee uses their delegated power is irrelevant to the nondelegation analysis. In *Whitman v. American Trucking Associations, Inc.*, Justice Scalia, writing for the Court, held that an

42. *See* 293 U.S. at 415.
43. *See* 295 U.S. at 495.
44. *See id.* at 541–42.
45. *See id.*
46. *See* 23 U.S. 1, 50 (1825).
47. *Id*. at 42–43.
48. *See id.*

agency cannot itself cure a nondelegation problem by construing a statute narrowly.[49] This implies that if a statute grants federal courts broad powers over the marshals, the fact that the courts use those powers sparingly will not ameliorate any nondelegation problems inherent in the statute.

The Court has held that instances in which coordinate branches assist each other to carry out their legitimate duties should not be considered delegations. In *Gundy v. United States* Justice Kagan, writing for a plurality of the Court, applied the intelligible principle test while affirming that "[c]ongress may 'obtain[ ] the assistance of its coordinate Branches'—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws."[50] The assistance principle could apply to non-legislative delegations as well, since they can also be characterized as assistance.

Because privatization cases use the same language and concepts as the nondelegation cases, both doctrines are discussed here.[51] In *Carter v. Carter Coal Co.*, the Court addressed whether Congress could, consistent with the Constitution, delegate the power to set minimum wages for coal workers to non-governmental groups.[52] Although the Court ultimately invalidated the law as beyond the scope of Congress's Commerce Clause power, the Court stated, "[t]his is *legislative delegation* in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[53]

More recently the Court decided *Department of Transportation v.*

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49. *See* 531 U.S. 457, 473 (2001) ("The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise–that is to say, the prescription of the standard that Congress had omitted–would *itself* be an exercise of the forbidden legislative authority." (emphasis in original)).

50. 139 S.Ct. 2116, 2123 (2019) (citing Misretta v. United States, 488 U.S. 361, 372 (1989)).

51. *Compare* the language and reasoning in Carter Coal Co. v. Carter, 298 U.S. 238 (1936), *with* that of Panama Refin. Co. v. Ryan, 293 U.S. 388, 415 (1935). *See also* Calvin R. Massey, *The Non-Delegation Doctrine and Private Parties*, 17 GREEN BAG 2D 157, 167 (2014), http://www.greenbag.org/vT7n2/V'7n2_ariclesCmassy.pdf ("Delegation to private entities is a mirror image of the usual nondelegation concern.").

52. *See* 298 U.S. at 311.

53. *Id.* (emphasis added).

Association of American Railroads.[54] Before the Supreme Court granted certiorari, the D.C. Circuit held that—for purposes of the dispute—Amtrak was a private entity and that Congress had violated the nondelegation doctrine when it granted "Amtrak and the Federal Railroad Administration (FRA) joint authority to issue 'metrics and standards' that address the performance and scheduling of passenger railroad services."[55] The Circuit reasoned that because Amtrak was a private party, Congress could not delegate rulemaking authority to it.[56] The Supreme Court ultimately held that Amtrak was governmental rather than private.[57] The Court then remanded the case to the Circuit to determine whether Congress's grant nonetheless violated the nondelegation doctrine.[58] Hence, it is evident that cases invalidating privatization rely on the same reasoning as the nondelegation doctrine.

The literature on privatization provides a helpful framework to understand the marshals because it has been applied specifically to delegations of executive power.[59] Although this doctrine is not dispositive given the differences between private actors and the judicial branch, the concepts remain useful in building a framework to analyze the marshals. Privatization scholarship argues that the Constitution limits the government's ability to delegate the power to perform certain inherently governmental activities to private parties.[60] Paul Verkuil has theorized that "certain government functions may be so fundamental as not to be transferable to private hands under any circumstances. Acts of government committed to high officials, including the President, who have taken oaths to uphold the Constitution fall into this category."[61] Verkuil ties this limitation to both the textual requirement that certain officials take an oath to defend the Constitution as well to the desirability that those in

54. *See* 575 U.S. 43 (2015)

55. *Id.* at 45.

56. *See id.*

57. *See id.*

58. *See id.* at 55–56.

59. *See* Mishra, *supra* note 21, at 1509.

60. *See, e.g.*, Verkuil, *supra* note 20, at 425, 438; Mishra, *supra* note 21, at 1509; *but see* Jody Freeman, *The Private Role in the Public Governance*, 75 N.Y.U. L. REV. 543, 582 (2000) (asserting that in a privatization case, West v. Atkins, 487 U.S. 42 (1998), the Supreme Court was unperturbed by privatization and that "the Court never engaged the possibility that some duties might be nondelegable.").

61. Verkuil, *supra* note 20, at 424.

government be accountable for their enumerated duties.[62]

Relatedly, in an article by Dina Mishra, Mishra focuses on the language of the Vesting Clause, Take Care Clause, and Appointments Clause in determining the scope of the President's authority to delegate executive power to private entities.[63] The framework that Mishra proposes first asks whether a specific power is "executive" and second whether the entity delegated to is subordinate enough to the President such that the President retains ultimate control of that power.[64] Mishra's "Article conceptualizes [the executive] power as an authority to 'take Care' and bear ultimate responsibility for the execution of law, rather than to execute it directly, the President might retain that power so long as he retains *some* ability to take meaningful steps to encourage the faithful execution of law."[65] Although her article focuses on delegations of executive power by the executive branch, Mishra notes that her analysis:

> rests on the principle of non-divestment of "[t]he executive Power" from the President. Where Congress purports to authorize someone to perform certain tasks fundamental to the execution of law, under this doctrine's logic Congress cannot divest the President of all influence or control, whether directly or through his subordinates, over that task or the one performing it.[66]

Thus, we can apply Mishra's analysis where, as here, Congress delegates executive power to the Judiciary. Mishra concludes that there are certain bounds placed upon the President's ability to privatize executive branch functions.[67]

In an inverse of the issue presented by the marshals, an article by Mark Thomson argues that the intelligible principle test should be

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62. *Id.* at 425. Be that as it may, nowhere does the Constitution address whether any specific power is delegable.

63. *See* Mishra, *supra* note 21, at 1523.

64. *See id.* at 1524.

65. *Id.* at 1541. Mishra also recognizes that evidence exists which tends to show that arrests have historically not been considered exclusively executive; *see also id.* at 1548 ("Ultimately, the best, albeit imperfect, explanation for private citizens' authority to conduct arrests regardless of executive control may be that an arrest is attenuated from the ultimate administration of a sanction for the violation of law.").

66. *Id.* at 1524.

67. *See id.*

applied to situations in which the judicial branch delegates judicial responsibility to probation officers.[68] When judges direct the marshals, they, arguably, indirectly exercise the executive power. By contrast, according to Thomson's article, when probation officers (who are executive officials) do their job, they exercise the judicial power. Thomson observes that, as a textual matter, "[t]he Vesting Clauses that give rise to both Article I's and Article III's nondelegation principles are virtually identical—using basically the same language and having basically the same structure."[69] But despite the textual similarity between the vesting clauses in Articles I and III, courts look to whether non-Article III judges are exercising the "essential attributes" of the judicial branch when assessing whether a delegation violates the separation of powers rather than looking for an "intelligible principle."[70] This brings us to the next separation of powers test.

C. Administrative Adjudication

Cases involving Congress's assignment of judicial functions to administrative agencies should also be considered nondelegation cases. In essence, those cases involve the extent to which Congress may delegate judicial power to non-Article III courts. Thus, the Court's analysis in those cases sheds light on ways to analyze other non-legislative delegations.

The first case to address this issue did so only briefly. In *American Insurance Company v. Canter*, Chief Justice John Marshall writing for the Court, assessed the constitutionality of the admiralty jurisdiction of the territorial court of Florida, the judges of which were limited to a four-year term in office.[71] Justice Marshall wrote, "[t]hese courts, then, are not Constitutional Courts, in which the judicial powers conferred by the Constitution on the general government can be deposited. They are incapable of receiving it."[72] *Canter* expressly recognizes that the core "judicial [p]ower" cannot be delegated outside the courts created under Article III. It is, therefore, a

68. *See* Mark Thomson, *Who Are They to Judge?: The Constitutionality of Delegations by Courts to Probation Officers*, 96 MINN. L. REV. 306, 329 (2011).

69. *Id.* at 328.

70. *Id.* at 310.

71. *See* 26 U.S. 511, 512 (1828) ("deposit[ing]" judicial power mirrors the idea of "delegating" legislative power).

72. *Id.*

quintessential example of a case analyzing Congress's power to delegate non-legislative power.[73]

Later cases somewhat complicated this area of law.[74] The Court has struggled to articulate exactly when Congress may vest non-Article III tribunals with the power to adjudicate cases. Congress may usually vest a non-Article III tribunal with adjudicatory power in two situations: first, Congress may require cases involving "public rights"—rights created by Congress—to be adjudicated by non-Article III courts[75]; second, Congress may require that rights which are not "public" be adjudicated by non-Article III courts so long as doing so does not infringe on the "essential attributes" of Article III courts.[76]

D. Case Law on the Character of the Marshals

This Article focuses on Congress's ability to transfer power from the executive branch to the judiciary. But to determine whether the marshals constitute a delegation of executive power to the judiciary, we must first determine whether the marshals *are* executive. In *Cunningham v. Neagle*, the Supreme Court assumed, without in-depth analysis, that the marshals were an executive agency.[77] The Court

73. Ultimately, Justice Marshall upheld the jurisdiction of the territorial courts on the theory that the federal government has special powers when legislating for the territories, which Florida was at the time. *See id.* ("In legislating for [the territories], Congress exercises the combined powers of the general and state governments.")

74. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1855) (holding that in cases of public rights, "Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."); Crowell v. Benson, 285 U.S. 22, 50–51, 60 (1932) (non-Article III courts can decide cases involving private rights so long as there is adequate judicial review in an Article III court because this maintains the essential attributes of Article III review); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 (1982) (reasserting the importance of the public versus private rights distinction); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986) (creating multi-factor balancing test to determine whether a non-Article III court can adjudicate a private right common law claim); Stern v. Marshall, 564 U.S. 462, 490 (2011) (Court limited the public rights doctrine to "federal regulatory scheme[s]" or claims where "an expert Government agency is deemed essential to a limited regulatory objective"); Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S.Ct. 1365, 1373 (2018) ("[The] Court has not 'definitively explained' the distinction between public and private rights, and its precedents applying the public-rights doctrine have 'not been entirely consistent.'").

75. *See Crowell*, 285 U.S at 50–51.

76. *See id.* at 51; *see also N. Pipeline Constr. Co.*, 458 U.S. at 77.

77. 135 U.S. 1, 60–63 (1890).

provided examples of the "executive power" and included control over the marshals as one example; the critical issue being whether the federal government could enforce the laws it enacted or if it had to rely on state enforcement agencies to enforce federal law.[78] The issue arose when a deputy marshal shot and killed a man who had tried to assault a Supreme Court Justice. Writing for the Court, Justice Miller rhetorically asked:

> Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the process of the courts, must they call on the nearest constable for protection? Must they rely on him to use the requisite compulsion, and to keep the peace, whilst they are soliciting and entreating the parties and by-standers to allow the law to take its course?[79]

The Court then rhetorically asks where the judicial branch is to turn for its own protection, and, in response, the Court states that they turn to the marshals for protection—and assumes that the marshals belong to the executive branch:

> [A]s has been more than once said in this court, in the division of the powers of government between the three great departments, executive, legislative, and judicial, the judicial is the weakest for the purposes of self-protection, and for the enforcement of the powers which it exercises. The ministerial officers through whom its commands must be executed are *marshals of the United States, and belong emphatically to the executive department of the government.* They are appointed by the president, with the advice and consent of the senate. They are removable from office at his pleasure. They are subjected by act of congress to the supervision and control of the department of justice, in the hands of one of the cabinet officers of the president, and their compensation is provided by acts

78. *See id.*
79. *Id.* at 61.

> of congress . . . . We cannot doubt the power of the president to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death; and we think it clear that where this protection is to be afforded through the civil power, the department of justice is the proper one to set in motion the necessary means of protection.[80]

For those reasons, the Court held that the marshals were executive in nature. There are two weaknesses in Justice Miller's opinion. First, it fails to account for the history of the marshals and the possibility that the marshals are, in fact, part of the judicial branch. Second, if the marshals are executive, as Justice Miller asserts, it begs the question whether the delegation of supervisory authority to the United States courts violates the nondelegation doctrine— i.e., the subject of this Article.

Contrarily, at least one past Supreme Court Justice has stated that. since the founding, the marshals have been integral to the judicial branch and that their history establishes that judges have broad authority to direct the marshals.[81] In *Pennsylvania Bureau of Correction v. U.S. Marshals*, Justice Stevens, dissenting, noted that "[t]he court's authority to issue such directives to the marshal is therefore not derived from the All Writs Act, but rather is simply one of the powers of the federal judicial office that has long been an aspect of the relationship between the court and its officers."[82] Although Justice Stevens does not explicitly reference the "judicial [p]ower" of Article III, his reference to the "powers of the federal judicial office" evokes that power, implying his belief that direction of the marshals is within the Court's inherent constitutional powers. Chief Justice Burger's dissent in *Nixon v. Administrator of General Services* is also informative.[83] *Nixon* revolved around the constitutionality of a federal statute which directs the General Services Administration to preserve presidential materials. The Court held that the statute was constitutional, but, in his dissent, Chief Justice Burger implied that the

80. *Id.* at 63–67 (emphasis added).

81. *See* Pa. Bureau of Corr. v. U.S. Marshals, 474 U.S. 34, 45–47 (1985) (Stevens, J., dissenting).

82. *Id.* at 48.

83. *See* 433 U.S. 425, 505 (1977).

Court was interpreting its precedent to mean that the "Judiciary is at liberty to order all papers of a President into custody of United States Marshals."[84]

Finally, some lower courts have also found that the judiciary has broad power to direct marshals and that such direction does not violate any separation of powers principle.[85]

As explained further below, the history of the marshals makes it far from clear whether the marshals were thought of as part of the executive branch by the Founders. But depending on the answer, the marshals' subordination to the judiciary could violate the separation of powers principle inherent in the Constitution.

E. Other Scholarship on the Separation of Powers

Professor Gerard Bradley has written about the separation of powers implications when officers who are not under the complete control of the executive branch undertake executive functions.[86] Bradley's article contradicts some of the foundational assertions in Mishra's analysis. For instance, Bradley asserts that much of what is characterized as executive should not be characterized that way.[87] He contends instead that "[l]aw enforcement is a governmental activity dispersed across the branches with effective congressional direction."[88] If that is true, the vesting clause of Article II does not limit the President or Congress's authority to delegate enforcement power because enforcement is a power shared among all the branches, not just one. Even if Bradley is correct, this argument may only hold up for delegations of "executive" power and may not apply to other types

84. *Id.* at 516. To be clear, Chief Justice Burger disagreed with this proposition and was admonishing the majority justices for misreading the Court's precedent. But his implication that the majority was holding that judges could direct the marshals to go against the President's directives is significant if an accurate characterization.

85. *See* United States v. Trudell, 563 F.2d 889, 892 (8th Cir. 1977) ("The inherent power of a judge to require order in and around the courtroom, including the immediately adjacent areas, is fundamental to the administration of justice . . . To that end he may authorize and direct subordinate court officials and marshals to assure that such required order is observed." (citation omitted)); *id.* at n.5 ("Appellant's contention that the Standing Order, as enforced by the Deputy United States Marshals, violates the Separation of Powers doctrine, is clearly without merit.").

86. *See* Gerard V. Bradley, *Law Enforcement and the Separation of Powers*, 30 ARIZ. L. REV. 801 (1988).

87. *See id.* at 804 ("Law enforcement just is not a peculiarly article II activity requiring presidential direction.").

88. *Id.*

of non-legislative delegation such as of "judicial" power.

Relatedly, one recent article by Professors Julian Davis Mortenson and Nicholas Bagley altogether "refutes the claim that the Constitution was originally understood to contain a nondelegation doctrine."[89] They base their argument on the fact that "early federal Congresses adopted dozens of laws that broadly empowered executive and judicial actors to adopt binding rules of conduct for private parties on some of the most consequential policy questions of the era, with little if any guidance to direct them."[90] Their analysis is relevant here because similar reasoning may apply to the marshals—who were created by the First Congress. Yet the analysis conducted by Mortenson and Bagley is not dispositive on the constitutionality of non-legislative delegations because even if delegations of administrative rulemaking power were routine, the delegation of law enforcement power may have its own distinct separation of powers concerns. Professor Ilan Wurman's response to the article by Mortenson and Bagley is also relevant to the analysis here.[91] Wurman accepts that the Founders thought certain powers were nonexclusive, meaning that they could be characterized as either legislative or executive, but rejects the proposition that all powers were thought of as nonexclusive.[92] Wurman therefore contends that the nondelegation doctrine did exist and—as relevant to this Article—his argument provides support for the idea that even if some powers were thought of as nonexclusive at the founding, the power over law enforcement may not have been.

Another recent article by Nicholas Parillo provides new originalist evidence tending to show that the Founders did not believe in a nondelegation doctrine. Parillo examined "the rulemaking power [of the federal board of tax commissioners]" under the "direct tax" of 1798[93] and found that the federal board of tax commissioners were given authority to make regulations that were "coercive and domestic" and "that the originalist skeptics of rulemaking are mistaken" in arguing that such delegations did not occur.[94] Like

89. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 277 (2021).

90. *Id*.

91. *See* Ilan Wurman, *No Nondelegation at the Founding? Not So fast, Notice & Comment*, YALE J. ON REG. (Jan. 5, 2020), https://www.yalejreg.com/nc/no-nondelegation-at-the-founding-not-so-fast-by-ilan-wurman/.

92. *See id*.

93. Parillo, *supra* note 12, at 1302.

94. *Id.*

Parillo's 1798 tax commissioners, the marshals long existence also unsettles the conventional wisdom on nondelegation. The fact that the Founders authorized the existence of the tax commissioners and the marshals lends credence to the argument that delegation of the various branches' powers was not considered constitutionally prohibited by the Founders. After all, marshals have been around for nearly as long as the Constitution itself.[95]

III. THE ESTABLISHMENT OF THE UNITED STATES MARSHALS AND CURRENT PRACTICE

The United States Marshals are the oldest federal law enforcement agency.[96] They were established by the Judiciary Act of 1789, signed into law by President Washington on September 24, 1789.[97] The same Act established the three levels of federal courts, delineated their jurisdiction, and concurrently established the marshals to serve at the direction of the judiciary.[98]

The legislative history of the Judiciary Act reveals that certain members of Congress saw marshals as essential to the functioning of the federal judiciary. For example, in a floor speech on August 24, 1789, Representative Samuel Livermore criticized the proposed Judiciary Act for the expense of requiring an additional set of judges *and* marshals—thus assuming that both were required when establishing new federal courts.[99] Representative William Loughton

95. *See* Judiciary Act of 1789 § 27.

96. *See* FREDERICK S. CALHOUN, THE LAWMEN: UNITED STATES MARSHALS AND THEIR DEPUTIES: 1789–1989 2 (Smithsonian Institution Press, 1989).

97. *See* Judiciary Act of 1789; *see also* MAEVA MARCUS, ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, 4 (1992).

98. *See* MARCUS, *supra* note 97, at 4; Judiciary Act of 1789 § 27 ("And be it further enacted, [t]hat a marshal shall be appointed in and for each district for the term of four years, but shall be removable from office at pleasure, whose duty it shall be to attend the district and circuit courts when sitting therein, and also the Supreme Court in the District in which that court shall sit. [ ] And to *execute throughout the district, all lawful precepts directed to him*, and issued under the authority of the United States, and he shall have power to command all necessary assistance in the execution of his duty, and to appoint as there shall be occasion, one or more deputies, [ ] *who shall be removable from office by the judge of the district court, or the circuit court* sitting within the district, *at the pleasure of either*.") (emphasis added).

99. Judiciary Act of 1789. It is noteworthy that Samuel Livermore served as the head of the New Hampshire Superior Court of Judicature before becoming a Member of Congress—demonstrating his familiarity with court functions. *See Livermore, Samuel*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=L000364 (last visited Jan. 22, 2021).

Smith, responding to Livermore's criticism, likewise presumed that establishing courts would require both judges and marshals.[100]

This assumption makes sense given the traditional role of court officers. Like many lawyers of the time, Representative William Loughton Smith studied the law of England.[101] Because it provided the background for how the Founders thought of judicial procedure, the English courts' procedural precedent was important to the way the drafters of the Judiciary Act thought of the necessary powers of a court.[102] In the English system the "Sheriff [was] the immediate officer to all the Courts at Westminster to execute writs . . . ."[103] The English sheriff would sometimes even sit with the judges on the bench.[104] The sheriff was also a common concept in the American colonies. "Prior to independence, each of the American colonies had established a system of local courts served by sheriffs appointed by the royal governor (except in Pennsylvania, where sheriffs were elected)."[105] And, after the founding, marshals were sometimes called "Federal Sheriffs."[106]

Another inspiration for the marshals came from the British and colonial-American vice-admiralty courts.[107] Part of the structure of those courts included officers—called marshals—who "served the writs, subpoenas, and other court process, took possession of condemned ships and goods, made arrests, kept custody of the court's

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100. Judiciary Act of 1789.

101. *Smith, William Loughton*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=S000633 (last visited Jan. 22, 2021); English common law and court practice formed the basic framework for the colonial judiciary. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 10 (1989). English Jurist William Blackstone's *Commentaries on the Laws of Englander* were referenced in the ratification debates. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, 544 (Jonathan Elliot ed., 1836).

102. *See generally* Emile J. Katz, Note, *The "Judicial Power" and Contempt of Court*, 109 CAL. L. REV. 1913, 1925 (2021) (explaining how the founders looked to the English judicial system for guidance).

103. GEORGE ATKINSON, SHERIFF-LAW; OR, A PRACTICAL TREATISE ON THE OFFICE OF SHERIFF, UNDERSHERIFF, BAILIFFS, ETC.: THEIR DUTIES AT THE ELECTION OF MEMBERS OF PARLIAMENT AND CORONERS, ASSIZES, AND SESSIONS OF THE PEACE, 5 (4th ed. 1861).

104. *See id.* at 6.

105. U.S. Marshals Service, *History: Recognition of the Need for Federal Marshals*, https://www.usmarshals.gov/history/judiciary/judiary_act_of_1789_6.htm (last visited Feb. 16, 2022).

106. *Id.*

107. *See* CALHOUN, *supra* note 96, at 13.

prisoners, hung convicted pirates and murderers, and carried out all the orders of the courts."[108] When the First Congress created the judicial system they modeled it on the admiralty courts, including marshals to enforce judicial commands.[109] Yet, those during the era knew they were creating a new system—distinct from England or the colonies—and that, as such, judges might not need the same attendants they had at common law.[110] The role of the marshal may therefore have been considered vestigial: relating to the powers of the judiciary under the English system where judges themselves were officers of the executive.

There is some debate about the extent to which the marshals were judicial branch officers. In her article, discussed above, Dina Mishra assumes that a federal law enforcement agency like the marshals has always been considered executive.[111] To support this, Mishra points to the fact that the marshals were removable by the executive.[112] However, the boundary between executive and judicial branches has not always been clear. For example, prosecutors—now considered executive—were once considered judicial officials.[113] With the marshals, the distinction is even more muddled. Although the President had authority to remove a marshal, the courts could remove deputy marshals.[114] And the first Congress's decision to vest in the judiciary the power to remove deputy marshals likely gave the judiciary significant control over the marshals as a whole. Further, the Judiciary Act mandated that the marshals follow judicial orders. It required marshals and deputy marshals take the following oath of office: "I, A. B., do solemnly swear or affirm, that I will faithfully

108. *Id*.

109. *See id*. at 13–14.

110. *See generally* Katz, *supra* note 102, at 1932–34 (explaining how the founders intentionally departed from the English system to separate the judicial and executive branches).

111. *See* Mishra, *supra* note 21, at 1546 n.164.

112. *See id.*

113. *See* Joan E. Jacoby, *The American Prosecutor in Historical Context* (2010), available at https://cdn.ymaws.com/mcaa-mn.org/resource/resmgr/Files/About_Us/AmerProsecutorHistoricalCont.pdf?msclkid=b5fdd600ac6d11ec8b9512b7ff4c673f ("As a subsidiary of the courts, the prosecutor was considered an adjunct to the real powers of the courts, the judges.").

114. While the marshals have historically been appointed and removable by the President, Cunningham v. Neagle, 135 U.S. 1, 60–63 (1890), the text of the Judiciary Act does not actually specify which of the branches was to appoint or remove the marshals. Read in context, the most logical branch to do so may have actually been the Judiciary. *See* Judiciary Act of 1789.

execute all lawful precepts directed to the marshal of the district of under the authority of the United States . . . ."[115] The language "authority of the United States" was intentionally chosen over other language that would have placed the marshals under the exclusive command of the President: One prominent Federalist, Oliver Ellsworth, specifically proposed that the Judiciary Act should place the marshals under the President's authority, but that proposal was rejected.[116] And one reason that the Anti-Federalists were not overly concerned about the marshals was that the marshals were thought to only have the power to enforce court orders and federal law.[117]

Over time, the marshals' command structure was slightly modified. "In 1849 the Congress [] vested the Secretary of the Interior with 'supervisory power' over marshals' census taking operations and their financial accounts."[118] In 1861, a statute placed the marshals (and U.S. Attorneys) under the "general superintendence and direction" of the Attorney General.[119] But the legislative history, though admittedly somewhat inconclusive, suggests that the Act was merely intended to transfer the limited supervisory powers of the Secretary of the Interior to the Attorney General.[120] Additionally, the 1861 Act did not strip the courts of their own authority over the marshals—granted in 1789[121]; the Act "placed marshals under the 'general superintendence and direction' of the Attorney General and left unchanged the original requirement that marshals attend sessions of court and execute writs, process etc., when directed by the judiciary."[122]

Even if the marshals were nominally housed under the executive branch, they were largely autonomous, independent of executive

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115. Judiciary Act of 1789 § 27. It is also worth noting that the marshals traditionally paid the fees of the U.S. Attorneys. And because the marshals worked at the close direction of Judges one might infer that the Judges had significant influence over the U.S. Attorneys as well. *See also* CALHOUN, *supra* note 96, at 6.

116. *See* U.S. Marshals Service, *History: Recognition of the Need for Federal Marshals*, https://www.usmarshals.gov/history/judiciary/judiary_act_of_1789_7.htm (last visited Feb. 16, 2022).

117. *See id.*

118. Report by the Comptroller General, *U.S. Marshals' Dilemma: Serving Two Branches of Government* 8 (1982) [hereinafter Comptroller General].

119. *See* Act of August 2, 1861, ch. 37, 12 Stat. 285 (1861); Comptroller General *supra* note 118, at 7–8.

120. *See* Comptroller General, *supra* note 118, at 8–9.

121. *Id.* at 6–8.

122. *Id.* at 6.

control, and only beholden to the judge in their district.[123]

> For most of their history, U.S. Marshals enjoyed a surprising degree of independence in performing their duties. Quite simply, no headquarters or central administration existed to supervise the work of the Marshals until the late 1950s. Even then, the Executive Office for U.S. Marshals had no real power over the districts until it was transformed into the U.S. Marshals Service in 1969 and given control of the district budgets and the hiring of Deputies. Prior to that, each Marshal was practically autonomous, receiving only general guidance from the executive branch of the government. As a result[,] the Marshals[,] working with the federal judges and U.S. Attorneys in their districts, enjoyed a wide latitude in determining how they would enforce the law.[124]

There is evidence from the mid-1800's of the judicial branch using the marshals to enforce their orders against explicitly *executive* branch officials. For instance, in 1861 at the start of the United States Civil War, Chief Justice Taney directed a marshal to summon a posse comitatus to seize Union General George Cadwalader and bring him to the Court.[125] Chief Justice Taney eventually excused the marshal from performing his orders because that General Cadwalader's military force was much greater than any force the marshal could summon, but, nonetheless, this use of the marshals shows the level of control the judiciary exercised over them—even against the executive branch. The early history of the marshals exemplifies how the marshals would not necessarily have been considered solely executive by contemporary lawmakers.

A more significant reorganization occurred in the 1960s. In 1966, the U.S. Marshals Service was reorganized in a bill which codified "the general and permanent laws relating to the organization

123. *See id.* at 1.

124. CALHOUN, *supra* note 96, at 6.

125. *See* Ex parte Merryman, 17 F.Cas. 144 (C.C.D. Md. 1861). The military has been considered a part of the executive branch since 1789. *See also The Establishment of the Department of War*, HISTORY, ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES (June 30, 2021), https://history.house.gov/Historical-Highlights/1700s/The-establishment-of-the-Department-of-War/.

of the Government of the United States."[126] Prior to that statute, the marshals served in essentially the same way from 1789 until the late 1950s with limited oversight from Washington.[127] Upon a vacancy in the office of U.S. Marshal, the 1966 statute provided that "[t]he district court for a district in which the office of United States marshal is vacant may *appoint* a United States marshal to serve until the vacancy is filled."[128] In 1969 the Attorney General established the Marshals Service by DOJ Order 415–69, May 12, 1969.[129]

The statute which reorganized the marshals has been amended since 1966.[130] The modern statute, under which the marshals derive their authority, gives the marshals two "masters"; they serve under the direction of the United States Attorney General and yet are required to obey and execute the orders of the judges they serve.[131] Furthermore, the marshals describe themselves as the "enforcement arm of the federal courts."[132]

The issues stemming from the dual authorities that oversee the marshals are not merely a scholastic or hypothetical matter. In 1979, Senator Max Baucus asked the General Accounting Office to "review various functions performed by U.S. Marshals."[133] Specifically, the report "concerns the organizational relationship of U.S. Marshals to

126. Title 5 Government Organization and Employees, Pub. L. No. 89-554, 80 Stat. 378 (1966) [hereinafter Government Organization and Employees].

127. *See* CALHOUN, *supra* note 96, at 6.

128. Government Organization and Employees, *supra* note 126, at 620 (emphasis added).

129. *See* National Archives, *Records of the U.S. Marshals Service*, 527.1 ADMINISTRATIVE HISTORY, (last visited Feb. 2, 2022 3:09 PM), https://www.archives.gov/research/guide-fed-records/groups/527.html#527.1.

130. *See* 28 U.S.C. § 561 (2006).

131. *See id.* § 561(a) ("There is hereby established a United States Marshals Service as a bureau within the Department of Justice under the authority and direction of the Attorney General."); 28 U.S.C. § 566(a) (2021) ("It is the primary role and mission of the United States Marshals Service to provide for the security and to obey, execute, and enforce all orders of the United States District Courts, the United States Courts of Appeals, the Court of International Trade, and the United States Tax Court, as provided by law."). It has been recognized for thousands of years that "no one can serve two masters." *Matthew* 6:24; *Luke* 16:13.

132. U.S. Marshals Service, *Fact Sheet U.S. Marshals 2021*, U.S. DEP'T. OF JUST. OFF. OF PUB. AFFS. (Feb. 26, 2021), https://www.usmarshals.gov/duties/factsheets/overview.pdf; *see also* U.S. Marshals Service, *Fact Sheet Judicial Security 2020*, U.S. DEPT. OF JUST. OFF. OF PUB. AFFS. (Feb. 26, 2021), https://www.usmarshals.gov/duties/factsheets/judicial_sec.pdf ("The U.S. Marshals Service has been responsible for protecting the federal judicial process as the enforcement arm of the federal courts since 1789.").

133. Comptroller General, *supra* note 118, at i.

the Federal judiciary and the Department of Justice, and how this relationship affects the performance of duties and responsibilities assigned to marshals by both branches of the Government."[134] The report concluded that "[t]he manner in which the existing organizational relationship has been implemented [ ] prevents the U.S. Marshals Service from effectively managing law enforcement programs assigned by the Attorney General, and –[ ]interferes with the marshals' performance of essential duties for the Federal courts which hinders the judicial process."[135] The GAO proposed that if the Attorney General and Judiciary could not resolve the difficulties administratively, "that the Congress take legislative action to eliminate the Attorney General's authority to supervise, direct, and control the operations of U.S. marshals."[136] A majority of Chief Circuit Judges agreed with the proposition that reforms needed to be made. The Department of Justice on the other hand, took the position "that dual authority is an illusory concept . . . [and] that authority to supervise and direct marshals is clearly and exclusively vested in the Attorney General . . ."[137] The GAO contended that dual authority was not illusory.[138] Although Congress never reformed the marshals as suggested by the GAO, the potentiality raises the question whether following the GAO's suggestion would violate the separation of powers.

Even though the Department of Justice claimed that there wasn't dual authority, it implicitly recognized that it did not have full authority over the marshals when the agency supported legislation which would have given them sole control over determining the security needs of the United States Courts.[139] Additionally, the Attorney General has effectively conceded that the marshals could be commanded by court order—even those orders contrary to the direction of the Marshals Service.[140] The Marshals Service has been forced to accept that the marshals, as court officers, can be commanded by the courts—which has hindered the Marshals Service

134. *Id.* at 1.
135. *Id.* at cover page.
136. *See id.* at iv.
137. *Id.*
138. *See id.* at v.
139. *See id.* at 11 (the legislation was not adopted).
140. *See id.* Note that the United States Marshals and the United States Marshals Service are not synonymous. *Id.* at 10, 16. The service has far more control over Deputy Marshals than it does over marshals themselves.

from "exercising fundamental management prerogatives."[141]

The current statute under which the marshals operate gives the Attorney General and the Marshals Service somewhat more control over the marshals. For instance, under 28 U.S.C. § 562, when there is a vacancy in the office of a U.S. Marshal, the Attorney General temporarily appoints someone to the office, rather than the district court of the district.[142] Yet the changes in statutory text are not significant enough to fix the issues identified by the GAO.[143] The author of this Article submitted a Freedom of Information Act request to the United States Marshals Service which, among other things, requested any "[d]ocuments relating to the Marshals' procedures in situations where a court order/warrant conflicts with a directive of the Director of the Marshals Service or Attorney General."[144] In response, the United States Marshals Service informed the author that "USMS conducted a search of its records and files within the Prisoner Operations Division, the Judicial Security Division, and the Investigative Operations Division, which all failed to locate any USMS records responsive to your request."[145] As such, it appears that the Department of Justice has not published any policy guidance explaining to the marshals how to deal with the situations that the GAO identified: those in which directives of the courts and the Justice Department conflict.

The failure to clarify who has authority to direct the marshals has had practical consequences. On June 29, 2021, United States District Court Judge Charles Kornmann, filed an order appointing a special prosecutor to prosecute three employees of the Marshal's Service for

141. *Id.* at 15. For example, one of the top priorities of the Marshals Service is the Witness Security Program, yet many marshals view the program as low-priority and the Marshals Service cannot always adequately direct the marshals because the marshals can be commanded by the district court. *Id*. at 16–17.

142. *See* 28 U.S.C. § 562.

143. A recent report by the Justice Department's Inspector General's office found that "'competing agency priorities have impeded' the Marshals Service's ability to fund enhancements to security." Dan Mangan, *U.S. Marshals Service Lacks Resources to Protect Federal Judges Even as Threats Surge 81%, Report Says*, CNBC (June 16, 2021), https://www.cnbc.com/2021/06/16/us-marshals-lack-resources-to-protect-federal-judges-as-threats-surge-report-says.html; *see also* DEP'T OF JUST. OFF. OF THE INSPECTOR GEN., *Audit of the U.S. Marshals Service Judicial Security Activities*, ii (June 2021), https://oig.justice.gov/sites/default/files/reports/21-083_0.pdf.

144. Email from Emile Katz to Office of General Counsel, Dep't. of Just., U.S. Marshals Service (Dec. 11, 2020) (on file with author).

145. Letter from the Dep't. of Just., U.S. Marshals Serv., Off. of Gen. Couns. to Emile Katz (Mar. 8, 2021) (on file with author).

contempt following their refusal to obey judicial orders.[146] The court had asked that deputy marshals be vaccinated against the COVID-19 virus before entering the courtroom, but the Marshals Service advised deputy marshals that they didn't need to respond to requests by judges for proof of vaccination, nor answer questions about their vaccination status.[147] Judge Kornmann directed a USMS employee to leave his courtroom during a hearing after the employee failed to answer whether he was vaccinated.[148] Later that day, the Marshals Service left the building altogether and took various federal prisoners with them, contrary to the judge's orders, thereby "preventing timely scheduling as previously ordered."[149] When Judge Kornmann inquired who ordered the removal of the prisoners, the deputy marshal answered that it was simply the Marshals' Service.[150] Separately, tension has also recently arisen between Congressional directives to the marshals and control over the marshals by the judicial branch; Congress has asked the marshals to disclose information related to the activities of the judicial branch.[151]

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146. *See* Ord. for United States v. Kilgallon, et al., No. 1:21-CR-10023 (01), (02) AND (03)-CBK, 1-2 (D.S.D. June 29, 2021) ("The Department of Justice, acting through the Marshals Service, has apparently adopted a public policy to the effect that DOJ policies may trump lawful federal court orders . . . . I cannot ignore what may be a significant conflict between the Federal Judiciary and the Executive branch of our government."); *Criminal Charges Filed Against U.S. Marshal Supervisors in Vaccine Dispute, Defender Services Office Training Division*, FD.ORG (June 15, 2021), https://www.fd.org/news/criminal-charges-filed-against-us-marshal-supervisors-vaccine-dispute; *see also* Josh Blackman, *Update from South Dakota: Judge Kornmann Appoints Special Prosecutor to Try U.S. Marshals for Contempt*, THE VOLOKH CONSPIRACY, (June 30, 2021), https://reason.com/volokh/2021/06/30/update-from-south-dakota-judge-kornmann-appoints-special-prosecutor-to-try-u-s-marshalls-for-contempt/.

147. *See* In re Kilgallon, No. 1:21-MC-01, 2021 WL 2102650, at *3 (D.S.D. May 19, 2021); *see also* Arielle Zionts, *SD Federal Judge Wants to Hold U.S. Marshals Service in Contempt Over COVID-19 Vaccine Spat*, RAPID CITY J. (June 29, 2021), https://rapidcityjournal.com/news/local/crime-and-courts/sd-federal-judge-wants-to-hold-u-s-marshals-service-in-contempt-over-covid-19/article_215e0c11-a9d2-5ec3-b106-ad7d92c691e3.html.

148. Ord. for United States v. Kilgallon, et al., No. 1:2I1-CR-10023 (01), (02) AND (03)-CBK, 3 (D.S.D. June 29, 2021).

149. *Id*.

150. *See* In re Kilgallon, 540 F. Supp. 3d 875, 879 (D.S.D., 2021) ("[The Chief Deputy Marshal of South Dakota] did not answer the question of the court as to who made the decision to leave with the prisoners. It was simply the Marshals Service. I assume that an official in the Washington, D.C. office authorized and perhaps directed the action which may very well be subject to contempt sanctions.").

151. Senators Sheldon Whitehouse and John Kennedy recently directed a request to the U.S. Marshals Service "to provide information about where Supreme Court justices have traveled." *See* John Fritze, *Senators Ask Marshals Service for*

In short, although the department of justice has attained more control over the marshals throughout their history, the marshals have historically been independent of the executive branch and largely subordinate to the judiciary. Even under their contemporary organization, the marshals remain at the beck of the courts. Keeping this history in mind will help us assess the constitutionality of the marshals.

IV. CONSTITUTIONAL ISSUES IMPLICATED IN DELEGATING EXECUTIVE AUTHORITY TO THE JUDICIARY

In *Cunningham*, the Supreme Court said that marshals are executive officials, so we will assume—for now—that they are. Because the marshals are subordinate, at least in part, to the judicial branch, the statute authorizing that structure may violate the separation of powers. Article II, § 1 of the Constitution begins with the phrase "The executive Power shall be vested in a President of the United States of America."[152] Article II, § 3 says that the President "shall take care that the laws be faithfully executed."[153] These clauses have been interpreted by some to mean that only the executive branch, with the President at its head, is constitutionally empowered to enforce the laws.[154] Because marshals enforce court orders as well as directives given to them by the executive branch, the statute may violate the separation of powers principle inherent in these clauses.[155]

The marshals allow the federal courts to mix the executive and judicial powers. As described above, Mishra explains that the Vesting and Take Care Clauses limit the Executive's ability to delegate to private non-governmental actors, such as when the Bureau of Prisons delegates the power to punish or discipline to private prisons.[156] If

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Information on Past Supreme Court Justice Travel, USA TODAY (June 8, 2021, 8:05 AM) https://www.usatoday.com/story/news/politics/2021/06/08/senators-seek-insight-into-when-where-supreme-court-justices-travel/7593347002/. Although this request merely asks for information, it demonstrates Congress's understanding that it also has control of the marshals, thereby adding a twist to who the marshals must ultimately answer to. If the Court directs the marshals Service not to answer the request, must the marshals still do so? What if the Attorney General directs them to answer?

152. U.S. CONST. art. II, § 1.

153. *Id.* § 3.

154. *See id.*; Laufer v. Arpan LLC, 29 F.4th 1268, 1294–95 (Newsom, J., concurring).

155. *See* Part II, *supra* note 152, at II.

156. *See* Mishra, *supra* note 21, at 1546–47.

the structure of the office of the marshals is a delegation to the judiciary it has more dangerous ramifications. When the executive or legislative branch delegates to private entities they generally only delegate one aspect of the government's power (e.g., legislative, executive, judicial).[157] However, when the legislative branch delegates a coordinate branch's authority to another coordinate branch, the government's powers are concentrated.[158] With control of the marshals, the judiciary exercises both the judicial and executive functions: an arguably tyrannical result.[159]

"The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government."[160] It stands to reason that, just as the Court has held that "'the integrity and maintenance of the system of government ordained by the Constitution mandates that Congress generally cannot delegate its legislative power to another [b]ranch," the Constitution also prohibits Congress from delegating the power of the executive branch to the judicial branch.[161]

Indeed, a delegation of executive authority from the legislative to the judicial branch may be even more egregious because the power is not the legislature's to delegate in the first place.[162] Even if Congress could, constitutionally, broadly delegate legislative power, Congress is still prohibited from delegating executive power. The legislature cannot give what it does not possess in the first place.[163] Of course, if Bradley's article is correct, then perhaps the marshals are not purely executive, and Congress can constitutionally delegate control over

157. *See, e.g.*, Metzger, *supra* note 18, at 1397, 1439 (describing different delegations).

158. *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXTS, AND CASES 46 (8th ed. 2017).

159. The Federalist Papers: No. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny.").

160. Mistretta v. United States, 488 U.S. 361, 371 (1989).

161. *Id.* at 371–72 (quoting Field v. Clark, 143 U.S. 649, 692 (1892)).

162. *See* U.S. CONST. art. I & art. II.

163. I have not seen the common law legal maxim applied to constitutional law, but I do not see why the concept of *nemo dat quod non habet* should not apply to political rights as well as other rights. *Legal Maxims*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("No one gives what he does not have; no one transfers [a right] that he does not possess."). *See generally* Wayman v. Southard, 23 U.S. 1, 42–43 (1825) (Justice Marshall's opinion implies the same idea when he states that Congress may delegate powers "which the legislature may rightfully exercise *itself*." (emphasis added)).

them.[164] Alternatively, the legislature can try to constitutionally facilitate the beneficial delegation of authority from one branch to another through legislation at the request of the branch with the delegated authority. However, the same nondelegation principle may generally prohibit the executive branch from delegating its executive authority to the judicial branch as well.[165]

Assuming that marshals are executive, several doctrinal frameworks can be employed analogically to determine whether the statutes under which they are organized violate the separation of powers by giving the courts executive power.

A. Analyzing the Marshals Under Theories Involving Executive Control of the Administrative State

As explained above, there is no consensus on the scope of the President's directive authority under the Constitution.[166] Proponents of unitary executive theory argue that all actions to enforce the laws of the United States must ultimately come under the control of the President.[167] Therefore, when analyzing the marshals, a unitary executive proponent may ask whether the structure of the marshals removes some control over law enforcement from the President. That said, the traditional view is that if Congress assigns policy decisions elsewhere, the President cannot direct that decision.[168] Because the Court has not addressed this issue directly it is unclear what standard applies. The closest case to controlling precedent is *Bowsher v. Synar*, where "the Court held the Comptroller General could not lawfully exercise executive powers assigned to him by statute"[169] because the Comptroller General was subordinate to the legislature rather than the Executive.[170] We might, therefore, infer that a court would apply similar reasoning to the courts' control over the marshals. But, unlike in *Bowsher* where Congress could remove the Comptroller,[171] only the

164. *See* Bradley, *supra* note 88, at 804.

165. *See generally* Mishra, *supra* note 21 (analyzing limits on the executive's ability to delegate).

166. *See supra* Part I.A.

167. *See* Calabresi & Rhodes, *supra* note 35, at 1166.

168. *See* BREYER ET AL., *supra* note 24, at 149.

169. Collins v. Yellen, 141 S. Ct. 1761, 1792 (2020) (citing Bowsher v. Synar, 478 U.S. 714, 732–35 (1986)) (Thomas, J., concurrence).

170. *See Bowsher*, 478 U.S. at 727–28, 732–33.

171. *See id.* at 734.

President can remove marshals.[172] Despite that difference, the same concern remains, namely, that a branch other than the executive can direct executive powers.[173]

The caveat to this analysis is the possibility that the marshals are not "executive" officials. If a court were to find that the authority to direct marshals is within the inherent judicial power,[174] and that marshals are not therefore agents of the executive branch, it would be constitutionally unnecessary for the President to maintain directive authority over the marshals. In that scenario, the court could find that any law enforcement function undertaken by the marshals was merely incidental to the marshals' traditional duties assisting the courts. But, given the Supreme Court's precedent indicating that marshals are executive,[175] that seems unlikely.

This Article does not focus heavily on appointment and removal because marshals have historically been appointed by the President with the advice and consent of the Senate and have been removable by the President at will.[176] The logistic difficulty of removing a marshal is relevant to the analysis here since, as Kagan notes,[177] a President's ability to threaten removal is equivalent to directive authority. If a President can believably threaten removal upon dissatisfaction with a marshal's conduct, marshals will likely follow the President's direction. Thus, the President's removal authority bolsters the President's power to direct the marshals.

B. Analyzing the Marshals Under the Nondelegation Doctrine

The standard that the Court uses to determine whether a delegation violates the separation of powers is the "intelligible principle" test.[178] The crux of the test is that the delegating law must

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172. *See* 28 U.S.C. § 561(d); Judiciary Act of 1789.

173. *See Bowsher*, 478 U.S. at 736 ("[T]he powers vested in the Comptroller General . . . violate the command of the Constitution that the Congress play no direct role in the execution of the laws.").

174. *See supra* Part I.D.

175. *See id.*

176. The Judiciary Act establishing the marshals did not specify which branch would appoint and remove marshals. *See* Judiciary Act of 1789, § 27; 28 U.S.C. § 561. However, President Washington seemingly assumed he would make the appointments. *History: Recognition of the Need for Federal Marshals*, U.S. Marshals Serv., https://www.usmarshals.gov/history/judiciary/judiary_act_of_1789_6.htm (last visited Feb. 14, 2022).

177. *See* Kagan, *supra* note 8, at 2327–28.

178. *See* Gundy v. United States, 139 S.Ct. 2116, 2123 (2019).

contain an "intelligible principle" providing the executive branch with guidance on effectuating the law.[179] Thus, one way to determine whether the statute creating the marshals violates the non-delegation doctrine is to see if it contains an intelligible principle guiding the judiciary's use of the marshals. In *Schechter Poultry*, the Court was concerned with ensuring that the President was not exercising the legislative power.[180] Here, a court might concern itself with ensuring that the judiciary does not have unfettered discretion to *enforce* laws—i.e., exercise the executive power.

In this context, application of the intelligible raises the question which branch must set out the intelligible principle, Congress or the Executive. In legislative delegations, Congress must set out an intelligible principle for the delegee to comply with. Here, however, Congress delegated a power presumptively belonging to the executive branch (instead of its own power), and thus it makes sense that the executive would have to set out the intelligible principle.[181] It is unclear how exactly the executive branch could do so. Usually, the intelligible principle must be incorporated in the statute itself. Perhaps, since the executive takes part in the legislative process by signing bills into law (or vetoing them),[182] we can infer that when the executive signs a bill, he, she, or they approve the intelligible principle contained within it.[183]

That said, even if a bill does not contain a satisfactory intelligible

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179. *See* J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394 (1928); Mistretta v. United States, 488 U.S. 361, 372 (1989) ("So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'") (citation omitted) (alteration in original).

180. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935).

181. This idea tracks the principle underlying the nondelegation doctrine. The basis for the traditional intelligible principle test is that it is ultimately Congress who must exercise the Article I legislative power. *See* Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 472–73 (2001). Agencies only fill in details pursuant to the intelligible principle that Congress set out. *See id.* If executive power is delegated, it would not help to maintain the separation of powers if Congress set out an intelligible principle because by setting out its own intelligible principle, Congress would be exercising executive power instead of the President. To ensure that the appropriate power is being exercised by the appropriate branch, the appropriate branch must delineate the clarifying intelligible principle to be followed. Logically, only the President should set out an intelligible principle when executive power is delegated.

182. *See* U.S. CONST., art. I § 7.

183. *See Implied Consent*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Consent inferred from one's conduct rather than from one's direct expression.").

principle on its face, when the power being delegated is executive, the Executive should be able to set out an intelligible principle in other ways, such as by executive order. If that's accurate, a statute delegating executive power would never be facially invalid unless it specifically precluded the President from issuing clarifying instructions to executive officers. That's because it's more important to assess whether marshals are ultimately under the control of the *Executive*—who can set out an intelligible principle later—rather than whether Congress, which wrote the statute, included an intelligible principle. Therefore, in analyzing a delegation like this, it's necessary to look both at the text of the statute and at subsequent history to determine whether an intelligible principle exists and if so, who created it.

Even if the executive branch does somehow set out an intelligible principle for the marshals, the type of delegation here may be "so fundamental" to the executive branch's law enforcement duty "as not to be transferable." If so, under both Verkuil's and Mishra's analysis, judicial control over the marshals would be unconstitutional. Whether or not marshals serve a "fundamental" executive function is elaborated on below.

Because of the difficulty in applying the intelligible principle test in this context, we can question whether it is a coherent test to begin with. And, even if it can be applied, given the current composition of the Court, the intelligible principle test may not remain good law for very long.[184]

C. Analyzing the Marshals Under the Administrative Adjudication Doctrine

Another method of determining whether the statute which created the marshals impermissibly delegates is by analogizing to statutes which delegate judicial power. The Supreme Court has held that the judiciary's "essential attributes" must be reserved for Article III courts. That "essential attributes" concept can be applied to the marshals as well.

Under Supreme Court precedent, the "essential attributes" test has essentially meant that non-Article III courts can make determinations of fact, so long as determinations of law are left with

184. *See supra* Part I.A. (noting the opinions of several current justices who have opposed the current application of the nondelegation doctrine).

the Article III judiciary.[185] After all, "[i]t is emphatically the province and duty of the Judicial Department to say what the law is."[186]

Analogizing to the structure of the marshals, the courts may direct marshals so long as the ultimate responsibility of "tak[ing] Care that the Laws be faithfully executed"[187] remains vested with the executive branch. This test practically echoes the doctrine concerning executive control over the administrative state.[188] Both focus on whether one branch is exercising the "essential attributes" of another.[189] In the case of the judiciary it is whether another court is exercising traditional judicial powers[190] and in the case of the executive it is whether another branch is executing the law.[191] Thus, this Article will use both tests synonymously when analyzing the various iterations of the marshals below.

As related above, the organizational structure of the marshals has changed over time pursuant to statute and practice.[192] This Article analyzes the separation of powers concerns of the statutory schemes under which the marshals were organized in 1789 and the present statutory scheme separately.

V. APPLYING THE FRAMEWORKS TO SPECIFIC ITERATIONS OF THE MARSHALS

A. Marshals Under the 1789 Judiciary Act

As described above, the 1789 Judiciary Act gave the federal courts a great deal of control over the marshals, significantly more control than courts exercise over the marshals today. So, the organization of the marshals in 1789 posed a far greater danger to the separation of powers than today's organization.[193]

185. This is a generalization of a complicated doctrine but can serve as a foundation here. *See generally* Crowell v. Crowell, 285 U.S. 22, 51 (1932); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986); Stern v. Marshall, 564 U.S. 462, 515 (2011) (Breyer, J., dissenting).

186. Marbury v. Madison, 5 U.S. 137, 177 (1803).

187. U.S. CONST., art. II, § 3.

188. *See supra* Part III.A.

189. *Compare* Bowsher v. Synar, 478 U.S. 714, 736 (1986) *with Marbury*, 5 U.S. at 177.

190. *See Crowell*, 285 U.S. at 51–54.

191. *See Bowsher*, 478 U.S. at 736.

192. *See supra* Part II.

193. *See supra* Part III.

It is noteworthy, then, that the marshals' organization was enacted by many of the Founders who framed the Constitution and who presumably understood their own intentions in creating the separation of powers.[194] The Court has presumed constitutionality when a practice has a long history[195] and relying on historical practice is a common feature in separation of powers analyses.[196] Thus, even though the statute creating the marshals may infringe on the separation of powers based on some of the frameworks below, a court might rely on their long history to find the marshals constitutional.[197] That said, we test the marshals' constitutionality below by applying the various separation of powers tests.

1. Applying the Intelligible Principle Test

Beginning with the text of the Judiciary Act, it is possible to argue both for and against the existence of an intelligible principle. To support the existence of an intelligible principle, one can point to the statutory phrase "execute throughout the district, all *lawful* precepts

194. For example, James Madison was an important framer of the Constitution as well as an influential member of the House of Representatives. *See* Irving Bryant, *James Madison: President of the United States*, ENCYC. BRITANNICA (last visited Feb. 14, 2022), https://www.britannica.com/biography/James-Madison.

195. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 327–28 (1936) (the Court declined to invalidate a congressional delegation of foreign affairs authority to the President, because "[a] legislative practice such as we have here, evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or in both combined."). *See also Town of Greece, N.Y. v. Galloway*, where the Court stated that actions taken by the first Congress were presumptively constitutional. 572 U.S. 565, 602 (2014) (Alito, J., and Scalia, J., concurring) ("This Court has often noted that actions taken by the First Congress are presumptively consistent with the Bill of Rights"). Yet, note that there are examples of the early Congress passing legislation which was found to unconstitutionally infringe on the separation of powers. *See, e.g.*, Hayburn's Case, 2 U.S. 408 (1792); *see also Hayburn's Case*, OXFORD REFERENCE, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095925455 (last visited Jan. 29, 2022) (five of the six justices of the Supreme Court, while sitting as circuit judges in different circuits, held that a congressional delegation of certain nonjudicial duties to the federal courts violated the separation of powers).

196. *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411–13 (2012); Mistretta v. United States, 488 U.S. 361, 401 (1989) ("'traditional ways of conducting government . . . give meaning' to the Constitution."(citation omitted)); *see also* Parillo, *supra* note 12, at 1311 (using evidence of early congressional practice to prove constitutionality).

197. *See Mistretta*, 488 U.S. at 371.

. . . issued under the authority of the United States."[198] Breaking it down to its components, a court could find that the Act provides an intelligible principle because it requires the Courts to use the marshals in a certain way and therefore limits the courts' discretion. The Act sets restrictions by only allowing the courts to use marshals to (a) execute lawful precepts which (b) are issued under the authority of the United States. The Court has allowed broad intelligible principles in the past[199] and so it is feasible the Court would find an intelligible principle here.

But it is also easy to argue that there is no intelligible principle. In *Schechter Poultry* the Court held that a delegation which gave the President nearly unfettered discretion to enact laws violated the nondelegation doctrine.[200] Analogous to the unfettered discretion referred to in *Schechter Poultry*, the Judiciary Act gave judges nearly unfettered discretion to direct marshals. The authors of the Judiciary Act gave courts the power to issue orders at their discretion[201] and thus the first limit—lawful precepts—referred to above is no limit at all.[202] As all Article III courts act under the authority of the United

198. Judiciary Act of 1789 § 27 (emphasis added).

199. *See* Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 472 (2001) (statute instructing the EPA Administrator to set air quality standards "the attainment and maintenance of which *in the judgment of the Administrator*, based on [the] criteria [documents of § 108] and allowing an adequate margin of safety, are requisite to protect the public health" (emphasis added, internal quotation omitted) (alteration in original)); Gundy v. United States, 139 S.Ct. 2116, 2132 (2019) (Gorsuch, J., dissenting) ("The breadth of the authority Congress granted to the Attorney General in these few words can only be described as vast."); Jody Freeman, *The Private Role in the Public Governance*, 75 N.Y.U. L. REV. 543, 581 (2000) ("Virtually any delegation to an agency, no matter how vague, will survive constitutional scrutiny.").

200. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537–38 (1935).

201. The Judiciary Act of 1789 contained the precursor to the modern All Writs Act. Judiciary Act of 1789 § 14 (1789) ("That all the before-mentioned courts of the United States, shall have power to issue writs of scire facias, habeas corpus, and *all other writs not specially provided for by statute*, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." (emphasis added)). Additionally, the Judiciary Act mentions the courts' authority to issue orders (and specifically to the marshals) in numerous sections. *See id.* §§ 6, 7, 15, 17, 29.

202. The Supreme Court has held that "[u]nless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." United States v. N.Y. Tel. Co., 434 U.S. 159, 173 (1977) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 273 (1942) (internal quotation omitted)); *but see* Shoop v. Twyford, 142 S.Ct. 2037, 2042 (2022) (All Writs Act can only be used in aid of court's jurisdiction).

States,[203] the second limit is illusory as well. Thus, the only sentence in the Act which could feasibly provide a limit on the ability of the courts to direct the marshals does not actually constrain the courts in any meaningful way. The Act allowed the courts to direct the marshals as the courts saw fit.

As explained above, this Article proposes that a delegation's intelligible principle must derive from the branch whose power is being delegated.[204] President Washington signed the Judiciary Act into law on September 24, 1789 so it is clear that he approved of creating marshals. But Washington's signature does not create an intelligible principle for the courts to follow. Washington could have provided further principles to guide the use of the marshals, but the only record in his papers that mentions the marshals does not do so.[205] That record is a proclamation pertaining to the Whiskey Rebellion and notes that normal judicial procedure and use of force by Marshal David Lenox failed to put down the rebellion.[206] Washington provided no further intelligible principle beyond the Act.

On balance, it doesn't seem like any intelligible principle truly animated the statutory authority for the court's control over the marshals. But given the malleability of the intelligible principle test, there's no way to tell for certain how a court would decide.

2. Applying the "Essential Attributes" Test

Next, the "essential attributes" test. Based on the text of the Judiciary Act of 1789, one might conclude that ultimate responsibility for the marshals traced to the President because marshals were removable at pleasure.[207] The text also states that the marshals execute "all lawful precepts directed to [them], and issued under the

203. *See* U.S. CONST., art. III §§ 1, 2.

204. *See supra* Part III.B.

205. George Washington: A Proclamation (Aug. 7, 1794), reprinted in 16 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, 1 May–30 September 1794, 531–37 (David R. Hoth & Carol S. Ebel eds. 2011).

206. *See id.*

207. *See* Judiciary Act of 1789 § 27, ("[B]ut [marshals] shall be removable from office at pleasure."). The statute does not actually set out who the marshals can be removed by, but we can infer that it is the President because later the section specifies that deputy marshals may be removed "from office by the judge of the district court, or the circuit court sitting within the district, at the pleasure of either." *Id.* If the marshals themselves were removable by the courts, the section would have said so. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012) ("The expression of one thing implies the exclusion of others).

authority of the United States"[208] and the President can be considered an "authority of the United States." But, as discussed above, for most of their history, marshals were largely independent of any centralized executive control.[209] There are few records of a President removing a marshal.[210] Even if a President wanted to give direction to a marshal or remove them, in the era before modern technology, it could take weeks before the marshal received that direction.[211] As a practical matter the President did not have nearly the level of control over the marshals as district court judges had.[212] And as explained, the central government only attained even nominal control over the marshals in the mid-1800s.[213] So, it doesn't seem as if the executive branch retained the "essential attribute" of enforcement.

We must also consider whether the marshals must be categorized as exclusively Executive. If not, judicial direction of the marshals would not violate the "essential attributes" test. There is a close link between the historic role of the sheriff and that of the courts.[214] Even so, the historic connection between the sheriff and the court is not dispositive given that the courts themselves were part of the executive branch under the English system of government and

208. *Id.*

209. *See supra* Part II.

210. A marshal was removed by the President on October 15, 1903. *See Removed by the President.; United States Marshal Fieid of Vermont Allowed Chinese to Escape*, N.Y. TIMES, Oct. 16, 1903, at 6. *See generally* Martin v. Tobin, 451 F.2d 1335 (9th Cir. 1971) (President Nixon removed a marshal and the marshal brought declaratory judgment action to determine the propriety of his discharge); Chabal v. Regan, 633 F. Supp. 1061 (M.D. Pa. 1986) (marshal sued for reinstatement after being removed by the Regan administration).

211. A trotting horse moves at an average speed of 8.1 miles per hour. *See* SUSAN E. HARRIS, HORSE GAITS, BALANCE AND MOVEMENT 35–37 (Howell Book House 1993). If the President wanted to send a message to an U.S. Marshal in Texas from Washington, D.C., an approximate distance of 1550 miles, it would likely take over twenty-one days to arrive (1549 miles divided by 8.1 miles per hour divided by an assumed nine hours of riding per day). The telegraph was not initially an option for sending messages since it was only invented in 1837. *See* Clare D. McGillem, *Telegraph*, ENCYC. BRITANNICA, https://www.britannica.com/technology/telegraph (last visited Feb. 14, 2022). Texas did not have a telegraph office until 1854. *See* Curtis Bishop & L. R. Wilcox, *Telegraph Service*, HANDBOOK OF TEXAS ONLINE, TEXAS STATE HIST. ASS'N https://www.tshaonline.org/handbook/entries/telegraph-service (July 6, 2017). To be fair, this is not so much a structural problem with the marshals but, rather, was simply the reality of the time and would have been true even if courts had no control over the marshals.

212. *See supra* Part II.

213. *See id.*

214. *See id.* (explaining that the idea of creating the marshals was inspired by the traditional role of sheriff).

Americans adopted a tripartite system of government.[215] But marshals can also be viewed as general assistants to the federal government—irrespective of branch.[216] Support for this can be found in the fact that marshals were early tasked with conducting the national census as well as collecting certain government revenues—tasks which are not exactly law enforcement.[217] In *Wayman*, the Court stated that "Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself" even if those powers are not exclusively legislative.[218] Thus, if marshals are characterized as general government assistants rather than law enforcement officers, it would not violate the "essential attributes" test for the courts to exercise significant discretion over their use. By contrast, if the marshals are purely executive, the structure of the marshals under the Judiciary Act would have failed the essential attributes test. District courts had directive control over the marshals, they had removal power over the deputy marshals, and the President had no quick way to direct the marshals in practice.

Perhaps, the test most likely to have preserved the structure of the marshals is the one proposed by Dina Mishra.[219] To some extent Mishra's test is a more lenient version of the essential attributes test described above. It seeks to ensure that the executive is the final arbiter in law enforcement matters while allowing other actors to act in the interim.[220] Mishra's analysis first asks whether the power is executive and then whether the authority exercising the power answers sufficiently to the executive branch.[221] Marshals carry out law enforcement tasks, so their power is at last arguably executive. Yet the judiciary is not subordinate to the President. Even so, the President "retains *some* ability to take meaningful steps to encourage the faithful execution of law"[222] since he, she, or they could still bypass the judiciary and direct or fire the marshals. Mishra's suggested analysis is more concerned with ultimate authority rather than control of day-to-day functions.[223] Therefore, the original structure of

215. *See* Katz, *supra* note 102, at 1925.
216. *See* CALHOUN, *supra* note 96, at 3.
217. *See id.*
218. 23 U.S. 1, 42.
219. *See* Mishra, *supra* note 21, at 1541.
220. *Compare* N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 81 (1982), *with* Mishra, *supra* note 21, at 1524.
221. *See* Mishra, *supra* note 21, at 1524.
222. *Id.* at 1541.
223. *See id.* at 1541–42.

the marshals was likely constitutional under Mishra's analysis.

In sum, whether or not one views the original marshals' organizational structure as constitutional or not depends largely on how the marshals are themselves characterized. Each of the Court's separation of powers tests can be applied analogically to the marshal's original structure, but their malleability demonstrates how the tests are only as good as our inputs. If we assume the 1789 marshals' constitutionality—because they were established by the same Founders who drafted the Constitution–it leads us to one of two conclusions: the marshals must either (1) not have been considered exclusively executive officers, or (2) the Founders must not have been as concerned with delegation as some modern scholars believe.

B. U.S. Marshals Under the Current Statutory Regime

The United States courts retain a great deal of control over marshals even under the current statutory scheme; Marshals remain tasked with carrying out the orders of, and assisting, the courts.[224] And, the Judiciary Act of 1789, while modified by other statutes, has never been completely repealed.

1. Applying the Intelligible Principle Test

Similar to the original statute which created the marshals in 1789, the modern statute may contain an intelligible principle—or not. Title 28 U.S.C. § 566 requires marshals "to obey, execute, and enforce all orders of the United States District Courts, the United States Courts of Appeals . . . " etc.[225] The last few words of § 566(a) state that marshals are to act "as provided by law."[226] It is hard to see what limits § 566 places on the judicial branch's control over the marshals. The authority granted to the courts to order the marshals may somehow be tempered by the phrase "as provided by law," but, frankly, that doesn't provide any real direction.[227] If a judge wants to push her authority to the limit, there is very little to stop her because she will be protected by judicial immunity.[228]

224. 28 U.S.C. § 566(a).

225. *Id.*

226. 28 U.S.C. § 566(a).

227. Presumably, the courts are only limited by their inability to issue unlawful orders.

228. *See* Mireles v. Waco, 502 U.S. 9, 12–13 (1991) (holding that a judge was

Furthermore, unlike the 1789 Act, the modern statute specifies that marshals must execute "all orders" of the courts rather than "all lawful precepts . . . issued under the authority of the United States."[229] We can infer from the change in language that the modern statute places the marshals more exclusively under the control of the courts than the original statute. Thus, the statute grants courts broad power to command the marshals—raising the specter of delegation without any limiting intelligible principle.

As explained above, the statute's text is not the only way to set out an intelligible principle when the Executive's power is delegated. We can also look to other means by which the executive branch directs the marshals. For instance, other sections of Title 28 reveal more centralized control over the marshals by the executive branch,[230] and § 566 should not be read in isolation.[231] Those sections of the statute allow the executive branch to provide an intelligible principle for the marshals during their duties. The executive branch issues directions to the marshals and their deputies as well as pays for expenses and fills vacancies.[232] Additionally, the "United States Marshals Service retains final authority regarding security requirements for the judicial branch of the Federal Government."[233]

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immune from suit after the judge issued a bench warrant for a lawyer's arrest, and instructing the police sent to arrest him to "rough him up a little" resulting in the lawyer being beaten).

229. Judiciary Act of 1789 § 27; 28 U.S.C. § 566(c) (stating that the "Service shall execute all lawful writs, process, and orders issued under the authority of the United States" but the modern reference to writs and process makes clear that the statute is referring to authority of the courts).

230. *See* 28 U.S.C. § 561(a) (creating the United States Marshals Service with a Director who "is authorized to appoint and fix the compensation of such employees as are necessary to carry out the powers and duties of the Service and may designate such employees as law enforcement officers in accordance with such policies and procedures as the Director shall establish"); 28 U.S.C. § 561(f) ("The Director shall supervise and direct the United States Marshals Service in the performance of its duties"); 28 U.S.C. § 562 ("In the case of a vacancy in the office of a United States marshal, the Attorney General may designate a person to perform the functions of and act as marshal"); 28 U.S.C. § 565 ("The Director is authorized to use funds appropriated for the Service to make payments for expenses incurred pursuant to personal services contracts and cooperative agreements, authorized by the Attorney General, for security guards and for the service of summons on complaints, subpoenas, and notices in lieu of services by United States marshals and deputy marshals.").

231. *See, e.g.*, Yates v. United States, 574 U.S. 528, 534–35 (2015); NLRB v. SW Gen., Inc., 137 S. Ct. 929, 938–39 (2017).

232. *See* 28 U.S.C. §§ 561, 562, 565.

233. *Id.* § 566(i).

That the Service has final authority over security requirements for the courts might reflect the marshals' ultimate independence from the courts. Nonetheless, that provision may be of limited significance given that the courts maintain the power to require the local marshal's attendance during court sessions.[234] Even more importantly, the statute makes clear that it is the "primary role and mission" of the marshals to obey the courts.[235]

Since the intelligible principle test is practically useless in ascertaining whether a non-legislative delegation is in fact unconstitutional, we next apply the essential attributes test. Even if the "essential attributes" test is also manipulable, evident by the court's varied decisions on non-Article III adjudication, it is more transparent in trying to balance the needs of modern government against the desire to protect the constitutional structure. In *J.W. Hampton, Jr. & Co. v. United States*, Chief Justice Taft,[236] writing for the Court, explained the Court's approach to cooperative ventures: "In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination."[237] The "essential attributes" test provides a structure that can accurately be described as "inherent to the necessities of government co-ordination."

2. Applying the "Essential Attributes" Test

The modern era provides the executive branch far greater practical control over the marshals than previously available. This results from a revised statutory scheme as well as the development of modern technology which allows the central government to direct marshals promptly. Yet, as described above, the statute also clarifies the central role of the marshals: assisting the judiciary.[238]

Unlike earlier eras, communication is now virtually

234. *See id.* § 566(b).

235. *Id.* § 566(a).

236. Note that Chief Justice Taft's opinion on this matter is especially informative given that he served both as the twenty-seventh President of the United States and the tenth Chief Justice of the United States. Consequently, Taft had experience with both judicial and executive functions. *See William Howard Taft,* The White House, https://www.whitehouse.gov/about-the-white-house/presidents/william-howard-taft/ (last visited Feb. 14, 2022).

237. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928).

238. *See* 28 U.S.C. § 566(a).

instantaneous. Therefore, if the executive branch disagrees with a marshals' actions, they can notify the marshal quickly and, if the marshal refuses to change course, the President can remove the marshal. This has occurred. In one instance a marshal "was dismissed because he communicated to his superiors his belief that he was bound to follow the instructions and orders of the Federal Judges of the Middle District and that the Justice Department and the United States Bureau of Prisons were interfering with such instructions and orders."[239] The district court held that the statute under which the marshals are organized allows the President to remove a marshal without cause, even where the marshal is actively working on the behalf of the judicial branch.[240] The court expressly refused to reach whether Congress could make the marshals independent of the executive branch,[241] and the decision was subsequently vacated on other grounds,[242] but it nevertheless bolsters the notion that the modern structure of the marshals hews more closely to presidential directives. Furthermore, as discussed above, there have been contemporary instances in which deputy marshals have disobeyed judicial orders at the direction of the Marshals Service.[243] Those instances demonstrate that under current practices, the executive branch retains greater authority to direct marshals.

Additionally, the executive branch is statutorily authorized to use, and does use, marshals for law enforcement purposes.[244] Finally, the statute organizing the marshals states that the director of the marshals "shall supervise and direct the United States Marshals Service in the performance of its duties."[245] Although the Marshals Service is different from the marshals themselves, the service provides critical support (like payment) that marshals need to function.[246]

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239. *See* Chabal v. Reagan, 633 F. Supp. 1061, 1063 (M.D. Pa. 1986), *vacated*, 822 F.2d 349 (3d Cir. 1987).

240. *See id.* at 1064–65 ("While the Marshal's Service may frequently serve two houses, it has but one master"). Despite this decision, I believe that the issues outlined by the GAO report discussed in Part II *supra* contradict that assertion.

241. *See id.* at 1065 n.3 ("[W]e do not reach the question of whether the statute would be a legitimate constitutional exercise of congressional power were § 561 so intended.").

242. *See* Chabal v. Regan, 822 F.2d 349, 358 (3d Cir. 1987).

243. *See* Ord. for United States v. Kilgallon, et al., No. 1:21-CR-10023 (01), (02) AND (03)-CBK, 3 (D.S.D. June 29, 2021).

244. *See* 28 U.S.C. § 561(f).

245. *Id.* § 561(g).

246. *See id.* §§ 565–566.

Be that as it may, § 566 clarifies that the primary role and mission of the marshals is to obey the courts.[247] And marshal employees have been held in contempt of court when they have disobeyed judicial commands.[248] Thus, marshals might be unable to ignore court orders at the behest of the executive branch without facing penal consequences. The court's power to order marshals to do their bidding may undermine the "essential attributes" of the Executive's law enforcement function.

* * *

Unitary executive theory, the nondelegation doctrine, and the essential attributes test all provide guidance for assessing the marshals' constitutionality. The directive structure of the marshals clearly raises separation of powers concerns. But, as shown above, the history of the marshals, the text of the organizing statutes, and the malleability of the various doctrines could allow courts to reach opposing results when assessing the marshals' constitutionality.

VI. FUNCTIONAL AND POLICY JUSTIFICATIONS FOR THE U.S. MARSHALS

There are functional and policy reasons why the structure of the marshals should be found constitutional. This Article explains some of those justifications below, but disavows any reliance on policy in constitutional interpretation.

First, the judicial branch arguably needs control over the marshals to enforce its judgments. This justification assumes that without plenary control, the judiciary cannot exercise its assigned function under the Constitution. Relatedly, one justification for the nondelegation doctrine is that it protects the system as a whole, not the power of an individual branch.[249] Allowing the courts to share control over the marshals *may* infringe on some executive power but ultimately redounds to the benefit of the system as a whole; If the courts do not have an enforcement power, it is possible that the executive branch could ignore the orders of the judiciary thereby causing a constitutional crisis.[250]

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247. *See id.* § 566(a).

248. *See generally* United States v. Kilgallon, 540 F. Supp. 3d 875 (D.S.D. 2021).

249. *See* Martin H. Redish, *Pragmatic Formalism, Separation of Powers, and the Need to Revisit the Nondelegation Doctrine*, 51 LOY. U. CHI. L. J. 363, 385 (2019).

250. *See* Edwin A. Miles, *After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis*, 39 J. OF S. HIST. 519–20 (1973); *see also* Ameron, Inc. v. U.S. Army Corps of Eng'rs, 787 F.2d 875, 889 (3d Cir. 1986) ("[T]he record shows that upon the President's orders, the Attorney General instructed all executive agencies to

At least one Justice has provided a response to that argument. Justice O'Connor writing for the Supreme Court in *Planned Parenthood v. Casey* wrote:

> As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, *it cannot independently coerce obedience to its decrees*. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.[251]

Even before constitutional ratification, Alexander Hamilton explained the Court's role pointedly—"[The courts] may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately *depend upon the aid of the executive arm* even for the efficacy of its judgments."[252] The fact that the courts do not have plenary authority over a law enforcement agency is only hard to reconcile when we forget the separation of powers in our tripartite government. The courts can carry out their constitutionally assigned duties because they are respected and assisted by the executive, not because they control the marshals or because of any inherent authority to enforce orders.[253]

Although writing about Article-III Standing Doctrine, the majority and dissenting opinions in *Lujan v. Defenders of Wildlife* provide two perspectives addressing the concern that the executive

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ignore" certain court decisions.); Steve Vladeck, *What Would Happen If Trump Ignored a Divided Supreme Court Ruling Against Him?*, WASH. POST (Oct. 14, 2019), https://www.washingtonpost.com/outlook/2019/10/14/what-would-happen-if-trump-ignored-divided-supreme-court-ruling-against-him/; Aaron Blake, *Constitutional Crisis? What Happens If Trump Decides To Ignore a Judge's Ruling*, WASH. POST (Feb. 5, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/05/constitutional-crisis-what-happens-if-trump-decides-to-ignore-a-judge/.

251. 505 U.S. 833, 865 (1992) (emphasis added).

252. THE FEDERALIST NO. 78 (Alexander Hamilton) (emphasis added). In 1788, Hamilton defended the creation of a federal judiciary by asserting that it had no capacity for force. Yet, incongruously, in 1789 (just one year later) Congress created the marshals, thereby giving the judiciary that capacity.

253. For an analysis of whether the Court has inherent authority to punish, see Katz, *supra* note 102.

branch will not do its job enforcing the law. Writing for the majority, Justice Scalia stated that allowing Congress to confer standing for certain broad causes of action would:

> permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, §3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department["] and to become "'virtually continuing monitors of the wisdom and soundness of Executive action.'"[254]

Justice Scalia takes it as a given that it is improper for the judiciary to second guess of the Executive's actions.[255] He posits that it is not the judiciary's concern whether or not the executive branch is properly enforcing the law. Therefore, it seems reasonable to presume that Justice Scalia would have taken great umbrage at the idea of the judicial branch directing federal law enforcement officers themselves rather than leave enforcement for the executive branch. This argument does not satisfactorily address what the remedy should be, if any, when the executive branch ignores a court order. Justice Blackmun's dissent offers a compelling response to Justice Scalia in *Lujan*:

> [T]he principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates . . . In my view, it reflects an unseemly solicitude for an expansion of power of the Executive Branch.[256]

Justice Blackmun argued that courts must have broad authority to adjudicate claims to make sure that the will of the people, through

254. Lujan v. Defs. of Wildlife, 504 U.S 555, 577 (1992) (citing Allen v. Wright, 468 U.S. 737, 760 (1984)).

255. *See id.*

256. *Id.* at 602–05 (Blackmun, J., dissenting).

their elected representatives in Congress, is being carried out.[257] Reasoning by analogy, one can infer that Justice Blackmun would have viewed the existence of the marshals as a necessity to ensure that judicial orders are carried out rather than ignored by the executive branch. The view taken by Justice Scalia seems to say, "trust the executive to do its job," while the view taken by Justice Blackmun seems to say, "courts must have the power to ensure the executive is doing its job." Which side one thinks is right likely depends on whether one has more trust in the elected and accountable executive[258] or the life-tenured and politically insulated judiciary.[259]

Another functional concern related to nondelegation, originally raised by Professor Paul Verkuil, is the prevention of conflicts of interest.[260] Verkuil suggests that one of the fundamental purposes of the separation of powers is to avoid conflicts of interest in the governmental process and he traces that reasoning to "the earliest expressions of the rule of law in Anglo-American jurisprudence."[261] But under the paradigm presented by Justice O'Connor in *Casey*, if the judiciary rules that the executive branch must take a certain action, it is left up to the executive to determine whether to enforce the judicial order against itself.[262] This creates the very conflict of interest that Verkuil asserts is meant to be ameliorated through the separation of powers because it would violate the principle that "no man can be a judge in his own cause."[263] If someone in the executive branch is accused of a crime, other members of the executive branch cannot necessarily be considered neutral adjudicators entrusted with enforcing the law.[264] The only way to preserve the legitimacy of the

257. *Id*.

258. *See generally* Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1742–43 (2009) (explaining that the executive may be less accountable for its actions than is often stated).

259. *See* Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459, 1463 (2017) ("Far too often, legislators and officials have a strong incentive not to comply with the Constitution . . . those without political power have nowhere to turn except the judiciary for the protection of their constitutional rights."). "[T]he federal judiciary is the . . . institution most insulated from political pressures. Article III of the Constitution provides that federal court judges have life tenure unless impeached and that their salary may not be decreased during their terms of office." *Id*. at 1466.

260. *See* Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 304–06 (1989).

261. *Id.* at 305.

262. *See* Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992).

263. Verkuil, *supra* note 259, at 305.

264. *See* Bradley, *supra* note 86, at 801.

government therefore is to allow an impartial adjudicator, an Article III judge, to enforce the law.

Another justification explaining why the structure of the marshals may not to violate the separation of powers is voter waiver. One of the unique aspects of the legislation which created the marshals is the fact that it has remained codified with only minor changes since 1789. That the legislation has remained so robust can be used as a proxy for the electorate's acceptance of the structure of the marshals. To borrow a phrase from Justice Breyer in *Milner v. Department of the Navy*, after two centuries without a constitutional crisis it may be preferable to "let sleeping legal dogs lie."[265]

There are also policy reasons cautioning against the court's control over the marshals. One danger is a lack of political accountability. Unlike traditional legislative delegation cases, where power is being transferred from one political branch (the legislature) to another political branch (the executive), in the case of the marshals, the power is being transferred from a political branch to a politically insulated one. Although that may have rule of law benefits, it can raise serious concerns about accountability. Courts sometimes abuse their authority and if they do so with the marshals it is extremely hard to hold them accountable.[266]

VII. IMPLICATIONS FOR OTHER NON-LEGISLATIVE DELEGATIONS

The parallel doctrines discussed above analyzing the marshals all serve similar functions: supporting the separation of powers by preventing too dramatic a shift in power from one branch to another—thus ensuring each branch is exercising its respective power. This common underlying concern sheds light on the vesting clauses of Articles I, II, and III despite the different doctrinal frameworks used to apply each of them. All three vesting clauses have a "similar form and function" and the "few differences that do exist between the . . . Clauses are largely semantic or stylistic."[267] This begs the question of what, if any, utility there is in having separate doctrinal

265. Milner v. Dep't of Navy, 562 U.S. 562, 593 (2011) (Breyer, J., dissenting).

266. The only way of removing an Article III judge is by impeachment and, while judicial impeachments occur, they are rare. *See generally Fed. Jud. Ctr,* Impeachments of Federal Judges, https://www.fjc.gov/history/judges/impeachments-federal-judges.

267. Thomson, *supra* note 68, at 329.

frameworks.[268] Regardless of doctrinal particulars, in the marshals context, like in the legislative delegation context or administrative adjudication context, the task remains the same: determining whether a seeming relocation of one branch's function to another branch is core,[269] constitutional, and problematic on the one hand or peripheral and ministerial on the other. Despite using different names such as "intelligible principle" or "essential attributes" the Court may have been applying one test all along under the guise of different names.[270] In each case the Court has ultimately applied a balancing test to determine whether the balance has shifted too far in favor of convenience[271] such that the power listed in one vesting clause is being exercised by a branch other than the one listed to the exclusion of its proper branch.[272] If that is true, it would be helpful for the Court to clarify that the doctrinal test is the same regardless of which vesting clause the Court is analyzing. Explaining such a balancing test, weighing convenience against aggrandizement[273]—aside from

268. Courts already sometimes use the same terminology in different tests. *Compare* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935) ("The Congress is not permitted to abdicate or to transfer to others the *essential legislative functions* with which it is thus vested" (emphasis added)) *with* N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (Congress "impermissibly removed most, if not all, of 'the *essential attributes of the judicial power*' from the Art. III district court" (citation omitted) (emphasis added)).

269. In Morrison v. Olson, the Court was concerned that the Act it was interpreting removed from the President one of his "core" powers—the prosecutorial power. 487 U.S. 654, 688, 708 (1988).

270. "What's in a name?/That which we call a rose/By any other name would smell as sweet." WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 2, sc. 2.

271. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) ("the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches."); Crowell v. Crowell, 285 U.S. 22, 46 (1932) ("To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task."); *Id.* at 88 ("[A] class of controversy which experience has shown can be more effectively and expeditiously handled in the first instance by a special and expert tribunal.").

272. *See* Panama Refin. Co. v. Ryan, 293 U.S. 388, 432 (1953); *N. Pipeline Constr. Co*., 458 U.S. at 58–59, 62 ("[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.") (quoting Baker v. Carr, 369 U.S. 186, 211 (1962) (internal quotation omitted)).

273. *See* Buckley v. Valeo, 424 U.S. 1, 122 (1976) ("The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a

providing transparency—would also mitigate the concern Justice Thomas's expressed in *Whitman*, namely, that despite an intelligible principle a delegation may go too far in giving away legislative power.[274] Consolidating the separation of powers doctrine into one test could also prevent inconsistency in application.[275] The Constitution makes no mention of "intelligible principles" or "essential attributes," and a test that simply asks whether the power in the vesting clause is being unduly exercised by an actor it was not assigned to more closely conforms to the text[276] and history[277] of the Constitution. The Court can allow branches to assist each other,[278] so long as the ultimate authority granted by each vesting clause remains with its assigned branch.

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self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."); *see also* THE FEDERALIST NO. 51 (James Madison) (explaining the danger of one branch encroaching on the powers of another).

274. *See* Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 487 (2001).

275. *See* Posner & Vermeule, *supra* note 10, at 1731 ("[C]ase law conspicuously lacks any suggestion that the delegation metaphor or the concomitant intelligible principle test constrains congressional delegations to the judges rather than the executive."). They note that the Court has broadly allowed Congress to delegate the power to create procedural rules to the Court. *Id. See generally* 28 U.S.C. § 2072 (granting the Supreme Court "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts [(including proceedings before magistrate judges thereof)] and courts of appeals.").

276. *See* U.S. CONST. art. I, § 1, art. II, § 1, & art. III § 1 (vesting each branch of government with its designated power).

277. In THE FEDERALIST NO. 51, James Madison rejected the idea that a document like the Constitution can contain any formal separation of powers. Rather, Madison suggested that the only way to stop the encroachment of one branch upon another is to organize government so that the various branches fight each other for power. THE FEDERALIST NO. 51 (James Madison) ("Ambition must be made to counteract ambition."). Based on the fact that Madison assumed the various branches could encroach on each other's powers, and that only ambition would serve as a check, we might infer that he did not believe intentionally giving away power would violate the vesting clauses. The one hard line that Madison does seem to advocate is that each branch should retain the ability to check the ambitions of the others. *Id.* ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means . . . to resist encroachments of the others."). Thus, each branch must retain its essential power to ensure that the branches can check one another. This is supported by the historical research conducted by Julian Davis Mortenson and Nicholas Bagley in their article *Delegation at the Founding* in which they conclude that the Founders did not question legislative delegations generally so long as the legislature did not permanently alienate "legislative power without right of reversion or control." 121 COLUM. L. REV. 277, 307 (2021).

278. *See, e.g.*, Gundy v. United States, 139 S.Ct. 2116, 2123 (2019) (affirming that branches can assist each other).