Chicago-Kent Law Review

Volume 94
Issue 2 *The Trump Administration and Administrative Law*

Article 3

5-1-2019

Prosecutors at the Periphery

Peter M. Shane
Moritz College of Law

PROSECUTORS AT THE PERIPHERY

PETER M. SHANE*

In *Morrison v. Olson*,[1] the Supreme Court decision upholding the independent counsel provisions of the post-Watergate Ethics in Government Act,[2] the Court announced a new functional test regarding the scope of Congress's power to limit presidential authority in the removal of executive branch administrators: "[T]he . . . question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light."[3] The independent counsel statute implicated two presidential duties. One, the obligation to "take Care that the Laws be faithfully executed,"[4] the Court found to be unimpaired by the statute: "[B]ecause the independent counsel may be terminated for 'good cause,' the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act."[5] As to the second presidential function, the conduct of criminal prosecutions as an exercise of the executive power vested by Article II,[6] the Court was elliptical:

> There is no real dispute that the functions performed by the independent counsel are "executive" in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch. . . . Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so *cen-*

* Jacob E. Davis and Jacob E. Davis II Chair in Law, Moritz College of Law, Ohio State University. I am grateful to my designated respondents as well as engaged audience members for suggestions I received in connection with this project at the Chicago-Kent Law Review symposium on The Trump Administration and Administrative Law. Special thanks go to Dean Harold Krent and Professors Peter Strauss and Chris Walker for their insightful feedback.

1. 487 U.S. 654 (1988).
2. Ethics in Government Act, Title VI, 28 U.S.C. §§ 591–599 (1982 ed., Supp. V).
3. *Morrison*, 487 U.S. at 691.
4. U.S. CONST. art. II, § 3.
5. *Morrison*, 487 U.S. at 692.
6. U.S. CONST. art. II, § 1.

> *tral to the functioning of the Executive Branch* as to require as a matter of constitutional law that the counsel be terminable at will by the President.[7]

The Court did not elaborate on how to determine "centrality" in the sense it intended or exactly why the Court "simply did not see" it in this case.

Intriguingly, however, the idea of centrality was significant also in the opinion of then-Judge Ruth Bader Ginsburg, who had dissented from the D.C. Circuit decision that the Supreme Court reversed.[8] She had explained part of her reasoning in this way:

> Appellants contend that the Act tampers with a "core" executive function—prosecution. Though it is indisputably an executive task, *it is not obvious that prosecution is at the "core" of the executive branch's constitutionally-assigned functions*, in the sense that the job must be kept, in any and all cases, under the President's wing and cover.
>
> Core executive functions are described in Article II; they include, notably, the President's role as Commander in Chief of the Armed Forces, and his power to make treaties and to grant pardons. While the executive's powers, unlike those of the legislature, are not limited to those enumerated in the Constitution's text, it seems fair to assume that *the powers specifically mentioned were of central concern* to the framers. Prosecution was decentralized during the federalist period, and it was conducted by district attorneys who were private practitioners employed by the United States on a fee-for-services basis. I cannot conclude that the framers, or the Congress that enacted the Judiciary Act of 1789, would have considered prosecution a function that must remain, sans exception, with the President and his men.[9]

For Judge Ginsburg, distinguishing between core executive functions and executive functions that need not remain under complete presidential control put the centrality of criminal prosecution squarely at issue.

Reasoning of Judge Ginsburg's sort—classifying certain executive functions as "core" and others implicitly as more peripheral—is inconsistent with what is now called "unitary executive theory," or what, following former Vice President Al Gore, perhaps should be called Uni-

7. *Morrison*, 487 U.S. at 691–92 (emphasis added).

8. *In re* Sealed Case, 838 F.2d 476 (D.C. Cir. 1988), *rev'd sub nom.* Morrison v. Olson, 487 U.S. 654 (1988).

9. *Id*. at 526–27 (Ginsburg, J., dissenting) (emphasis added) (citations omitted).

lateral Presidency Theory.[10] This is the notion that Article II, by virtue of its "original public meaning," vests all executive power in the President, and that Article II "executive power" thus understood includes the authority to supervise any and all law-execution functions that Congress delegates to the executive branch. Such was the separation of powers theory championed in Justice Scalia's *Morrison* dissent,[11] and it has been embraced widely (though not exclusively) among conservative jurists and constitutional scholars.[12]

One way of understanding the difference between the *Morrison*-Ginsburg approach and Unilateral Presidency Theory is to focus on the dual character of each of the Constitution's first three articles. Each has an *authorizing* character, in the sense that it affirmatively authorizes one or more of the respective branches to implement certain powers. But each also has a *protective* character, in that it signals some domain of legislative, executive, or judicial power, respectively, beyond the authority of any other branch to regulate or impede. For example, Article III leaves to Congress the jobs of configuring a Supreme Court and structuring the inferior courts entirely,[13] but the Supreme Court has interpreted the grant of "judicial power" as foreclosing legislation that would undo final judgments in cases already decided.[14] Article II similarly authorizes the President to exercise certain managerial powers with regard to the executive branch. He nominates, appoints, and commissions civil officers, may seek the opinions of heads of depart-

10. Al Gore, Former Vice President, The Limits of Executive Power: Restoring the Rule of Law (Jan. 16, 2006), https://web.archive.org/web/20080604144941/http://www.washingtonpost.com/wp-dyn/content/article/2006/01/16/AR2006011600779_pf.html [https://perma.cc/FCW9-RCHZ]. Among legal scholars, the term was perhaps first embraced by Dean Harold J. Krent. Harold J. Krent, *From A Unitary to A Unilateral Presidency*, 88 B.U. L. REV. 523, 523 (2008). Thirty years ago, Dean Krent's own detailed and discerning historical treatment reached a conclusion similar to the one I now advance: "Viewed through a historical lens, criminal law enforcement does not lie at the end of the continuum marking the Executive's greatest power in relation to the coordinate branches of government." Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 309 (1989).

11. 487 U.S. at 697 (Scalia, J., dissenting).

12. Leading works by conservative scholars include SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE (2015), and STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008). Perhaps the foremost advocate of Unitary Executive Theory who is not a jurisprudential conservative is Akhil Amar, although he appears to regard independent administrative agencies as constitutional. *See, e.g.*, Akhil Reed Amar, *The President, the Cabinet, and Independent Agencies*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 36 (2010).

13. U.S. CONST. art. III.

14. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

ments, and "takes care that the laws be faithfully executed."[15] At the same time, the President is given a textually unlimited pardon power and a veto power extremely difficult in practice to override.[16] The dual character of each Article is crucial because, without each branch's self-protective powers, a system of checks and balances could not work; one branch could vitiate the checking powers of the other branches. But Presidential Unilateralists also interpret the *protective* Article II as wholly foreclosing congressional regulation of the President's supervisory authority regarding administration, even though complete presidential control over all administrative discretion goes far beyond the need of the executive branch to check any abuses by Congress or the judiciary.[17] This excessive embrace of presidential unilateralism stands in contrast to the *Morrison*-Ginsburg approach, which implicitly acknowledges that Article II, in its authorizing character, allows the President a wide berth in supervising administration but insists that Article II, even in its protective character, allows Congress some discretion to limit the scope of that relationship if Congress chooses to do so.

This essay will argue that the seven-Justice *Morrison* majority and then-Judge Ginsburg have the sounder view of the constitutional status of criminal prosecution. The approach is sounder because it better reflects both the history of criminal prosecution, in particular, and the proper role of history in informing separation of powers interpretation more generally. The Presidential Unilateralists are certainly interested in history, and their scholarly output includes much thoughtful and painstaking work.[18] Yet the resort to history in unilateralist originalism is all but entirely to confirm the plausibility of our contemporary originalists' foundational premise: that the meaning of the original Constitution was fixed once ratified. It is their premise about the text of Article II, not the history they read as confirmatory, which does the work of limiting Congress's authority vis-à-vis the regulation of the

15. U.S. CONST. art. II, §§ 2–3.

16. According to a House of Representatives count, presidents, as of August, 2017, had exercised "regular" vetoes a total of 1,508 times and "pocket" vetoes another 1,066 times. There have been 111 overrides, amounting to just over four percent of the total. Office of the Historian, U.S. House of Representatives, *Presidential Vetoes*, https://history.house.gov/Institution/Presidential-Vetoes/Presidential-Vetoes/ [https://perma.cc/DGJ7-GHVZ].

17. Indeed, because Congress and the courts have greater institutional incentives to defer to presidents than presidents have to defer to the other branches, there is always an asymmetrical risk of excessive presidentialism, even under a system of formal checks and balances. PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 28 (2009).

18. *See, e.g.*, PRAKASH, *supra* note 12.

President's relationship to administration.[19] What history actually reminds us, however, is that the Constitution was designed as a plan for a working government, and that the Founding generation—having agreed to a new and largely unprecedented blueprint—confronted their new arrangements with some conspicuous uncertainties. Rather than use dictionaries to marginalize the significance of their uncertainties, it is truer to the Founding generation to take those uncertainties as signaling how much room remains for present-day interpretation of the text. With regard to criminal prosecution—and law enforcement, in general—the lived meaning of executive power was far from fixed, which ought to inform separation of powers debates even today.

Part I below casts a critical eye on the textual syllogism that underlies unitary executive theory. Knowing what the words or phrases of Article II meant in the abstract in 1789 does not deprive Article II of its largely Delphic quality. Part II documents the constitutional ambiguities surrounding criminal prosecution and its relationship to the powers of any jurisdiction's chief executive. The concluding section argues that the history on which originalists rely as confirmation of Presidential Unilateralism addresses only the question whether, in the absence of legislative constraint, presidents have supervisory authority over prosecutors. It does not preclude Congress's exercise of legislative authority to significantly limit presidential control. Acknowledging such legislative authority is fully consistent with the constitutional ambiguities discussed in Part II.

19. Justice Scalia's inattention to the historical meaning of executive power could hardly be more stark than it is in his *Morrison* dissent. He writes of the majority:

> The Court concedes that "[t]here is no real dispute that the functions performed by the independent counsel are 'executive'," though it qualifies that concession by adding "in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch." The qualifier adds nothing but atmosphere. In what other sense can one identify "the executive Power" that is supposed to be vested in the President (unless it includes everything the Executive Branch is given to do) except by reference to what has always and everywhere—if conducted by government at all—been conducted never by the legislature, never by the courts, and always by the executive.

Morrison v. Olson, 487 U.S. 654, 705–06 (1988) (Scalia, J., dissenting). Part II, *infra*, provides the historically based answer to Scalia's rhetorical question. Justice Scalia analytic premise regarding Article II's "fortifications" against legislative attack on the executive branch appears to make any inquiry into historical meaning irrelevant. *Id.* at 698–99.

I. THE NOT-SO-PLAIN ORDINARY MEANING OF THE EXECUTIVE POWER VESTING CLAUSE

The foundation of unitary executive theory is a syllogism rooted in what its advocates offer as the "original public meaning" of "executive power": "Executive power," in the late 18th century, meant "not legislative" and "having the power to put in act the laws."[20] When Article II thus vested "[t]he executive power" in "a" President, it thus vested in a single individual all executive power, comprehensively and indivisibly. Vesting that authority in "a" President meant that it would be shared by no other individual, and any person assisting the President in the exercise of executive power must be removable by the President at will.

In an important recent article,[21] Professor Victoria Nourse goes a long way toward demonstrating how this reading of the Article II Vesting Clause is far less straightforward than it appears. When any text is sparse, as Article II certainly is, she explains that "interpreters are likely to interpolate or add to the meaning of raw text when seeking to apply the text to a particular context."[22] Drawing on philosophy of language, she calls this process "pragmatic enrichment,"[23] and notes that such enrichments are "hypothesized meanings—they are not the 'actual' meaning of the text but attempts to apply the raw text to a particular context, by the addition of meanings."[24] For example, if I see a sign on a restaurant door that reads, "No shirt. No shoes. No service," I do not infer that this is an establishing offering neither shirts, nor shoes, nor service; I understand that I may receive service only if I am wearing both shirt and shoes. I likewise understand, dressing as I do as a conventional male, that I am not relieved of the obligation to wear pants or shorts. I even understand that a customer wearing a dress will not be denied service because she is not wearing a shirt. Yet none of this is discernible from the text of the sign alone. I have enriched the meaning of the sign based on my knowledge of its context and purposive intent. Persuasive interpretation of any document requires readers to be alert to the degree to which they are engaging in pragmatic infer-

20. Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 716 (2003) (quoting Samuel Johnson's dictionary of 1773).

21. Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1 (2018).

22. *Id.* at 12.

23. *Id.*

24. *Id.* at 12–13.

ence and to be open to evidence within the document that contradicts that inference.[25]

As Professor Nourse explains, the unilateralist "enrichment" of the Article II Vesting Clause, exemplified by Justice Scalia's *Morrison* dissent,[26] is reading into it a vesting of *all* the power of executing law, even though the word "all" or something similar is not actually part of the text.[27] But this reading is bedeviled by other aspects of both Article I and Article II. Perhaps the most obvious is that the Senate has roles to play in both the appointment of officers of the United States and in the approval of international treaties, powers otherwise explicitly conferred on the executive branch.[28] So at most, the Vesting Clause can be read to mean, "The executive Power shall be vested in a President of the United States of America, *except as this Constitution explicitly assigns executive power elsewhere*." But once we surface that the Unilateralists have enriched the meaning of the Vesting Clause with an implied exceptions clause in the manner I have crafted, the question is immediately posed as to why the *explicit* vesting of executive power elsewhere is the only constitutionally permissible limitation on executive power. Might the vesting of legislative and judicial power, respectively, in the other two branches of government imply some authority in those branches to regulate the scope of discretion vested in the President by Article II?

The semantic possibility that the Vesting Clause does not preclude legislative checks on executive power would also seem to follow directly from the wording of the Necessary and Proper Clause, which gives Congress authority "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [of Congress], and all other Powers vested by this Constitution in the Government of the United States, or in *any Department or Officer thereof*."[29] One might have thought the organization of the executive branch would itself be

25. *Id.* at 17.

26. "Article II, § 1, cl. 1, of the Constitution provides: 'The executive Power shall be vested in a President of the United States.' . . . [T]his does not mean *some of* the executive power, but *all of* the executive power." 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (emphasis in the original).

27. The article "the" before "executive power" does not require comprehensiveness, given that we often use "the" to refer also to things that are divisible. "The dessert was my favorite part of the meal," means exactly the same as, "Dessert was my favorite part of the meal," and neither formulation implies that I am the only diner at any meal who got dessert. Likewise, "The dog is a human's faithful companion," means exactly the same as, "Dogs are a human's faithful companions."

28. U.S. CONST. art. II, § 2.

29. U.S. CONST. art. I, § 8 (emphasis added).

an executive power if all executive power is vested in the President and the entire executive branch is to be viewed as merely an extension of his authority.[30] Yet the Constitution says otherwise, and it says so with the word "all," a signaling of comprehensiveness that does not appear in Article II.

What makes this yet more complicated is that Justice Scalia, in line with the Unilateralist school, wants to infer not just that the President is vested with all the power of legal execution, but that the lodging in the President of the executive power implies a hierarchical relationship that entitles him to unregulated removal power over administrators, including criminal prosecutors. Article II, however, says nothing about removal, and the Appointments Clause complicates the inference in two respects. First, Congress is authorized to vest the appointment of "inferior officers" in the courts of law.[31] This plainly points to an uncertainty as to the President's constitutionally intended relationship to an entire class of inferior officers. Second, and more profoundly, given the ordinary rule that the power to appoint implies the power to remove,[32] the Senate's role in the appointments process for any officer requiring the Senate's advice and consent would seem to imply a Senate role in removals as well. Indeed, Alexander Hamilton so represented the Constitution to readers of The Federalist:

> It has been mentioned as one of the advantages to be expected from the co-operation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint. A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected, if he were the sole disposer of offices.[33]

Joseph Story later acknowledged the logic of this reading, suggesting that, even if practice by the 1830s had settled on the President a power of removing principal officers—the propriety of which he declined to endorse—"in regard to 'inferior officers' . . . the [option] is still within the power of Congress . . . of requiring the consent of the senate to re-

30. William Maclay, one of Pennsylvania's first two Senators, made this suggestion, which the Senate rejected. E. Garrett West, *Congressional Power Over Office Creation*, 128 YALE L.J. 166, 188 (2018) (citing THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES, *reprinted in* 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, MARCH 4, 1789 – MARCH 3, 1791, at 1, 83 (Charlene Bangs Bickford et al. eds., 1988)).

31. U.S. CONST. art. II, § 2.

32. *In re* Hennen, 38 U.S. 230, 254 (1839).

33. THE FEDERALIST No. 77 (Alexander Hamilton).

movals in such cases."[34] The persistence of the idea, forty years into the life of the Republic, that Congress could condition presidential removals on Senate consent strongly belies the notion of any "ordinary meaning" interpretation of the Vesting Clause that would give the President unfettered, unilateral removal power.

Beyond these complications lies the puzzle of the Article II Opinions Clause. Article II authorizes the President to "require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices."[35] From a Unilateralist perspective, this strikes an obviously odd note because such a power would seem necessarily implicated in the scope of the Unilateralists' version of the Executive Power Vesting Clause. Professor Akhil Amar has suggested that the redundancy is there for purposes of emphasis or clarification.[36] But taking the actual wording of the text seriously generates greater uncertainties. The Opinions Clause would make no sense if it empowered the President to require opinions in writing only concerning those "duties" that the President assigns to principal officers; it would be bizarre for the Vesting Clause to have authorized the President to assign duties to subordinate officers, but not to authorize him to inquire as how those directions were being implemented. Therefore, the "duties" referenced by the Opinions Clause must logically be duties assigned to principal officers by some authority other than the President—presumably by Congress. But if that is so, then the ordinary meaning of the explicit grant of power to seek formal opinions regarding those duties would have two further logical implications that complicate the Unilateralist narrative. The first is that duties assigned to "the Heads of Departments" are not to be performed by the President, but rather by those officers explicitly tasked to perform them. The text links duties explicitly to "offices," and Congress, not the President, creates offices.[37] Further, the formality of

34. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 572–73 (R.D. Rotunda & J.E. Nowak eds., 1987).

35. U.S. CONST. art. II, § 2.

36. Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 13 (1998).

37. West, *supra* note 30, at 169–99. It is hard to explain how all the power to implement law is the President's when Congress explicitly vests authority in other officials to administer the laws. Professor Prakash implicitly offers a way around this conundrum in arguing that the President is constitutionally entitled to execute the statutes of the United States personally, should he choose to do so. That suggestion implicitly re-conceptualizes Congress's charges to specific agencies as, effectively, delegations to the President with an expression of congressional preference as to the President's sub-delegate. But it is doubtful that Congress has ever viewed its administrative statutes in this manner. When Congress wants the President to shoulder personal

the opinions that Presidents may request supports the idea that the President's relationship to the agencies is, if not at arm's length, then at least not fully integrated. This suggests, as Peter Strauss has argued, that the President's power, upon receiving those opinions, is supervisory, not directive.[38] His task is to "take Care that the Laws be *faithfully* executed," which on its face is something different from "executed in a manner consistent with the President's policy preferences." Authorizing presidential demands for "opinions in writing" from officials to whom the President may issue direct, substantive orders truly would seem oddly superfluous.

Taking the foregoing textual complications into account, here is a semantically plausible rendering of the Vesting Clause that reads very differently from Justice Scalia's version. The Article II Vesting Clause could be interpreted to convey the following thought:

> To the extent this Constitution does not confer executive power elsewhere, the executive power that the Constitution does confer shall be vested in a president of the United States. Should Congress assign duties to executive branch Departments, the President shall supervise their execution.

A point this reading highlights is that the mission of Article II's first sentence is chiefly to signal the choice of a single, rather than a plural chief executive, but not to say what the single chief executive does. Nothing in the "original public meaning" of "executive power" contradicts this reading. The reading is perhaps not compulsory, but it reveals both the role of pragmatic enrichment in attaching meaning to the Vesting Clause and the potential for a pragmatic enrichment that gives the legislative branch more leeway to structure the President's relationship to the bureaucracy. It highlights the reality that the Scalia reading of Article II, which purports to follow from the meaning of "executive power," really follows instead from his presupposition that our government has three branches of government with distinct boundaries and that the basket of power in the hands of the executive branch must include plenary supervisory authority over every officer of the United States who participates in the execution of the law. In other

responsibility for the exercise of administrative authority, it vests such authority in the President explicitly. It likewise authorizes by statute the presidential subdelegation of such duties to Senate-confirmed officials of his choice, provided that no such subdelegation "relieve[s] the President of his responsibility in office for the acts of any such head or other official designated by him to perform such function." 3 U.S.C. § 301 (2012).

38. *Cf.* Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 728–30 (2007).

words, having predetermined what the Vesting Clause must mean, Justice Scalia just ignores the ways in which other Clauses potentially falsify his reading. It is a pre-commitment to a presidency empowered in a particularly robust way that produces Justice Scalia's hard-edged reading of the Article II Vesting Clause; it is not compelled by the words.

II. CRIMINAL PROSECUTION AND CONSTITUTIONAL AMBIGUITY

The theoretical attractiveness of "original public meaning" as a guide to constitutional interpretation rests on the solution it purports to offer to an older generation of so-called originalists who advocated interpretation guided by "original intent."[39] "Original intent" theory raised obvious questions as to whose intent counts and how we are supposed to determine that intent over two centuries later. "Original public meaning" offers to solve that problem by noting that, whatever the founding generation's subjective intentions, we do have a text that people voted upon and thus turned into law. If there was plausible consensus as to the meaning of the text, then it seems to be fair to infer that such was the meaning that the text communicated to its audience of ratifiers.[40]

This logic, however, elides just how complex is the process by which we understand what words are intended to communicate when applied to specific contexts. The dress-wearing restaurant customer to whom I referred earlier will confidently expect service from the "No shirt, no shoes, no service," restaurant because (a) she understands the restaurant's intention that its customers be dressed to meet conventional expectations of modesty and restaurant etiquette, and (b) she probably observes dress-wearing customers other than her who are being served. Likewise, when I drive an interstate highway and see a sign reading, "Speed Limit, 55 MPH," I understand the message to be a normative, not a descriptive statement. "55 MPH" is not a limit on the possibility of speed. I know this because, sure enough, my car easily crosses the "55 MPH" limit, as does every car that passes mine. This might well be called, "experience-based interpretation."

My hypothesis, therefore, is that, in contemplating the newly proposed constitutional text between 1787 and 1789, those Americans

39. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004).

40. *Id.* at 610 ("It is the adoption of the text by the public that renders the text authoritative, not its drafting by particular individuals.").

enfranchised to vote on its ratification would have brought to their understanding of "executive power" not just dictionary definitions, whether in a legal or general use dictionary. They would have also had their experience of living under executive power as exercised under state constitutions, which would have greatly colored what they thought they were voting on. Moreover, they would have had available various representations by the Constitution's supporters and opponents as to its operational implications. As noted earlier, Publius told them, for example, that the President would not be able to remove officials appointed with the Senate's consent unless the Senate likewise consented to that removal.

If we consider experience to be a guide to understanding, then it is critical that Americans in 1789 would not have experienced on our side of the Atlantic either a widespread commitment to concentrated executive power in general or a specific expectation that the direction of government lawyering was centrally an executive function. As I have argued at length elsewhere, the early state constitutions, some drafted before and some drafted after 1789, commonly authorized the legislature to appoint certain civil officers directly or to determine by statute how officers should be appointed.[41] Insofar as those constitutions provided specifically for the legislative appointment of officers we would conventionally identify as "executive," the likeliest targets were state fiscal officers and attorneys general. Only six of the first thirteen state constitutions mention an attorney general specifically, and each of them speaks of the attorney general in the same breath, as it were, as it refers to state judges.[42]

41. Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323 (2016) [hereinafter *Originalist Myth*].

42. GA. CONST. of 1789 art. III, § 5 ("The judges of the superior court and attorney general shall have a competent salary established by law, which shall not be increased nor diminished during their continuance in office, and shall hold their commission during the term of three years."); MD. CONST. of 1776 art. XL ("That the Chancellor, all Judges, the Attorney-General, Clerks of the General Court, the Clerks of the County Courts, the Registers of the Land Office, and the Registers of Wills, shall hold their commissions during good behaviour, removable only for misbehaviour, on conviction in a Court of law."); MD. CONST. of 1776 arts. XLVIII, LII, LIII; MASS. CONST. of 1780, pt. 2, ch. II, § 1, art. IX ("All judicial officers, the attorney-general, the solicitor-general, all sheriffs, coroners, and registers of probate, shall be nominated and appointed by the governor . . . ."); N.J. CONST. of 1776, para. XII ("That the Judges of the Supreme Court shall continue in office for seven years: the Judges of the Inferior Court of Common Pleas in the several counties, Justices of the Peace, Clerks of the Supreme Court, Clerks of the Inferior Court of Common Pleas and Quarter Sessions, the Attorney-General, and Provincial Secretary, shall continue in office for five years . . . ."); N.C. CONST. of 1776 art. XIII ("That the General Assembly shall, by joint ballot of both houses, appoint Judges of the Supreme Courts of Law and Equity, Judges of Admiralty, and Attorney-General, who shall be commissioned by the Governor, and hold their offices during good behavior."); N.C. CONST. of 1776 arts. XXI, XXX; VA. CONST. of 1776, para. 35 ("The two Houses of

Pre-1789 state constitutions providing explicitly for the legislative appointment of attorneys general were in effect in New Jersey, North Carolina, and Virginia.[43] This was so even though the North Carolina Constitution and the Virginia Bill of Rights mandated the separation of powers explicitly,[44] which the federal Constitution does not. The 1796 Constitution of the new state of Tennessee likewise provided explicitly for the legislative appointment of the state's attorneys.[45] Yet other constitutions left it to the discretion of the state legislature as to how state officers would be appointed or provided for appointments of administrative officers by councils made up predominantly of state legislators. In Vermont, for example, the state's attorneys, one in each county, were legislatively appointed and accountable to the courts for certification of their reimbursable expenses.[46] Connecticut provides an especially intriguing example. Continuing to operate under its 1662 Charter until well after ratification of the federal constitution, it provided by statute in 1784 for the judicial appointment of state's attorneys.[47] This practice continued until 1854, notwithstanding an 1818 Constitution that said nothing on the subject and also contained an explicit separation of powers provision.[48]

There are two common ripostes to this evidence. One is that the federal Constitution of 1789 was well understood to be a rejection of the weak executive model established by the pre-1789 state constitutions.[49] This proposition, however, does not resolve the questions as to what degree and in which respects the President would be a stronger executive than the governors who operated under the earlier state constitutions. The framers clearly rejected the idea of sharing the leadership of the executive branch between a chief executive and a council, as had been the case in a number of states. But clarity on that point does not resolve the ambiguities surrounding those powers that the

Assembly shall, by joint ballot, appoint Judges of the Supreme Court of Appeals, and General Court, Judges in Chancery, Judges of Admiralty, Secretary, and the Attorney-General, to be commissioned by the Governor, and continue in office during good behaviour."); VA. CONST. of 1776 art. 37.

The statement in Joan Jacoby's seminal work on the history of private prosecution that only five of the first thirteen Constitutions mentioned the Attorney General explicitly erroneously omits North Carolina. JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 22 (1980).

43. *Originalist Myth*, *supra* note 41, at 338–39.

44. *Id.* at 340.

45. *Id.* at 367.

46. *Id.* at 350–51.

47. *Id.* at 348.

48. *Id.*

49. Prakash, *supra* note 20, at 760.

chief executive would exercise. It also makes puzzling the persistence of divided control over state's attorneys in *post*-1789 state constitutions, notwithstanding executive power vesting clauses paralleling the now-ratified federal text.[50]

The second riposte is that explicit state constitutional clauses fragmenting gubernatorial control over executive functions supposedly testify to a common understanding that, without such explicit exemptions, executive power would be unitary. In response, however, it must first be pointed out that the reading of constitutional provisions *in pari materia* cannot explain the Connecticut practice of court appointments for state's attorneys; no provision for such appointments appears in the 1818 Constitution. But just as important, this is not the way in which the Supreme Court derives lessons from the early state constitutions. For example, in *District of Columbia v. Heller*, the Court drew on state constitutions that explicitly linked the right to bear arms to individual self-defense as confirming the meaning of the Second Amendment, which does not.[51] Explicit references in early state constitutions to individual self-defense did not demonstrate to the Court that self-defense was beyond the concerns of the Second Amendment.[52] The Court rather inferred that late eighteenth century constitutional drafters, deliberating on the right to bear arms, concluded that self-defense was embraced by that right, sometimes explicitly, sometimes implicitly. Similarly, the fact that state constitutions were often explicit in setting up the independence of certain executive officers from gubernatorial control suggests that, when deliberating on the nature of executive power, late eighteenth century constitutional drafters regarded a degree of administrative independence from the chief executive as consistent with the separation of powers. At the very least, the idea of criminal prosecution as central to constitutional grants of executive power is undermined by the common practice of vesting the appointment of Attorneys General and state's attorneys elsewhere than in the state governors.

50. *Originalist Myth*, *supra* note 41, at 337–38.

51. 554 U.S. 570, 600–01 (2008).

52. *Id.* ("Our interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment. Four States adopted analogues to the Federal Second Amendment in the period between independence and the ratification of the Bill of Rights. Two of them—Pennsylvania and Vermont—clearly adopted individual rights unconnected to militia service. Pennsylvania's Declaration of Rights of 1776 said: 'That the people have a right to bear arms *for the defence of themselves* and the state . . . .' In 1777, Vermont adopted the identical provision, except for inconsequential differences in punctuation and capitalization.") (internal citations omitted).

The conclusion that criminal prosecution was not central to constitutional grants of executive power is likewise buttressed by the way in which the First Congress dealt with federal law enforcement. As numerous scholars have recounted, Congress's approach to the creation of federal legal officers was dramatically different from the care with which Congress defined and established the Departments of Foreign Affairs, War and Treasury.[53] The centrality of both foreign and military affairs to the constitutional grant of executive power was clear to the First Congress, which gave the President explicit and broad powers to direct the cabinet departments holding those portfolios and did little to specify their internal structure. By way of contrast, Congress spelled out the structure of the Treasury Department in considerable detail and created a number of significant departmental offices. Although the Treasury Act allowed presidential removal of the Treasury Secretary, there was no indication that the Secretary's responsibilities, unlike those of the Secretaries of Foreign Affairs and of War, would be predominantly defined by presidential orders. The Secretary was charged by statute with a series of specific duties, about which he would be required to report not only to the President, but also to Congress directly.[54] Such arrangements quite likely were rooted in the idea, embodied in many of the early state constitutions, that the government's Treasurer ought to have special accountability to the legislature.[55]

Yet in stark contrast to all of this, here is the totality of Section 35 of the Judiciary Act of 1789, which was the organic statutory provision for the federal legal apparatus:

> SEC. 35. And be it further enacted, That in all courts of the United States, the parties may plead and manage their own causes personally or by assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein. And there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the supreme court in the district in which that court shall be holden. And he shall receive as

53. JERRY L. MASHAW, CREATING THE AMERICAN CONSTITUTION: THE LOST ONE HUNDRED YEARS OF ADMINISTRATIVE LAW 40–44 (2012).

54. *Id.* at 40.

55. *Id.* at 41–42.

> compensation for his services such fees as shall be taxed therefor in the respective courts before which the suits or prosecutions shall be. And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided.[56]

That's it. Just as the roles of attorney general or district attorney or criminal prosecutor go entirely unmentioned in The Federalist, the Judiciary Act conveys no clear idea on behalf of its drafters as to the centrality of these officials to the new government or, indeed, to executive power. The original draft of the Judiciary Act would have had each court appoint the attorneys who appeared before them on behalf of the United States,[57] and it is not clear on what basis the Congress was persuaded to abandon that proposal.

Ambiguity in the constitutional status of the federal government's new law enforcers appears a lot less mysterious once we understand that public prosecutors were generally far less significant government figures throughout the late eighteenth and most of the nineteenth centuries than they are today, and most definitely were not seen as bearers of inherently executive power. The British common law tradition was one of private prosecution.[58] Although a variety of public prosecutors appeared during the colonial period, private prosecution in the United States persisted throughout much of the nineteenth century.[59] The early version of the public prosecutor in the United States was considered a judicial officer: "At the beginning of the nineteenth century in America, the district attorney was viewed as a minor figure in the court, an adjunct to the judge. His position was primarily judicial, and

56. Judiciary Act of 1789, ch.20, § 35, 1 Stat. 73, 92–93 (codified as amended at 28 U.S.C. § 1257 (2012)).

57. HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE 16 (1937).

58. JACOBY, *supra* note 42, at 7–8.

59. *See generally* Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQUENCY 568 (1984). Indeed, vestiges remained as late as the 1950s because a majority of states still permitted private prosecution for misdemeanors. *Id.* at 586. On the post-Constitution vestiges of private participation in federal criminal prosecution, see Krent, *supra* note 10, at 293–96.

perhaps only quasi-executive."[60] Moreover, in contrast to the unilateralist theory of hierarchical control over prosecution, the norm with regard to public prosecution in both the colonies and early states was one of local control:

> Even where the Attorney General was nominal head of state prosecution, in reality the local prosecuting attorney was swiftly drifting toward his own island of localized power. Local courts and local appointments or recommendations hastened this trend, which was also marked by a concomitant decline in the centralized power of the Attorney General.
>
> The federal system of prosecution established in 1789 provides a freeze-frame of the trends and philosophies that were predominant in criminal prosecution at the beginning of the American nation. The Attorney General was a weakened office relegated to vague supervisory power, advisory capacity, and limited appellate jurisdiction. Primary responsibility for prosecution was in the hands of local officials.
>
> In the first 30 years of the new republic there were few changes in the duties and responsibilities of the prosecuting attorney . . . .[61]

Given this history of decentralized prosecution[62] and its common classification as a judicial function, it is a dubious proposition at best that the Vesting Clause of Article II communicated to those ratifying the federal constitution that they were signing on to a system of criminal prosecution to be administered within the complete and illimitable discretion of the new chief executive. Indeed, against this backdrop, the early history of the Attorney General's office and its relationship to our first district attorneys—later called U.S. Attorneys—looks less like a failure to live up to a founding text on executive power and more like a direct continuation of state patterns likely to have guided how those ratifying the Constitution understood its implications.[63]

60. JACOBY, *supra* note 42, at 23.

61. *Id.* at 20–21.

62. The decentralization of federal prosecution is yet further illustrated by the role early Congresses sanctioned for state officials in the enforcement of federal law. Krent, *supra* note 10, at 303–09. Indeed decentralization was a common feature of federal administration in antebellum America, as it continues in significant respects to be so today. Jerry L. Mashaw, *Center and Periphery in Antebellum Federal Administration: The Multiple Faces of Popular Control*, 12 U. PA. J. CONST. L. 331 (2010).

63. In his thoughtful defense of the President as "Chief Prosecutor," Professor Saikrishna Prakash makes much of the fact that "[i]n England, the king was regarded as the constitutional prosecutor of all offenses." He writes further: "Following the Lockean tradition, William Blackstone claimed that, in the state of nature, everyone enjoyed the executive power to punish those who transgressed the laws of nature." Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 547 (2005). The problem with this argument is precisely an equation of "executive power" in the Lockean sense with executive power as understood in 1789. Locke famously con-

Susan Bloch's study of the Attorney General's early role tells much of this story.[64] The district attorneys were part-time functionaries, whose chief source of income was their private practice.[65] The Judiciary Act did not provide the Attorney General any supervisory power over them, and the lack of a "fixed relation" between the Attorney General and the district attorneys was a powerful source of frustration to Washington's first Attorney General, Edmond Randolph.[66] Randolph sought and received Washington's support for proposed legislation that could have required district attorneys to notify the Attorney General of all cases they handled that involved foreign nations or "in which the harmony of the [state and federal judiciaries] may be hazarded."[67] He also sought authority to direct the district attorneys in their handling of such cases.[68] After the Senate, however, would go no further than requiring district attorneys to keep the Attorney General informed on lower court litigation, no legislation expanding the Attorney General's authorities was enacted.[69] Renewed efforts under Presidents Jackson and Pierce to consolidate supervisory control by the Attorney General failed similarly.[70]

The first congressional provisions for supervisory direction over the district attorneys gave that role, in a limited form, not to the Attorney General, but to the Treasury Department. The motivating concern was not one of criminal law enforcement, but the handling of litigation

sidered that the executive power embraced not only what Americans came to understand as executive power, but also judicial power, given that both entailed the application of general rules to specific cases or individuals. When Americans embraced Montesquieu's separation of legislative, executive and judicial powers, they were necessarily dividing a host of formerly Crown powers between the executive and the judiciary. The fact that prosecution was constitutionally lodged with the Crown did not take it outside the realm of judicial power in the American sense. Suri Ratnapla, *John Locke's Doctrine of the Separation of Powers: A Re-Evaluation*, 38 AM. J. JURIS. 189, 189 (1993) ("Locke often treated judicial power as part of the executive power and that his threefold separation of legislative, executive, and federative powers does not correspond to the constitutional model which was eulogized by Montesquieu and adopted in modern constitutions to greater or lesser extents.").

64. Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561 (1989).

65. Their entitlement to engage in private practice continued until 1953. EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, BICENTENNIAL CELEBRATION OF THE UNITED STATES ATTORNEYS 1789–1989, at 3 (1989) (unpaginated document). Until 1896, the district attorneys were paid entirely by fees, rather than salary. ALBERT LANGELUTTIG, THE DEPARTMENT OF JUSTICE OF THE UNITED STATES 68 (1927).

66. Bloch, *supra* note 64, at 586.

67. *Id.*

68. *Id.*

69. *Id.* at 587–88.

70. CUMMINGS & MCFARLAND, *supra* note 57, at 147–53.

with implications for the federal fisc. Thus although, as Jed Shugerman recounts, Congress in 1797 authorized the Comptroller of the Treasury to direct district attorneys regarding suits over revenue and debts: "In practice, district attorneys were not really supervised at all. Active supervision was impossible over such long distances, with such limited transportation and communication. They also had too little work to require much attention."[71]

Concerned that this system had proved inadequate to maintain control over federal accounts, especially in the wake of the War of 1812, Congress charged the President in 1820 with designating an officer of the Treasury to direct and superintend suits for the recovery of money or property.[72] President Monroe selected for this purpose a non-lawyer, Stephen Pleasanton, the Fifth Auditor of the Treasury, who was apparently overwhelmed when district attorneys sought instructions at too great a level of detail.[73] Attorney General Wirt, who claimed no supervisory power of his own, advised Mr. Pleasanton that he was obligated to provide instructions only on when to proceed, not how.[74]

Notwithstanding this account of early ambiguity as to the nature of prosecutorial power and the persistence of independence among the early district attorneys, two points might be made for the Presidential Unilateralists. First, notwithstanding the looseness of the early federal law enforcement network, presidents did issue directions to district attorneys in some especially important cases, consistent with the vesting of executive power in the President. Second, neither the relative lack of executive supervision in practice, nor historical ambiguity about the characterization of prosecutorial power belie the facts that Congress did place prosecution in the executive branch and ultimately did consolidate supervision of the district attorneys in the Attorney General. The point remains, however, that such arguments deal only with Article II in its authorizing character, not its protective character. They may support presidential assertions of supervisory authority in the absence of congressional restraint, but say nothing about any presidential entitlement to direct prosecution in defiance of legislative limits. It is also of no small interest that, as late as 1831, the Jackson

71. Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 131–32 (2014).

72. CUMMINGS & MCFARLAND, *supra* note 57, at 143–44.

73. *Id.* at 144.

74. *Id.*

Administration thought it necessary to secure an opinion from Attorney General Roger Taney as to whether he could properly direct the district attorney in New York to discontinue a prosecution.[75]

Moreover, the constitutionally ambiguous nature of prosecutorial power still found expression in federal law even as supervisory power was eventually conferred on the Attorney General. An Act of August 2, 1861 finally provided:

> That the Attorney-General of the United States be, and he is hereby, charged with the general superintendence and direction of the attorneys and marshals of all the districts in superintendence the United States and the Territories as to the manner of discharging their respective duties; and the said district-attorneys and marshals are hereby required to report to the Attorney-General an account of their official proceedings, and the state and condition of their respective offices, in such time and manner as the Attorney-General may direct.[76]

Yet two years later, in "An Act to give greater Efficiency to the Judicial System of the United States," Congress codified a statutory role for courts in the appointment of these very officials:

> In case of a vacancy in the office of marshal or district attorney in any circuit, the judge of such circuit may fill such vacancy, and the person so appointed shall serve until an appointment shall be made by the President, and the appointee has duly qualified, and no longer.[77]

The authority of courts to appoint U.S. Attorneys in cases of vacancy remains a part of federal law today,[78] testifying to the ongoing ambiguous character of the power they exercise.

And far from rejecting the ambiguous line between executive and judicial power, the Supreme Court in 1879 both acknowledged and embraced it. In the so-called Second Enforcement Act of February 28, 1871, Congress required federal circuit court judges, on petition, to appoint federal election supervisors for any congressional election in a city or town with a population of at least 20,000 persons.[79] When five Baltimore election judges were indicted for election irregularities, they sought habeas corpus on a number of grounds, including the supposed

75. Jewels of the Princess of Orange, 2 Op. Att'y Gen 482 (1832).

76. Act of Aug. 2, 1861, ch. 37, § 1, 12 Stat. 285, 285.

77. Act of Mar. 3, 1863, ch. 93, § 2, 12 Stat. 768, 768.

78. 28 U.S.C. § 546(d) (2012).

79. Act of Feb. 28, 1871, ch. 99, § 2, 16 Stat. 433 (codified as amended at 2 U.S.C. § 9 (2000), 28 U.S.C. §§ 1357, 1442, 1446–1447, 1449–1450 (2000)).

constitutional impropriety of having election supervisors chosen by judges, rather than within the executive branch.[80] The Supreme Court rejected the argument, specifically noting the executive-judicial ambiguity:

> It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, *it would be difficult in many cases to determine to which department an office properly belonged*. Take that of marshal, for instance. He is an executive officer, whose appointment, in ordinary cases, is left to the President and Senate. But if Congress should, as it might, vest the appointment elsewhere, it would be questionable whether it should be in the President alone, in the Department of Justice, or in the courts. The marshal is pre-eminently the officer of the courts; and, in case of a vacancy, Congress has in fact passed a law bestowing the temporary appointment of the marshal upon the justice of the circuit in which the district where the vacancy occurs is situated.[81]

The precise same argument could be made with complete validity regarding judicially appointed prosecutors.

Modern-day federal law continues to respect in other important way the special judicial tie to prosecution. For example, it is the prosecution's tie to the judicial function that gives rise to the absolute immunity from civil liability in tort that prosecutors enjoy in performing their prosecutorial functions: "A United States attorney, if not a judicial officer, is at least a quasi-judicial officer, of the government. He exercises important judicial functions, and is engaged in the enforcement of the law."[82] It is on this basis that the Supreme Court has upheld not only the prosecutor's absolute immunity from tort liability, but also the extension of that liability to § 1983 suits.[83]

Additionally, federal courts retain the authority to appoint prosecutors to handle cases of criminal contempt. Explicit authority for such appointments appears in Rule 42 of the Federal Rules of Criminal Procedure,[84] but Rule 42 is rooted in what has long been recognized as the "inherent power of the judiciary to appoint disinterested private attor-

80. *Ex parte* Siebold, 100 U.S. 371, 373 (1879).

81. *Id.* at 397 (emphasis added).

82. Yaselli v. Goff, 12 F.2d 396, 404 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927). *See also* Gregoire v. Biddle, 177 F.2d 579, 580 (2d Cir. 1949).

83. Imbler v. Pachtman, 424 U.S. 409 (1976).

84. FED. R. CRIM. P. 42(a)(2).

neys as special prosecutors to pursue criminal contempt proceedings . . . when government prosecutors are unwilling or unable to perform that function."[85] Of course, enforcing the law against criminal contempt is no less "execution of the laws" than any other criminal prosecution, which is precisely why Justice Scalia denied that the judiciary has any such power.[86] But no other Justice has joined his position.

III. OPERATIONALIZING CONSTITUTIONAL AMBIGUITY

In revisiting the debate over presidential authority over prosecution, I have really made two arguments. The first is that the formalist originalism of the "original plain meaning" school is, at best, an incomplete approach to resolving the scope of such authority in a constitutionally sound manner. The second is that, if one is to take "original public meaning" seriously, meaning must be understood in historical context, which Justice Scalia, in his famous *Morrison* dissent, was unwilling to do in any serious way. Educated readers of 1789—perhaps especially educated readers of law—would have deemed the public prosecutor an ambiguous figure—perhaps a judicial officer, perhaps an admixture of judicial and executive. Our contemporary interpretive issue is what to do in the face of such ambiguity.

Looming over contemporary discussions of presidential supervision of criminal prosecution is obviously the widespread anxiety concerning the ability of Special Counsel Robert S. Mueller to complete his independent investigation of crimes committed during the 2016 presidential campaign.[87] That investigation has helped to frame two questions about the proper interpretation of Article II in its protective character. The first is whether presidents are entitled to control all criminal prosecutions personally or whether Congress's vesting of supervisory authority in the Attorney General prevents the President from issuing direct orders to the prosecutor or limits him to relying on the Attorney General to oversee the Special Counsel.[88] The second is

85. United States v. Arpaio, 906 F.3d 800, 803 (9th Cir. 2018).

86. "Prosecution of individuals who disregard court orders (except orders necessary to protect the courts' ability to function) is not an exercise of '[t]he judicial power of the United States,' U.S. Const. art. III, §§ 1, 2." Young v. United States *ex rel*. Vuitton et Fils S.A., 481 U.S. 787, 815 (1987) (Scalia, J., concurring in the judgment).

87. Christal Hayes et al., *'Trump just crossed a red line': Protesters rally nationwide in support of Mueller probe*, USA TODAY (Nov. 8, 2018), https://www.usatoday.com/story/news/politics/2018/11/08/robert-mueller-probe-protesters-nationwide-fear-donald-trump-ending-investigation/1936817002/ [https://perma.cc/YK9B-9G8B].

88. Professors Bruce Green and Rebecca Roiphe have made a further statutory argument that, in view of evolving democratic norms and the professionalization of criminal prosecution,

whether Congress may, by statute, protect a prosecutor from at-will discharge.[89] Because presidential obstruction of a criminal investigation involving the President, his family and his political associates would so obviously threaten rule-of-law values, a "living constitutionalist" might well argue that those values alone, in the present context, provide a pro-Congress, pro-checks-and-balances answer to both questions.

The first of the two questions is but one variation on the ongoing and energetic debate about presidential control over administration generally. I have written elsewhere,[90] as have others,[91] as to why Congress's assignment of duties to particular officers requires that they and not the President must finally decide how those duties are to be exercised. Presidents may pressure and cajole, to be sure, but, in the face of impasse on pure matters of policy, the President's power—if permitted by statute—is only to remove the recalcitrant officer and take the political consequences.

On the second question—Congress's authority to protect federal prosecutors from policy-based dismissals—it ought to be understood that Judge Ginsburg and the *Morrison* majority were correct. Indeed, they were correct even on originalist terms. Legislative protections for the independence of criminal prosecution should not be deemed to deprive the President of power he was granted by Article II. If the guide to our interpretive exercise is "original public meaning," then it must be recognized that no consensus existed in 1789 to classify criminal prosecution as inherently "executive power" in the American constitutional sense—certainly not in the same way as the negotiation of treaties or command of the military. Americans voting to ratify the Constitution, if told that the Executive Power Vesting Clause, by virtue of its words alone, meant that Presidents would thereafter have illimitable discretionary control over criminal prosecution, would likely be puzzled at the very least. There is nearly no discussion at all in The Federalist, for example, of criminal prosecution. Hamilton's one general reference to criminal prosecution occurs in a paper on the judici-

statutory authorization for the Attorney General's direct supervision of U.S. Attorneys should be read to imply a prohibition on presidential control of the Attorney General with regard to specific prosecutions. Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice*?, 70 ALA. L. REV. 1 (2018). This argument, though by no means frivolous, goes beyond the contours of this essay.

89. *See, e.g.*, Special Counsel Independence and Integrity Act, S. 2644, 115th Cong. (2018).

90. SHANE, *supra* note 17, at 32–42.

91. For an especially notable example, see Strauss, *supra* note 38.

ary, and his statement implies his own understanding that prosecution is a form of judicial power:

> Arbitrary impeachments, *arbitrary methods of prosecuting pretended offences*, and arbitrary punishments upon arbitrary convictions, have ever appeared to me to be the *great engines of judicial despotism*; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the habeas corpus act, seems therefore to be alone concerned in the question. And both of these are provided for, in the most ample manner, in the plan of the convention.[92]

Of course, the absence of an original consensus that criminal prosecution was inherently executive might well be deemed inconclusive as to the scope of permissible presidential supervision once Congress decided to locate criminal prosecution in the executive branch. The President is seemingly required by the Faithful Execution Clause, just as he is permitted by the Opinions Clause, to have some sort of supervisory relationship with the entire executive apparatus. The historical evidence surrounding Article II in its authorizing character is wholly consistent with this point.

But criminal prosecution is not like the negotiation of treaties or the command of our armed forces—functions that Article II itself places in presidential hands. Criminal prosecution, like environmental protection or food safety regulation, is an administrative function for which the executive branch would have no role except insofar as Congress grants such a role through its statutory enactments. Indeed, the peripheral status of the prosecutor in relation to the core of executive power is especially clear precisely because, at the time of the Founding, prosecution would have been understood to have as much of a judicial as it does an executive character. Against the actual historical background of prosecution, it is entirely faithful to original understanding to respect Congress's authority to determine the scope of presidential policy control over criminal prosecutors.

Dividing the functions of the executive branch into those that are "core" and those that are peripheral, in the sense of being unrelated to an original understanding of executive power, goes against the conventional view of the Presidential Unilateralists. It certainly does not imply that criminal prosecution or other "peripheral" administrative functions are unimportant—far from it. But it does create legitimate room for the political branches to work out appropriate protocols regarding presidential supervision of new forms of administration as they evolve.

92. THE FEDERALIST No. 83 (Alexander Hamilton) (emphasis added).

At the very least, it legitimates limitations on the President's ability to control an administrative role with which the Founders were familiar, a function that Article II, in 1789, did not require that the President be assigned.