Levin College of Law
Office of the Dean

Merritt McAlister
Interim Dean and Levin, Mabie & Levin Professor of Law

Spessard L. Holland Law Center
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Gainesville, FL 32611-7620
352-273-0600
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October 31, 2023

MEMORANDUM

TO: Full-Time Faculty, Levin College of Law

FROM: Merritt McAlister, Interim Dean

RE: Faculty Meeting Agenda, Tuesday, November 7, 2023

Our fourth Faculty Meeting of the 2023-2024 academic year will take place in the Faculty Lounge on the third floor of Holland Hall on Tuesday, November 7, 2023. The meeting will begin at noon and will end no later than 1:30 p.m.

The agenda is as follows:

1. Approve Faculty Meeting Minutes for October 24, 2023, attached (Dean McAlister)
2. Information Item: Judicial Clerkship Committee update (Christopher Hampson, chair)
3. Information Item: Faculty Council report and updates (Danaya Wright, chair)
4. Information Item: Academic Success Committee update (Sabrina Lopez, chair)
5. Information Item: Exam printing (Dean McAlister)
6. Action Item: Recommendation from Tenure Track Appointments Committee of Gary Lawson for Professor of Law. Documents supporting the appointment can be found on Canvas. (Lyrissa Lidsky, Chair)

Please note that candidate voting will take place electronically shortly after the conclusion of the meeting. Votes will be accepted until 5 pm on November 7.

If you are unable to attend, please contact Peter Molk, who will discuss available options. Otherwise, I look forward to seeing you.

UF Levin College of Law Faculty Meeting Minutes
October 24, 2023 12:00 noon

PRESENT: Derek Bambauer, Yariv Brauner, Juan Caballero, Dennis Calfee, Judy Clausen, Lisa De Sanctis, Teresa Drake, Donna Eng, Donna Erez-Navot, Barbara Evans, Mark Fenster, Ben Fernandez, Thomas Haley, Bill Hamilton, Christopher Hampson, David Hasen, Thomas Hawkins, Berta Hernandez-Truyol, Benjamin Johnson, Lea Johnston, Matthew Kim, Heather Kolinsky, Elizabeth Lear, Lyrissa Lidsky, Sabrina Lopez, Lynn Lopucki, Charlene Luke, Jonathan Marshfield, Merritt McAlister, Timothy McLendon, Jonathan Mills, Peter Molk, Lars Noah, Jane O'Connell, Joan Stearns Johnsen, Amy Stein, Stacey Steinberg, Lee-Ford Tritt, Derek Wheeler, Steven Willis, Sarah Wolking, Danaya Wright, Jennifer Zedalis, Wentong Zheng
PRESENT ON ZOOM: Rachel Arnow-Richman, Julian Cook, Jiaying Jiang, Zachary Kaufman, Michael Wolf

NOT PRESENT: Robert Rhee, Annie Brett, Neil Buchanan, Karen Burke, Charles Collier, Kristen Hardy, Mindy Herzfeld, Elizabeth Katz, Tracey Maclin, Pedro Malavet, Grayson McCouch, Silvia Menendez, Katheryn Russell-Brown, Paige Snelgro, John Stinneford

Meeting called to order at 12:01 p.m.

1. Approve Faculty Meeting Minutes for September 26, 2023
   Dean McAlister presented and faculty considered the faculty meeting minutes for September 26, 2023.
   Outcome: Minutes were approved.

2. Information Item: Faculty Meeting on November 7, 2023
   Dean McAlister announced the optional faculty meeting scheduled for November 7 will be held.
   Outcome: Information Item only.

3. Information Item: Faculty Council Report and updates (Danaya Wright)
   Professor Wright presented the Faculty Council report and updates and announced a Faculty Council brown bag luncheon on Wednesday, November 1.
   Outcome: Information item only.

4. Information Item: Report from Appointments Committee (Lyrissa Lidsky, chair)
   Professor Lidsky presented a report from the Appointments Committee and announced that candidate updates were sent in an email yesterday and that the committee will present candidates at the November 7 meeting for a vote.
   Outcome: Information item only.

5. Information Item: Recent student concerns re: conflict in the Middle East (Dean McAlister)
   Dean McAlister reported on recent student concerns related to the conflict in the Middle East and meetings with students that have been held. Faculty discussed options for addressing student concerns.
   Outcome: Information Item only.

6. Action Item: Recommendation from Adjunct Teaching Committee to approve an additional course taught by Kristofer Eisenmenger. (Lisa De Sanctis, chair)
   Professor De Sanctis presented, and faculty considered, an additional course taught by Kristofer Eisenmenger.
   Outcome: Faculty approved the recommendation.

7. Action Item: Proposal from the Curriculum Committee for permanent approval of *Health Law Survey* and *Probate & Estate Administration: Tax Considerations* courses (Charlene Luke/Donna Erez-Navot, co-chairs)
   Professor Erez-Navot presented the *Health Law Survey* class and Associate Dean Luke presented the *Probate & Estate Administration: Tax Considerations* class, and faculty considered both.
   Outcome: Faculty approved the recommendation.

8. Action Item: Joint proposal from Curriculum and International Committees relating to the U.S. Law and LL.M. program (Charlene Luke/Donna Erez-Navot/Timothy McLendon, chairs)
   Professor McLendon presented, and faculty considered, a joint proposal from Curriculum and International Committees relating to requirements for the U.S. Law and LL.M. programs.
   Outcome: Faculty approved the recommendation.

9. Action Item: Presentation from Non-Tenure Track Appointments Committee of Margie Alsbrook and Stacy Biggart for Legal Writing Skills appointments. (Sarah Wolking, chair)
   Professor Wolking presented, and faculty considered and discussed the candidates for Legal Writing Skills appointments.
   Outcome: Voting scheduled to take place by Qualtrics survey immediately following this meeting.

Meeting adjourned at 1:24 pm.

Update from the Clerkships Committee

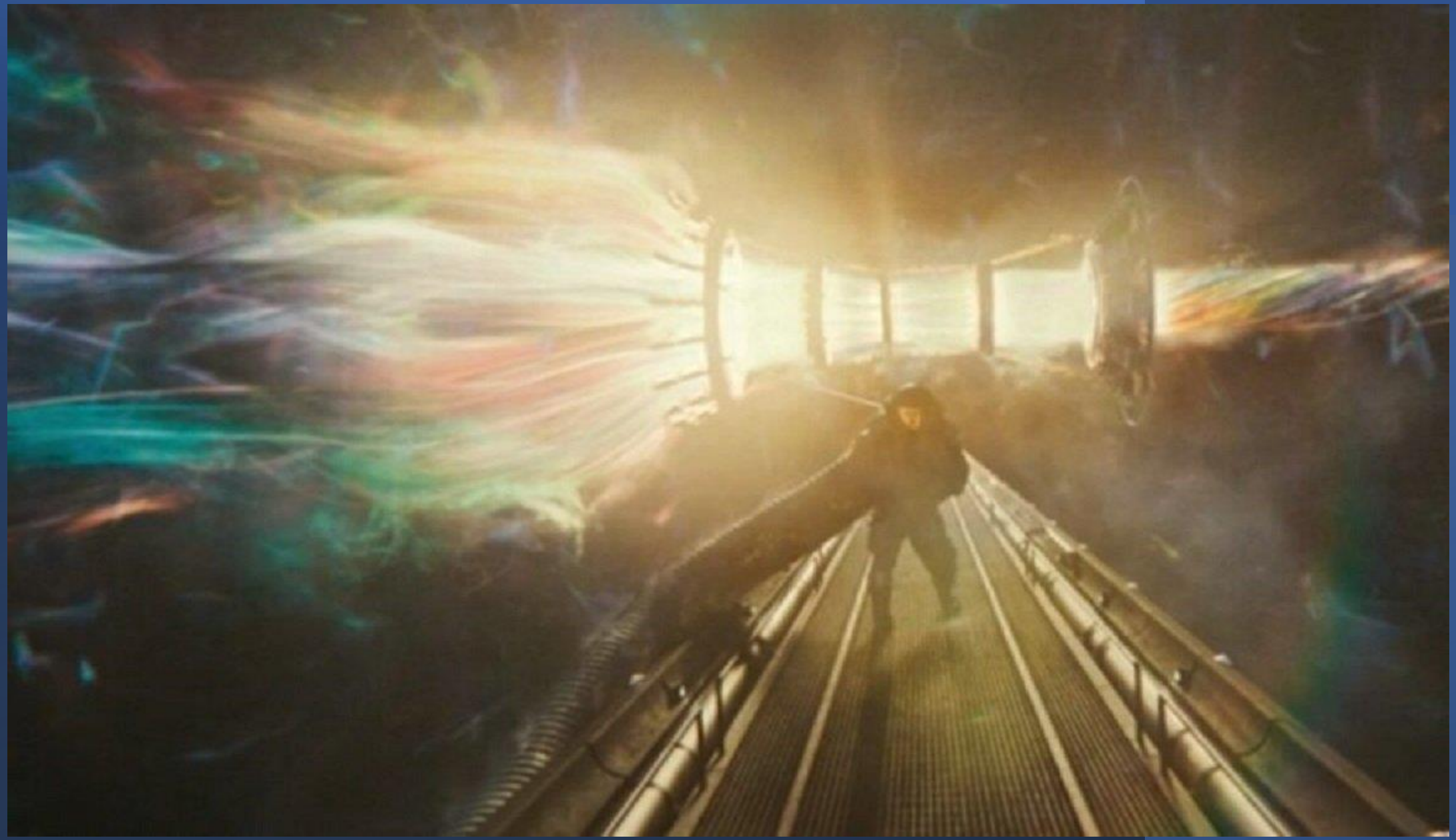
Class Year	UF Law Class Size[1]	Percent Students in Federal Clerkships[2]					
		UF	Georgia	Texas	USC	Minnesota	UNC
2020	303	1.32	12.64	12.11	2.12	4.52	8.04
2021	269	4.09	6.44	9.57	2.07	4.87	3.37
2022	217	3.69	5.73	10.38	1.89	4.26	4.76
2023	208	4.33					
2024	241	3.32					
2025	196	0.51					

[1] Class size based on ABA disclosures where available and on matriculation information for the Classes of 2023–2025.

[2] Data as of ten (10) months after graduation. These numbers are therefore final for the Classes of 2020, 2021, and 2022, but are based on internal records and are not final for the Class of 2023 and subsequent classes. The data show a percentage of students in the graduating class and do not count "stacked" clerkships twice — such as a district clerkship followed by a circuit court clerkship. The Committee is also aware of at least one student with a clerkship that begins more than one year after graduation and does not count for ABA purposes.

Biggest Challenges

- Students are attracted by the substantial entry-level salaries of big law firms ($215K + bonus).
- Students are unable or unwilling to consider clerkships outside of Florida.
- Some students have not built a strong law school resume (grades, journal experience, writing).



How to Support Students

- Students need glowing letters (and phone calls).
- The contents of the letter are up to you.
- Ways to Say No:
  - “No.”
  - “Not yet.”
  - “It depends.”
  - “I may not be the best person.”
  - “Why not chat with your clerkship mentor?”

Gary Lawson
William Fairfield Warren Distinguished Professor
Boston University School of Law

ACADEMIC RESUME

Revised 09/28/23

Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
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glawson@bu.edu

6 Willis Holden Drive
Acton, MA 01720
(978)929-2551 (home)
(978)828-3287 (cell)
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EMPLOYMENT

04/2022-present -- William Fairfield Warren Distinguished Professor, Boston University

10/2012-04/2022 -- Philip S. Beck Professor, Boston University School of Law

01/2000-09/2012 -- Professor, Boston University School of Law

09/1994-01/2000 -- Professor, Northwestern University School of Law

08/1991-09/1994 -- Associate Professor, Northwestern University School of Law

08/1988-08/1991 -- Assistant Professor, Northwestern University School of Law

08/1987-08/1988 -- John M. Olin Research Fellow, Yale Law School

10/1986-08/1987 -- Law Clerk, Justice Antonin Scalia, United States Supreme Court

10/1985-09/1986 -- Attorney-Adviser, Office of Legal Counsel, United States Department of Justice

08/1984-09/1985 -- Law Clerk, Judge Antonin Scalia, United States Court of Appeals for the District of Columbia Circuit

08/1983-06/1984 -- Associate, Ferguson & Burdell, Seattle, WA

EDUCATION

Law School: Yale Law School, New Haven, CT. J.D. received June 8, 1983

College: Claremont Men's College, Claremont, CA. B.A. in Philosophy, summa cum laude, received May 23, 1980

SCHOLARLY PUBLICATIONS

UNIVERSITY PRESS BOOKS

Deference: The Legal Concept and the Legal Practice (Oxford University Press, 2019) (with Guy I. Seidman)

"**A Great Power of Attorney": Understanding the Fiduciary Constitution** (University Press of Kansas, 2017) (with Guy I. Seidman)

Evidence of the Law: Proving Legal Claims (University of Chicago Press, 2017)

The Origins of the Necessary and Proper Clause (Cambridge University Press, 2010) (with Geoffrey P. Miller, Robert G. Natelson & Guy I. Seidman)

The Constitution of Empire: Territorial Expansion and American Legal History (Yale University Press, 2004) (with Guy I. Seidman)

TEXTBOOKS

The United States Constitution: Creation, Reconstruction, the Progressives, and the Modern Era (Foundation Press, 2020) (with Steven G. Calabresi) (and accompanying **Teachers Manual**)

Federal Administrative Law (9th ed.) (West 2022) (and accompanying **Teachers Manual**)

Federal Administrative Law (8th ed.) (West, 2019) (and accompanying **Teachers Manual**)

Federal Administrative Law (7th ed.) (West, 2016) (and accompanying **Teachers Manual**)

Federal Administrative Law (6th ed.) (West, 2013) (and accompanying **Teachers Manual**)

Federal Administrative Law (5th ed.) (West, 2009) (and accompanying **Teachers Manual**)

Federal Administrative Law (4th ed.) (Thomson/West, 2007) (and accompanying **Teachers Manual**)

Federal Administrative Law (3d ed.) (Thomson/West, 2004) (and accompanying **Teachers Manual**)

Federal Administrative Law (2d ed.) (WestGroup, 2001) (and accompanying **Teachers Manual**)

Federal Administrative Law (West Publishing Co., 1998) (and accompanying **Teachers Manual**)

ARTICLES AND BOOK CHAPTERS

Congressional Meddling in Presidential Elections: Still Unconstitutional After All These Years, -- **B.U. L. Rev. Online** – (2023) (with Jack Beermann) (forthcoming)

The Ghosts of Chevron *Present and Future,* 103 **B.U. L. Rev.** – (2023) (forthcoming)

Against the Chenery II *"Doctrine,"* 99 **Notre Dame L. Rev.** – (2023) (with Joseph Postell) (forthcoming)

Operationalizing the Unitary Executive, 91 **Fordham L. Rev.** – (2023) (forthcoming)

What McCulloch v. Maryland *Got Wrong: The Original Meaning of "Necessary" Is Not "Useful," "Convenient," or "Rational,"* 75 **Baylor L. Rev.** 1 (2023) (with Steven G. Calabresi & Elise Kostial)

Equivocal Originalism, 27 **Tex. Rev L. & Politics** 309 (2022)

Are People in Federal Territories Part of "We the People of the United States"?, 9 **Tex. A & M L. Rev.** 655 (2022) (with Guy Seidman)

The Electoral Count Act of 1877 Is Unconstitutional, and Other Fun Facts (Plus a Few Random Academic Speculations) about Counting Electoral Votes, 15 **Fla. Int'l U. L. Rev.** 297 (2022) (with Jack Beermann)

A Private-Law Framework for Subdelegation, in **The Administrative State before the Supreme Court: Perspectives on the Nondelegation Doctrine** (Peter J. Wallison & John Yoo, eds., 2022)

The Epistemology of Second Best, 100 **Tex. L. Rev.** 749 (2022)

What Is "United" about the United States?, 101 **B.U. L. Rev.** 1793 (2021)

(Hypothetical) Communication in (Hypothetical) Context, 23 **J. Contemp. Legal Issues** 139 (2021)

Deep Tracks: Album Cuts that Help Define The Essential Scalia, 15 **N.Y.U. J. L. & Liberty** 169 (2021)

The Fiduciary Social Contract, 38 **Social Phil. & Pol'y** 25 (2021)

"I'm Leavin' It (All) Up to You": Gundy v. United States *and the (Almost) Resurrection of the Subdelegation Doctrine*, 2019 **Cato Sup. Ct. Rev.** 31

Gundy v. United States, *in* **Scotus 2019** (David Klein & Morgan Marietta eds., 2019)

Why Robert Mueller's Appointment as Special Counsel Was Unlawful, 95 **Notre Dame L. Rev.** 87 (2019) (with Steven G. Calabresi)

An Enquiry Concerning Constitutional Understanding, 17 **Geo. J.L. & Pub. Pol'y** 491 (2019) (with Guy Seidman)

The Depravity of the 1930s and the Administrative State, 94 **Notre Dame L. Rev.** 821 (2018) (with Steven G. Calabresi)

Appointments and Illegal Adjudication: The AIA through a Constitutional Lens, 26 **Geo. Mason L. Rev.** 26 (2018)

Deference and National Courts in the Age of Globalization: Learning, Applying, and Deferring to Foreign Law, *in* 2 ***Ius Dicere*** **in a Globalized World** 431 (Chiara Antonia d'Allesandro & Claudio Marchese, eds. 2018) (with Guy Seidman)

Representative/Senator Trump?, 21 **Chapman L. Rev.** 111 (2018)

By Any Other Name: Rational Basis Inquiry and the Federal Government's Fiduciary Duty of Care, 69 **Fla. L. Rev.** 1385 (2018) (with Guy Seidman)

Take the Fifth . . . Please! The Original Insignificance of the Fifth Amendment's Due Process of Law Clause,

2017 **B.Y.U. L. Rev.** 611

Confronting Crawford: *Justice Scalia, the Judicial Method, and the Adjudicative Limits of Originalism*, 84 **U. Chi. L. Rev.** 2265 (2017)

Did Justice Scalia Have a Theory of Interpretation?, 92 **Notre Dame L. Rev.** 2143 (2017)

Original Foreign Affairs Federalism, 97 **B.U. L. Rev.** 301 (2017)

Reflections of an Empirical Reader (Or, Could Fleming Be Right This Time?), 96 **B.U. L. Rev.** 1457 (2016)

Time, Institutions, and Adjudication, 95 **B.U. L. Rev.** 1793 (2016)

Inigo Montoya Goes to War, 95 **B.U. L. Rev.** 1355 (2015)

Understanding State Constitutions: Locke and Key, 93 **Tex. L. Rev. See Also** 203 (2015)

The Return of the King: The Unsavory Origins of Administrative Law, 93 **Tex. L. Rev.** 1521 (2015)

The Rule of Law as a Law of Law, 90 **Notre Dame L. Rev.** 483 (2015) (with Steven G. Calabresi)

Classical Liberal Constitution or Classical Liberal Construction?, 8 **N.Y.U. J. L. & Liberty** 808 (2014)

One(?) Nation Over-Extended, 94 **B.U. L. Rev.** 1109 (2014)

The Fiduciary Foundations of Federal Equal Protection, 94 **B.U. L. Rev.** 415 (2014) (with Robert G. Natelson & Guy Seidman)

Originalism without Obligation, 93 **B.U. L. Rev.** 1309 (2013)

Making Law Out of Nothing at All: The Origins of the Chevron *Doctrine,* 65 **Admin. L. Rev.** 1 (2013) (with Stephen Kam)

Night of the Living Dead Hand: The Individual Mandate and the Zombie Constitution, 81 **Fordham L. Rev.** 1699 (2013)

No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory, 64 **Fla. L. Rev.** 1551 (2012)

Dead Document Walking, 92 **B.U. L. Rev.** 1225 (2012)

The PPACA in Wonderland, 38 **Am. J. L & Med.** 269 (2012) (with David B. Kopel)

Bad News for John Marshall, 121 **Yale L.J. Online** 529 (2012) (with David B. Kopel)

Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate, 121 **Yale L.J. Online** 267 (2011) (with David B. Kopel)

Rebel without a Clause: The Irrelevance of Article VI to Constitutional Supremacy, 110 **Mich. L. Rev. First Impressions** 33 (2011)

Optimal Specificity in the Law of Separation of Powers: The Numerous Clauses Principle, 124 **Harv. L. Rev. Online Forum** 42 (2011)

Truth, Justice, and the Libertarian Way(s), 91 **B.U. L. Rev.** 1347 (2011)

The American Experience with Territorial Governance, in **EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis** 417 (Dimitry Kochenov ed., 2011) (with Guy Seidman)

Stipulating the Law, 109 **Mich. L. Rev.** 1191 (2011)

Burying the Constitution under a TARP, 33 **Harv. J. L. & Pub. Pol'y** 55 (2010)

It Depends, 62 **Vand. L. Rev. En Banc** 139 (2009)

The "Principal" Reason Why the PCAOB Is Unconstitutional, 62 **Vand. L. Rev. En Banc** 73 (2009)

The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered, 50 **B.C. L. Rev.** 1123 (2009) (with Robert D. Sloane)

*The Constitution's Congress***,** 89 **B.U. L. Rev.** 399 (2009)

Dirty Dancing -- The FDA Stumbles with the Chevron *Two-Step,* 93 **Cornell L. Rev.** 927 (2008)

What Lurks Beneath: NSA Surveillance and Executive Power, 88 **B.U. L. Rev.** 375 (2008)

A Truism with Attitude: The Tenth Amendment in Constitutional Context, 83 **Notre Dame L. Rev.** 469 (2008)

The Unitary Executive, Jurisdiction Stripping, and the Hamdan *Opinions: A Textualist Response to Justice Scalia,* 107 **Colum. L. Rev.** 1002 (2007) (with Steven G. Calabresi)

Reprocessing Vermont Yankee, 75 **Geo. Wash. L. Rev.** 856 (2007) (with Jack M. Beermann)

Mostly Unconstitutional: The Case Against Precedent Revisited, 5 **Ave Maria L. Rev.** 1 (2007)

Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis, 87 **B.U. L. Rev.** 289 (2007)

Originalism as a Legal Enterprise, 23 **Const. Commentary** 47 (2006) (with Guy Seidman)

The Jeffersonian Treaty Clause, 2006 **U. Ill. L. Rev.** 1 (with Guy Seidman)

"Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the Penn Central *and* Mathews v. Eldridge *Frameworks,* 81 **Notre Dame L. Rev.** 1 (2005) (with Katharine A. Ferguson & Guillermo Montero)

The Original "Incorporation" Debate, in **The Louisiana Purchase and American Expansion, 1803-1898** (Sanford Levinson & Bartholomew H. Sparrow eds., 2005) (with Guy Seidman)

Prolegomenon to Any Future Administrative Law Course: Separation of Powers and the Transcendental Deduction, 49 **St. Louis U. L. Rev.** 885 (2005)

Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas under the Orders, Resolutions, and Votes Clause, 83 **Tex. L. Rev.** 1373 (2005)

Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine, 73 **Geo. Wash. L. Rev.** 235 (2005)

Making a Federal Case Out of It: Sabri v. United States *and the Constitution of Leviathan,* 2003-2004 **Cato Sup. Ct. Rev.** 119

Making Workshops Work, 54 **J. Leg. Education** 302 (2004)

Who's the Boss? Controlling Auditor Incentives through Random Selection, 53 **Emory L. J.** 391 (2004) (with David B. Kahn)

Interpretative Equality as a Structural Imperative (or "Pucker Up and Settle This!"), 20 **Const. Commentary** 379 (2003)

The First "Establishment" Clause: Article VII and the Post-Constitutional Confederation, 78 **Notre Dame L. Rev.** 83 (2002) (with Guy Seidman)

Conservative or Constitutionalist?, 1 **Geo. J. L. & Pub. Pol'y** 81 (2002)

Delegation and Original Meaning, 88 **Va. L. Rev.** 327 (2002)

When Did the Constitution Become Law?, 77 **Notre Dame L. Rev.** 1 (2001) (with Guy Seidman)

Controlling Precedent: Congressional Regulation of Judicial Decision-Making, 18 **Const. Commentary** 191 (2001)

The Hobbesian Constitution: Governing without Authority, 95 **Nw. U. L. Rev.** 581 (2001) (with Guy Seidman)

Everything I Need to Know About Presidents I Learned from Dr. Seuss, 24 **Harv. J. L. & Pub. Pol'y** 381 (2001)

Taking Notes: Subpoenas and Just Compensation, 66 **U. Chi. L. Rev.** 1081 (1999) (with Guy Seidman)

Downsizing the Right to Petition, 93 **Nw. U. L. Rev.** 739 (1999) (with Guy Seidman)

The Bill of Rights as an Exclamation Point, 33 **U. Richmond L. Rev.** 511 (1999)

Reconceptualizing Chevron *and Discretion: A Comment on Levin and Rubin,* 72 **Chi.-Kent L. Rev.** 1377 (1997)

A Farewell to Principles, 82 **Iowa L. Rev.** 893 (1997)

On Reading Recipes . . . and Constitutions, 85 **Geo. L. Rev.** 1823 (1997)

The Executive Power of Constitutional Interpretation, 81 **Iowa L. Rev.** 1267 (1996) (with Christopher D. Moore)

Outcome, Procedure, and Process: Agency Duties of Explanation for Legal Conclusions, 48 **Rutgers L. Rev.** 313 (1996)

Legal Indeterminacy: Its Cause and Cure, 19 **Harv. J. L. & Pub. Pol'y** 411 (1996)

Who Legislates?, 1995 **Public Interest L. Rev.** 147 (reviewing **David Schoenbrod, Power Without Responsibility** (1993))

Linguistics and Legal Epistemology: Why the Law Pays Less Attention to Linguists than It Should, 73 **Wash. U. L. Q.** 995 (1995)

Feminist Legal Theories, 18 **Harv. J. L. & Pub. Pol'y** 325 (1994)

Proving Ownership, 11 **Social Phil. & Pol'y** 139 (1994)

The Rise and Rise of the Administrative State, 107 **Harv. L. Rev.** 1231 (1994)

The Constitutional Case Against Precedent, 17 **Harv. J. L. & Pub. Pol'y** 23 (1994)

The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 **Duke L. J.** 267 (1993) (with Patricia B. Granger)

Thayer Versus Marshall, 88 **Nw. U. L. Rev.** 221 (1993)

Foreword: Two Visions of the Nature of Man, 16 **Harv. J. L. & Pub. Pol'y** 1 (1993) (with Steven G. Calabresi)

Panel: Congress, the Courts, and the Bill of Rights, 23 **Cumberland L. Rev.** 103 (1992-93)

Efficiency and Individualism, 42 **Duke L. J.** 53 (1992)

Equity and Hierarchy: Reflections on the Harris Execution, 102 **Yale L. J.** 255 (1992) (with Steven G. Calabresi)

Proving the Law, 86 **Nw. U. L. Rev.** 859 (1992)

Foreword: The Constitution of Responsibility, 77 **Cornell L. Rev.** 955 (1992) (with Steven G. Calabresi)

An Interpretivist Agenda, 15 **Harv. J. L. & Pub. Pol'y** 157 (1992)

A Tale of Two Professions: The Third-Party Liability of Accountants and Attorneys for Negligent Misrepresentation, 52 **Ohio St. L. J.** 1309 (1991) (with Tamara Mattison)

Introduction: Prospects for the Rule of Law, 21 **Cumberland L. Rev.** 427 (1990-91) (with Steven G. Calabresi)

Territorial Governments and the Limits of Formalism, 78 **Cal. L. Rev.** 853 (1990)

AIDS, Astrology, and Arline: *Towards a Causal Interpretation of Section 504,* 17 **Hofstra L. Rev.** 237 (1989)

In Praise of Woodenness, 11 **Geo. Mason U. L. Rev.** 21 (1988)

The Ethics of Insider Trading, 11 **Harv. J. L. & Pub. Pol'y** 727 (1988)

OTHER PUBLICATIONS

Comment on Brewer: Form and Content in Legal Proof (or Why Everybody Wins – or at Least Gets a Participation Trophy), 97 **B.U. L. Rev.** 2321 (2017)

On Getting It Right: Remembering Justice Antonin Scalia, 96 **B.U. L. Rev.** 299 (2016)

Legislative Vesting Clause, in **The Heritage Guide to the Constitution** 55 (Rev. 2d. ed.) (David F. Forte & Matthew Spalding eds. 2014)

Necessary and Proper Clause, in **The Heritage Guide to the Constitution** 189 (Rev. 2d. ed.) (David F. Forte & Matthew Spalding eds. 2014) (with David E. Engdahl)

A Note on Non-Article III Courts, in **The Heritage Guide to the Constitution** 312 (Rev. 2d. ed.) (David F. Forte & Matthew Spalding eds. 2014) (with Loren Smith)

Territories Clause, in **The Heritage Guide to the Constitution** 360 (Rev. 2d. ed.) (David F. Forte & Matthew Spalding eds. 2014)

Supremacy Clause, in **The Heritage Guide to the Constitution** 381 (Rev. 2d. ed.) (David F. Forte & Matthew Spalding eds. 2014)

Due Process Clause, in **The Heritage Guide to the Constitution** 439 (Rev. 2d. ed.) (David F. Forte & Matthew Spalding eds. 2014)

Deference to Whom?, **Online Library of Law and Liberty,** Aug. 1, 2013 (available at http://www.libertylawsite.org/liberty-forum/deference-to-whom)

*Reviving Formal Rulemaking: Openness and Accountability for Obamacare***, Backgrounder** No. 2585, July 25, 2011 (available at http://report.heritage.org/bg2585)

Limited Government, Unlimited Administration: Is It Possible to Restore Constitutionalism?, **Heritage First Principles Series** No. 23 (2009)

Due Process Clause, in **The Heritage Guide to the Constitution** 337 (Edwin Meese III, Matthew Spalding & David Forte ed. 2005)

Supremacy Clause, in **The Heritage Guide to the Constitution** 291 (Edwin Meese III, Matthew Spalding &

David Forte ed. 2005)

A Note on Non-Article III Courts, in **The Heritage Guide to the Constitution** 239 (Edwin Meese III, Matthew Spalding & David Forte eds. 2005) (with Loren Smith)

An Empirical Test of Justice Scalia's Commitment to the Rule of Law, 26 **Harv. J. L. & Pub. Pol'y** 803 (2003)

Casey at the Court, 17 **Const. Commentary** 161 (2000)

Delegation and the Constitution, 22 **Regulation** 23 (1999)

Book Review, **The Federalist Paper**, July 1994 (reviewing **Michael J. Perry, The Constitution in the Courts: Law or Politics?** (1994))

Everyday People, **A.B.A. J.**, December 1992, at 113 (reviewing **Joseph Goldstein, The Intelligible Constitution** (1992))

An Abuse of Authority, **A.B.A. J.**, November 1991, at 44

Caveat Auditor: The Rise of Accountants' Liability, **Claims**, Apr. 1990, at 34 (with Walter K. Olson)

Antitrust: Fear of Fairness, **Regulation**, Nov./Dec. 1985, at 5

Insider Trading As Victimless Crime, **Regulation**, May/June 1985, at 8

A Truce in the Takeover Wars?, **Regulation**, Mar./Apr. 1985, at 4

SCHOLARSHIP METRICS

HeinOnline ScholarRank Top 250 -- #117
Google Scholar citations – 7,585
Google Scholar h-index – 41
Google Scholar i10 index – 79
WESTLAW citations – 3455
Citations in United States Supreme Court Justice opinions -- 21

NON-ACADEMIC POSITIONS

Director, Federalist Society for Law and Public Policy Studies

Advisory Board, New Civil Liberties Alliance

Advisory Board, Center for the Study of the Administrative State

Associate Editor, **The Heritage Guide to the Constitution** (Rev. 3d ed.) (Josh Blackman & John Malcolm eds. ----) (forthcoming)

Associate Editor, **The Heritage Guide to the Constitution** (Rev. 2d ed.) (David F. Forte & Matthew Spalding eds., 2014)

Associate Editor, **The Heritage Guide to the Constitution** (Edwin Meese III, Matthew Spalding & David Forte eds., 2005)

TEACHING AWARDS

Mark Pettit Teaching Award, 2021-22

Metcalf Prize, Boston University, 2016-17

Michael Melton Memorial Award for Teaching Excellence, Boston University School of Law, 2014-15

Dean's Teaching Award, Northwestern University School of Law, 1997-98

Best First-Year Teacher, Northwestern University School of Law, 1995-96

Robert Childres Memorial Award for Teaching Excellence, Northwestern University School of Law, 1992-93

MAJOR ADMINISTRATIVE POSITIONS

Associate Dean for Intellectual Life, Boston University School of Law 2008-10, 2021-24

Chair, Faculty Appointments Committee, Boston University School of Law 2001-03

Director of Research, Northwestern University School of Law 1995-99

COURSES TAUGHT

Administrative Law (1988-2017, 2021-2023)
Evidence (2011-2023)
Property (1989-2023)

Advanced Administrative Law (1989-2009)
Corporations for LLMs (2017-2018)
Food and Drug Law (2005)
Future Interests (1993)
Securities Regulation (1989)

From: Lidsky,Lyrissa
To: McIlhenny, Ruth M.
Subject: FW: Request for reference for Prof. Gary Lawson
Date: Wednesday, November 1, 2023 11:48:46 AM

Raymond & Miriam Ehrlich Chair in U.S. Constitutional Law
UF Levin College of Law
352-273-0717

From: Ethan J Leib <eleib1@fordham.edu>
Sent: Wednesday, November 1, 2023 11:44 AM
To: Lidsky,Lyrissa <lidsky@law.ufl.edu>
Subject: RE: Request for reference for Prof. Gary Lawson

[External Email]

Gary Lawson is a gem. His work over decades has been as prescient as it has been provocative. It is also full of insight and integrity. He stakes out positions that are sometimes counterintuitive but they always demand careful consideration. Take, for example, his recent piece in the *Fordham Law Review*, "Command and Control." Unlike many unitary executive theorists who focus attention on the removal authority of the president, Lawson instead invites us to consider that the president has a constitutional power to nullify or veto actions of subordinates. That, he argues, is the only way to ensure all decisions are traceable back to the executive; under the removal power, by contrast, the decisions stand even if the subordinate goes. This idea is breath-taking in its implications. I won't bore you to explain why it also has to be wrong! But Lawson commands that we take it seriously and has been gently and thoughtfully making constitutional and administrative lawyers on the right and left alike rethink their ideas and refine their own arguments .

I probably know best his work on "fiduciary constitutionalism"—work he sometimes co-authors with Guy Seidman and Robert Natelson—that aims to trace some private law ideas within the American constitutional project. I've written some in response to it in various journals and I have lots of intramural critiques of it here and there. But most important as you think about onboarding Gary Lawson into your intellectual community is that Professor Lawson is a charitable and generous reader, who takes seriously the ideas of others as he engages them. He tries his best to reconstruct others' views without caricaturing them and is a good listener in symposia, as others' aim to find pressure points in his own work. He speaks and writes extremely clearly and will be a huge asset to student and colleague alike.

Let me know if you have any questions.

Ethan

Ethan J Leib
John D Calamari Distinguished Professor of Law
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From: Lidsky,Lyrissa [mailto:lidsky@law.ufl.edu]
Sent: Wednesday, November 1, 2023 8:02 AM
To: eleib1@law.fordham.edu
Subject: Request for reference for Prof. Gary Lawson

Dear Professor Leib,

Professor Gary Lawson has interviewed for a faculty position at the University of Florida Levin College of Law. As Chair of the Appointments Committee, I am gathering the required references to inform our faculty's hiring decision. Would you kindly provide us with your assessment of Professor Lawson's contributions as a scholar? I know you have previously reviewed one of his books. You may simply respond to this email, or I'm happy to call you at your convenience.

Best regards,

Lyrissa Lidsky

Raymond & Miriam Ehrlich Chair in U.S. Constitutional Law
UF Levin College of Law
352-273-0717

From: Lidsky,Lyrissa
To: McIlhenny, Ruth M.
Subject: Fwd: Request for reference
Date: Thursday, November 2, 2023 6:41:01 AM

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From: Mike Rappaport <mrappaport@gmail.com>
Sent: Wednesday, November 1, 2023 7:28:18 PM
To: Lidsky,Lyrissa <lidsky@law.ufl.edu>
Subject: Re: Request for reference

[External Email]

I have known Lawson since law school. I have not had the pleasure of being his colleague, but I can say that he is a very nice and pleasant person, although a bit eccentric.

His scholarship is at the highest level. Within originalism, he is a giant -- making many important innovations and discoveries. His work is both reasonable as well as innovative. He is one of our strongest originalist scholars.

His scholarship on administrative law is also quite significant. Again, he has made many important significant contributions.

He is both productive, original, and reliable. I don't always agree with him but I always learn from him.

He would deserve appointment at any law faculty in the country!

Mike

On Wed, Nov 1, 2023 at 4:56 AM Lidsky,Lyrissa <lidsky@law.ufl.edu> wrote:

> Dear Professor Rappaport,
>
> As I believe you know, Professor Gary Lawson has interviewed for a faculty position at the University of Florida Levin College of Law. As Chair of the Appointments Committee, I am gathering the required references to inform our faculty's hiring decision. Would you kindly provide us with your assessment of Professor Lawson's contributions as a scholar, teacher, and colleague? You may simply respond to this email, or I'm happy to call you at your convenience.
>
> I sincerely hope we can convince Professor Lawson to join us at UF Law.

Best regards,

Lyrissa Lidsky

Raymond & Miriam Ehrlich Chair in U.S. Constitutional Law

UF Levin College of Law

352-273-0717

--

Michael Rappaport
Hugh & Hazel Darling Foundation
Professor of Law
University of San Diego

Director, Center for the Study of
Constitutional Originalism

619-260-2329

From: Lidsky,Lyrissa
To: McIlhenny, Ruth M.
Subject: Fwd: Reference request for Gary Lawson (with typo corrected)
Date: Thursday, November 2, 2023 1:52:24 PM

Get Outlook for iOS

From: Steven G Calabresi <s-calabresi@law.northwestern.edu>
Sent: Thursday, November 2, 2023 1:43:08 PM
To: Lidsky,Lyrissa <lidsky@law.ufl.edu>
Subject: Re: Reference request for Gary Lawson (with typo corrected)

[External Email]

Dear Lyrissa:

Gary Lawson is the most talented, productive school in U.S. constitutional law today1 I would enthusiastically vote to hire him at any law school!

Best,

Steve

From: Lidsky,Lyrissa <lidsky@law.ufl.edu>
Sent: Wednesday, November 1, 2023 6:57 AM
To: Steven G Calabresi <s-calabresi@law.northwestern.edu>
Subject: FW: Reference request for Gary Lawson (with typo corrected)

Dear Professor Calabresi,

As I believe you know, Professor Gary Lawson has interviewed for a faculty position at the University of Florida Levin College of Law. As Chair of the Appointments Committee, I am gathering the required references to inform our faculty's hiring decision. Would you kindly provide us with your assessment of Professor Lawson's contributions as a scholar, teacher, and colleague? You may simply respond to this email, or I'm happy to call you at your convenience.

I sincerely hope we can convince Professor Lawson to join us at UF Law.

Best regards,

Lyrissa Lidsky

Raymond & Miriam Ehrlich Chair in U.S. Constitutional Law
UF Levin College of Law
352-273-0717

From: Lidsky,Lyrissa
Sent: Tuesday, October 31, 2023 8:22 PM
To: s-calabresi@law.northwestern.edu
Subject: Reference request for Gary Lawson

Dear Professor Calabresi,

As I believe you know, Professor Gary Lawson has interviewed for a faculty position at the University of Florida Levin College of Law. As Chair of the Appointments Commitee, I am gathering the required references to inform our faculty's hiring decision. Would you kindly provide us with your assessment of Professor Lawson's contributions as a scholar, teacher, and colleague? You may simply respond to this email, or I'm happy to call you at your convenience.

I sincerely hope we can convince Professor Lawson to join us at UF Law.

Best regards,

Lyrissa Lidsky

From: McIlhenny, Ruth M.
To: McIlhenny, Ruth M.
Subject: FW: Akhil Amar Reference for Proctor and Lawson
Date: Friday, November 3, 2023 2:34:26 PM

From: Lidsky,Lyrissa <lidsky@law.ufl.edu>
Sent: Friday, November 3, 2023 2:33 PM
To: LUKE,CHARLENE <lukec@law.ufl.edu>; Bambauer, Derek <bambauer@law.ufl.edu>; Marshfield, Jonathan <marshfield@law.ufl.edu>; Stein,Amy L. <stein@law.ufl.edu>; McAlister,Merritt Ellen <mcalister@law.ufl.edu>
Cc: McIlhenny, Ruth M. <ruthm@law.ufl.edu>
Subject: Akhil Amar Reference for Lawson

Gary Lawson had mentioned that I could reach out to Akhil Amar. In the meantime, I thought I'd relay what he said.

Re Lawson:

He is an asset, and we would be proud to have him on the faculty. He's among the 10 most cited faculty by the current Supreme Court. Akhil just filed a brief "opposite him" and Calabresi in the Supreme Court. He's a "player" and has good substance even though Akhil doesn't always agree with his methodology. He's a "genuine intellectual."

Lyrissa

Raymond & Miriam Ehrlich Chair in U.S. Constitutional Law
UF Levin College of Law
352-273-0717

Your Name	Candidate Name	Did you meet with the candidate at a small group faculty interview or in another setting, such as lunch or dinner?	Did you see the candidate's job talk?	Did you read the candidate's paper?	What is your overall impression of the candidate?	What are the candidate's strengths?	What are the candidate's weaknesses?	Please add any other comments you would like to share.
John L Badalamenti	Gary Lawson	Yes	No	Yes	He's a brilliant, articulate, and easy to get along with person. He is an academic leader in both administrative and constitutional law but teaches property, evidence, and any other classes a law school needs. He enjoys all subjects. His research and writing are vast and plentiful.	He will be a publication machine for us. Heâ€™s well connected with many federal appellate judges and Supreme Court justices, which may open up clerkship opportunities for our students. He is humble and simply wants to get things right.	I honestly do not see any.	I spent a lot of time getting to know Prof. Lawson. He could have his pick on law schools. He deliberately applied to our law school and no others. That tells me he wants to be here. He will not move around. This would be his last stop before retirement, which is at least a decade away.
Lynn LoPucki	Gary Lawson	Yes	No		Favorable	He is a very prolific scholar with a strong, national reputation. We would be taking one of the top scholars from a school above us in the rankings.	I did not observe any.	
Chris Hampson	Gary Lawson	Yes	Yes	Yes	Gary would be a "splash hire." He is a distinguished scholar and award-winning teacher with a long track record of influence in the academy. One doesn't have to be part of his school of thought to recognize his accomplishments.	Gary's scholarship has had a pronounced influence on the legal academy over the years. He is open about his prior commitments, unlike other scholars who may bury them, and very clear in his writing about what interpretive methods he wishes to engage with. He is also a committed teacher and I think would contribute to UF Law through service in humble and effective ways.	I have my own objections to Gary's scholarly project, both theoretical and methodological, but those aren't weaknesses of Gary as a candidate. I think Gary can feel a little inaccessible at first, but having gotten to know him over dinner, I think he is a kind and humble teacher and our students would appreciate having him here.	Thank you to the Committee!

Name of Candidate	Please write a general assessment of the candidate. Some of the inform	What are the candidate's strengths?	What are the candidate's weaknesses?	Please write any other thoughts or comments about the candidate.
Gary Lawson	Generally, I really liked Professor Lawson. Student Interactions: He seemed to seek out our insights and genuinely want to know our opinions. However, I did feel that he talked over me sometimes and was a bit resistant when I ever attempted to change topics. Interest: He seemed very interested. I think UF is his only choice at the moment. He seemed to be interviewing US more than us interviewing HIM. If he liked the school, I can see him coming here. Thoughtfulness: He was very open about his personality, teaching style, and priorities. I enjoyed it. He was refreshing to speak to because of his openness. Relatability: He is part of the Federalist Society, and is open about this, but it is not his end-all be-all. He was open about his interest in intellectual debate and curiosity. He seemed to like debating more than anything else. Teaching: He said he didn't cold call and was the opposite of Prof. Maclin (which made me laugh). I think the two would compliment each other as professors in the same semester for 1Ls.	Very level-headed, open, and smart. He seemed to care about student success. H	I could tell he had an ego, but most professors do.	He seemed most interested in intellectual diversity. He wanted to know if people could have different opinions and still get along. He was also interested in how UF law handles intellectual diversity. I may disagree with his interpretations, but I liked his approach and ability to find common ground. I think it is important for students to have professors they may disagree with.
Gary Lawson	Overall I think this candidate is the perfect hire for UF Law. I like his teaching style, his candor, his commitment to intellectualism and freedom of thought/viewpoints, he was completely interested in UF Law (stating that if he were to leave Boston College that UF is the only place that he would go to), and we had such a good time with him that we went over the alloted time slot dedicated to interviewing him.	I liked his willingness to teach whatever is needed from him. He stated that he has taught evidence and corporations even though those were not his specialized or interest areas per se, but the school needed him to teach those subjects, so he taught them and ended up enjoying those areas. I liked that even though he and I may not necessarily see eye to eye on contemporary issues, but we were able to easily look past those differences and dicuss robust intellectual arguments. He seems to be looking for a place that UF does excel in, which is trying to foster intellectual debates and somewhere that favors have a bit more of a neutral/moderate view on hot topic/hot button issues. I think he would be a good professor for those with learning disabilities or not necessarily representative of the traditional law student. As someone with autism, he could be a great resource for students who either have that condition or perhaps have social anxieties or the like. I appreciated his candor throughout the interview process - he didn't try to hide the ball on who he was, how he taught, his interests, and what he was looking for - to me, all great qualities for a professor. He had this curiosity about life at UF that other candidates I've interviewed didn't have - he wanted to know everything he could about the campus. He also had a very good conversation style, and something of note that I liked was that he likes teaching large classes which was a bit unusual for me (in a good way).	Honestly, this particular candidate I didn't really have much in terms of weaknesses for him.	Overall, I really liked him, and I think he would be a great fit for the law school.
Gary Lawson	perceived interest level: medium. His spouse considers living in Florida and UF is allegedly the only school he is interested in teaching at in Florida. Potential teaching style: No cold calls, heavy on lecturing thoughtfulness: Yes. The candidate cares very much about intellectual freedom and especially that people don't take personally different views of others. Also that students and faculty are not habitually hostile when there are disagreements.	The candidate loves to speak meanwhile he does not put himself on a higher grou	Slight autism according to the candidate's own admission.	Cool to be in a room with! Never came across as intimidating despite having taught 1L property.

UF UNIVERSITY of FLORIDA
Levin College of Law

Spessard L. Holland Law Center
PO Box 117625
Gainesville, FL 32611-7625
352-273-0959 Phone
352-392-3005 Fax

To: Lyrissa Lidsky, Appointments Committee Chair

From: John Stinneford

Date: November 3, 2023

Re: Gary Lawson, *Command and Control: Operationalizing the Unitary Executive*

You have asked me to review the draft article referenced above in order to assess whether Professor Lawson meets our standards to be appointed to the faculty as an endowed chair with tenure. Professor Lawson's overall scholarly record, in and of itself, more than justifies such an appointment. As the Boston University web site states, he has authored or co-authored more than 100 scholarly articles, 5 books with academic presses, and casebooks in both constitutional law and administrative law. His work has been cited 19 times by justices of the Supreme Court of the United States, and nearly 4000 times by other scholars (per HeinOnline). In short, he is one of the most influential legal scholars of his generation. I have personally found his work to be powerful, and it has influenced me, although I often disagree with some or all his conclusions.

"Command and Control" demonstrates the continued power of Lawson's work and amply justifies hiring him as an endowed chair with tenure – although I disagree with aspects of his methodology and with some of his conclusions. Lawson is an advocate of the "unitary executive" theory of Presidential power under the United States Constitution. The unitary executive theory holds that all executive power is personally vested in the President. This theory is based primarily on the "vesting clause" of Article II section 1, which states: "The executive Power shall be vested in a President of the United States of America." It is also based on the "take care" clause of Article II section 3, which states: "[H]e shall take Care that the Laws be faithfully executed." This language implies that the President, and the President alone, has both the power and the duty to exercise all executive power. This argument is simple and powerful, but both constitutional text and history raise questions about it as a comprehensive theory of presidential authority.

First, what is "executive power" and how extensive is it? Is it simply the power (and duty) to make sure that Congress's policies are effectuated, or does it devolve broad policymaking authority on the President himself or herself? Article II grants several specific powers to the President – for example, the Commander in Chief Power and the Pardon Power – that would seem to be superfluous if the executive power itself were broad and all-encompassing.

A second question – and one more directly related to the topic discussed in "Command and Control" – concerns the relationship between the President and subordinate executive branch officials. Proponents of the unitary executive theory, including Professor Lawson, hold that the

President must have control over such officials because the Constitution gives the President, and the President alone, both the executive power and the duty to take care that the laws be faithfully executed. But certain aspects of the constitutional text raise questions about this. Article I section 8 gives Congress the authority to "To make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Article II section 2 subjects the President's power of appointing both principal and inferior officers to congressional regulation and makes clear that the President (unlike the British king) has no authority to create offices. Rather, all offices not created directly by the Constitution "shall be established by Law." If Congress has the power to create offices, to regulate the appointment of officers, and to make all laws "necessary and proper" for carrying the executive power into effect, it would seem to have the authority to define the duties of officers – a fact that stands in tension with the notion that the President has total control over the executive branch. Article II section 2 also gives the President the specific power 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," a provision that would seem superfluous if the "vesting clause" had already given the President total control over subordinate executive officials. Article II does not say anything, one way or another, about whether the President has the inherent authority to remove (that is, fire) subordinate executive officials.

Constitutional history has also been ambiguous concerning the power of the President over subordinate executive officials. Congress, presidential administrations, and the Supreme Court have gone back and forth over the past two centuries concerning whether the President possesses a power of removal and whether Congress can limit it by law (for example by giving the official a specific term of office or by requiring a showing of "good cause" before she could be fired). Successive presidential administrations have also taken contrary positions concerning the President's personal authority to make decisions that have been given by statute to a subordinate official, or to countermand the official's decisions when the President disagrees with them.

"Command and Control" takes no position concerning the nature and extent of executive power. It acknowledges that such power might be narrow and it might be broad. Rather, the article focuses on the relationship between the President and subordinate executive officials. Specifically, it argues that the President does not possess a removal power (except, perhaps, as a default rule subject to contrary regulation by Congress) but does possess the authority to exercise directly all aspects of the executive power and to countermand or supplant all decisions by executive officials with which the President disagrees. Its argument is based primarily on the logical implications of the "vesting clause," the "take care" clause, and other constitutional provisions relating to executive and legislative power.

Professor Lawson's arguments demonstrate both the power and the limitations of his methodology. His writing is excellent: clear, concise, well-reasoned. He is obviously familiar with the arguments contrary to his position and takes them into account when formulating his own arguments. On the other hand, he unduly discounts (in my opinion) certain methodologies that have traditionally been at the core of constitutional interpretation – specifically the actual customs

and practices of the executive and legislative branches over the course of constitutional history. In the article he writes "I have little intellectual interest in historical practice," justifying this position in a footnote claiming that actual practice should be ignored because officeholders often stake claims to authority based on their own hunger for power or money rather than a concern for "correctly ascertaining the Constitution's communicative meaning." Similarly, he discounts Attorney General Wirt's opinion that the President lacks the authority to perform functions that had been given by statute to a subordinate official by noting that at that time, the Attorney General position was a part-time job and by speculating that General Wirt was worried that if the President took over the function he would simply dump the work onto him. This mode of argumentation is a kind of generalized "ad hominem" attack that allows Professor Lawson to avoid engaging with the substance of arguments based on historical practice. Professor Lawson is certainly correct that historical arguments set up in opposition to the constitutional text should be rejected, but as Lawson himself notes, the text of Article II is frustratingly sparse and ambiguous. Its meaning has to be filled in with *something*.

Instead of historical practice, Professor Larson uses fiduciary principles as his mode of supplementation. He does so based on a theory of popular sovereignty and delegation: The People are sovereign and they have used the Constitution to delegate authority to the three branches of government, which then may subdelegate some of those powers to subordinate officials subject to continued control and supervision by the primary delegees. This theory is powerful and, in many ways, attractive – but it does not obviously flow from the text of the Constitution, and Professor Lawson's decision not to check it against historical practice leaves me uncertain as to its proper applicability to constitutional interpretation.

My critique of Professor Lawson's methodology should not be construed as an argument against hiring him. If anything, it cuts in his favor. Constitutional interpretation is a field notoriously subject to disagreement, with proponents of different positions often falling into warring camps that refuse to speak to each other, and that constantly accuse each other of acting in bad faith. In discussing this paper with Professor Lawson, both in a small group interview and during his presentation, I found him to be open and receptive, interested in other people's ideas, and willing to reconsider his own. In fact, he told us that his thinking concerning the power of agencies had changed significantly in recent years based on conversations with colleagues. He also made it clear that engaging in conversations with colleagues about legal and other intellectual topics is one of his great joys as an academic. If we hire him, we will not only gain a highly productive and influential colleague, but also someone who loves to engage with ideas. He will participate in dialogue that may help us think more deeply about our own projects, and may help him rethink some of his own. Perhaps I will even convince him that historical practice is intellectually interesting!

Thank you all for reading this. A few words of explanation:

I don't normally like to present papers that are at such an advanced stage of development. I am doing so here for two reasons.

First, for the past nine months, I have been working almost exclusively on a co-authored book that is far outside my usual field of vision and that does not lend itself to a workshop presentation. (How I got roped into that project – at a fairly late stage of its development – is a story too involved to tell here.) That means that I am now left with articles that are near the end rather than the beginning of the production process.

Second, while this essay standing alone is almost published, it is really the outline for a much larger project. This piece was prepared for a symposium, with a *strict* word limit, so I used it to foreshadow a research agenda as much as to make a basic point about the unitary executive. I am more than happy to talk about the actual content of the paper and all things unitary executive, but my preference is to talk mostly about the next project in line, which is a systematic study of subdelegation under the Constitution.

Normally, when we think about subdelegation, we think about Congress subdelegating authority to administrative agencies. I have written a lot about that topic; my current thoughts, which are not necessarily my past thoughts, on the subject are best seen in Gary Lawson, *A Private-Law Framework for Subdelegation, in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE (Peter J. Wallison & John Yoo, eds., 2022). But there is much more to subdelegation than that. Every actor who receives delegated power under the Constitution – Congress, the President, the federal courts, presidential electors, etc. – could conceivably try to subdelegate some of that authority. I do not believe that the Constitution contains a uniform theory of subdelegation that applies the same way across all of those actors, so I want to explore the unique subdelegation principles that apply to non-congressional

actors such as the President. There are hints of that project in this essay, but there is a lot more to say about it.

This wider project also raises the question whether Congress has power to subdelegate authority away from those actors against their wills or to regulate the process of subdelegation. I think not on both counts, but explaining why not requires careful attention to some oft-neglected words in Article I, section 8, clause 18 of the Constitution: "for carrying into Execution." There are some vague hints about that topic in this symposium essay as well, but the topic also requires much more extensive treatment than I could give in my allotted space.

The bottom line is that I am delighted to talk about the four corners of the paper, but I am also delighted to talk about other projects to which it points.

Gary Lawson

COMMAND AND CONTROL: OPERATIONALIZING THE UNITARY EXECUTIVE

Gary Lawson[*]

The concept of the unitary executive is written into the Constitution by virtue of Article II's vesting of the "executive Power" in the President and not in executive officers created by Congress. Defenders and opponents alike of the "unitary executive" often equate the idea of presidential control of executive action with the power to remove executive personnel. But an unlimitable presidential removal power cannot be derived from the vesting of executive power in the President for the simple reason that it would not actually result in full presidential control of executive action, as the actions of now-fired subordinates would still exist as law until repealed. Rather, the clearest implication from the Article II Vesting Clause is a presidential power to nullify or veto actions by subordinates, even if those subordinates can continue to hold their congressionally created offices and draw their congressionally created salaries and benefits. The President likely also has the ability to directly make executive decisions, even when Congress tries to vest power in subordinates to the exclusion of the President. The Constitution's unitary executive controls actions, not personnel.

This view does not completely foreclose arguments for a presidential removal power, though it makes them considerably more difficult to develop. It is consistent with some, but not all, of the views expressed by Attorneys General in approximately the first half of the nineteenth century, when those actors expressly thought about the President's ability to control executive decision making.

[*] William Fairfield Warren Distinguished Professor, Boston University School of Law. I am grateful to the participants at the *Fordham Law Review*'s unitary executive symposium, with special thanks due to Christine Chabot, Andrea Katz, Jane Manners, Michael McConnell, and Jed Shugerman. All errors are strictly my own, except maybe the ones that Jed Shugerman talked me into making. This Essay was prepared for the Symposium entitled *Unitary Executive: History, Practice, Predictions*, hosted by the *Fordham Law Review* on February 17, 2023, at Fordham University School of Law.

INTRODUCTION

The United States Constitution is frustratingly terse about the structure of the national government. It creates three major federal institutions—Congress,[1] the President,[2] and a Supreme Court[3]—plus a Vice President,[4] whose only powers are to preside over and break ties in the Senate and to serve as acting President on specified occasions.[5] The Constitution contemplates the possibility of federal "inferior Courts"[6] ordained and established by Congress[7] but does not specifically mandate the creation of any federal judicial offices other than a Chief Justice of the U.S. Supreme Court.[8] It assumes that there will be "executive Departments,"[9] including a "Treasury,"[10] headed by "principal Officer[s]"[11] and staffed by "civil Officers"[12] including "Ambassadors, other public Ministers and Consuls,"[13] but it does not itself create any of those departments or positions.[14] It expects Congress to create them pursuant to the power to make laws "necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution"[15] but, with the possible exception of the U.S. Department of the Treasury, it does not *require* Congress to create them.[16] Accordingly, when the Constitution discusses the appointment of federal officers, it refers to persons filling offices "which shall be *established by Law*,"[17] meaning established by a statute that complies with the procedural requirements for

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1. *See* U.S. CONST. art. I, § 1.
2. *See id.* art. II, § 1, cl. 1.
3. *See id.* art. III, § 1.
4. *See id.* art. II, § 1, cl. 3.
5. *See id.* art. I, § 3, cl. 4; *id.* art. II, § 1, cl. 6. John Adams famously bemoaned: "[M]y country has . . . contrived for me the most insignificant office that ever the invention of man contrived or his imagination conceived." Letter from John Adams to Abigail Adams (Dec. 19, 1793), *in* 1 THE WORKS OF JOHN ADAMS 459, 460 (Charles Francis Adams ed., 1856).
6. U.S. CONST. art. III, § 1.
7. One could locate the power to create lower federal courts in either the Necessary and Proper Clause, *see id.* art. I, § 8, cl. 18, or the clause authorizing Congress to "constitute Tribunals inferior to the supreme Court," see *id.* art. I, § 8, cl. 9.
8. There must be at least one Justice to constitute the "supreme Court" created by Article III, and there must be a Chief Justice to preside over presidential impeachment trials. *See id.* art. I, § 3, cl. 6.
9. *Id.* art. II, § 2, cl. 1.
10. *Id.* art. I, § 9, cl. 7.
11. *Id.* art. II, § 2, cl. 1.
12. *Id.* art. II, § 4.
13. *Id.* art. II, § 2, cl. 2.
14. This basic point is not always recognized even by able Attorneys General. *See, e.g.*, Off. & Duties of Att'y Gen., 6 Op. Att'ys Gen. 326, 342 (1854) ("[T]he Constitution and the laws give to him agents . . . ."); *see id.* at 327.
15. *Id.* art. I, § 8, cl. 18.
16. The Constitution might mandate the creation of a treasury because the President and federal judges must receive federal "[c]ompensation." *Id.* art. II, § 1, cl. 7; *id.* art. III, § 1. Technically, one could perhaps have compensation without a treasury. The Constitution provides only that money cannot be withdrawn from the Treasury without an appropriation, *see id.* art. I, § 9, cl. 7, not that money can only be spent out of a treasury. But I can imagine a structural argument that requires creation of a federal treasury.
17. *Id.* art. II, § 2, cl. 2 (emphasis added).

federal lawmaking.[18] This was a monumental change from English practice, which gave the monarch "the prerogative of erecting and disposing of offices."[19]

Importantly, the Constitution does not itself "vest[]" any power in executive personnel created by Congress.[20] This is in stark contrast to the way that the Constitution directly "vest[s]" power in other officials.[21] The Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States, which shall consist of a Senate and House of Representatives."[22] Thus, when a Congress is properly assembled through the processes for election specified in the Constitution, that body automatically possesses the federal legislative powers "herein granted."[23] The Constitution vests "[t]he judicial Power of the United States . . . in one supreme Court, *and in such inferior Courts as the Congress may from time to time ordain and establish*."[24] When federal judges are appointed, either to the Supreme Court or to an inferior federal court created by Congress, the Constitution automatically vests them with "[t]he judicial Power of the United States."[25] But Article II of the Constitution does not vest "executive Power" in any congressionally created federal officers or employees.[26] Instead, it vests "[t]he executive Power . . . in a President of the United States of America"[27]—*not*, one should note, in "a President and such subordinate executive officials as the Congress may from time to time ordain and establish."[28] That vesting of executive power is qualified by the duty to "take Care that the Laws be faithfully executed"[29] and by implicit fiduciary

18. *See id.* art. I, § 7, cl. 2. For more detail on the Constitution's deferral to Congress on the structure of the federal government, see STEVEN GOW CALABRESI & GARY LAWSON, THE U.S. CONSTITUTION: CREATION, RECONSTRUCTION, THE PROGRESSIVES, AND THE MODERN ERA 287–89, 381–85 (2020).

19. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *262–63 (1787); *see also id.* at *262 ("[A]s the king may create new titles, so may he create new offices."). Does this mean that reorganization acts that allow the President to create new offices, such as happened with the Administrator of the Environmental Protection Agency, are unconstitutional, at least if those reorganizations are not specifically ratified by statute? Probably. It definitely means that the Attorney General cannot create an office of Special Counsel that is not created by statute. *See* Steven G. Calabresi & Gary Lawson, *Why Robert Mueller's Appointment as Special Counsel Was Unlawful*, 95 NOTRE DAME L. REV. 87, 102 n.80 (2019).

20. *See infra* notes 26–28 and accompanying text.

21. *See, e.g.*, U.S. CONST. art. I, § 1.

22. *Id.*

23. *Id.*

24. *Id.* art. III, § 1 (emphasis added). On the significance of the "ordain and establish" language, and its relationship to the grant of power to "constitute Tribunals," see Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1025–36 (2007).

25. U.S. CONST. art. III, § 1.

26. *See id.* art. II.

27. *Id.* art. II, § 1, cl. 1.

28. For the classic study of the structural differences between Article II and Article III, see Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

29. U.S. CONST. art. II, § 3.

principles,[30] but the "executive Power" is constitutionally vested specifically in the hands of one person. Period.

This is the inescapable textual feature of the Constitution that establishes, as conclusively as anything in constitutional interpretation[31] can be established, the basic fact of a "unitary executive." Whatever the federal "executive Power" encompasses is vested in the person of the President and in no one else.

This says nothing about the *content* of that "executive Power." Such power might include only those powers specifically enumerated in Sections 2 and 3 of Article II. It might include those enumerated powers plus the power to execute the laws. It might include the foregoing plus some measure of assumed power over foreign affairs. Or it might involve something resembling the powers of the English monarchy, minus a few items (such as the power to create offices or declare war) specifically vested elsewhere. Those are matters that have to be worked out through interpretative moves beyond those described thus far.[32] For now, all that matters is that anything falling within the compass of federal "executive Power," however much or little that turns out to be, is vested in the President. That is the meaning of a "unitary executive."

I. VESTED IN WHOM?

But what does it mean, in practical terms, to say that the President is unitarily vested with the "executive Power"? It surely does not mean that the President *must*, as a constitutional matter, personally execute every executive function.[33] If that were so, there would be no reason to have officers. Once Congress creates subordinate executive officers and employees, the President may subdelegate some measure of "executive Power" to them,[34] consistently

30. *See* GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION 131–35 (2017); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2178–91 (2019); Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-delegation*, 17 GEO. J.L. & PUB. POL'Y 463, 465–69 (2019).

31. I am discussing here *only* constitutional interpretation—that is, the ascertainment of the communicative meaning of the historically concrete document known as the Constitution. One can engage in many other activities with that document, such as normative prescription, adjudication, critique, etc. I am not downplaying or questioning the value of those other activities. I am just not engaged in any of them here.

32. For a range of views on the scope of executive power all published in the same year, see MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION (2020); SAIKRISHNA BANGALORE PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS (2020); Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269 (2020).

33. *See* MCCONNELL, *supra* note 32, at 144–45.

34. Specifically, the President may subdelegate the power to execute the laws, though not necessarily other functions granted by Article II such as the commander-in-chief power or the pardon power. *See* LAWSON & SEIDMAN, *supra* note 30, at 127–28; *accord* Presidential Succession & Delegation in Case of Disability, 5 Op. O.L.C. 91 (1981). Because this power to subdelegate law execution is incidental to the Constitution's grant to the President of "[t]he

with fiduciary standards for subdelegation of authority[35] and the accompanying duty to supervise.[36]

Suppose, however, that the express power of executive personnel does not come from subdelegation from the President but instead from direct statutory authorizations from *Congress*. When Congress creates federal offices, it usually does not simply create the office, provide a salary and benefits, and move on. The offices are typically defined by their substantive powers and duties, and the officers are given authorizations by legislation, either the legislation creating their office or by subsequent legislation defining, expanding, or contracting the original powers of the office. What is the effect of those statutes that specifically and directly purport to give authority to subordinate executive officers, in the face of the brute fact of the Constitution's creation of a unitary executive?

This question has befuddled American constitutional law and practice since the founding. The Constitution's terseness about governmental structure made that befuddlement predictable, if not inevitable. Apart from the Article II Vesting Clause and the Take Care Clause, the only provision that speaks directly to the relationship between the President and executive subordinates is the Opinions Clause, which says that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[37] Apart from relating only to the fraction of executive officials who count as "principal" officers (meaning essentially heads of departments),[38] this does not say a lot about the allocation of executive power.[39] It lets the President know what certain subordinates are thinking and doing but says nothing directly about what, if anything, the President can do with that information. And the latter is the real question.

There are at least four possible classes of answers to what the President can do with information about subordinates and their actions, whether that

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executive Power," it comes directly from the Constitution. *See* U.S. CONST. art. II. Congressional statutes that try to limit this power of subdelegation—by, for example, requiring subdelegations to be in writing and published in the Federal Register, *see* 3 U.S.C. § 301—are unconstitutional to the extent that they constrain rather than help "carry[] into Execution" the President's constitutionally vested power of subdelegation. A famous opinion of an Attorney General, to be discussed later, suggests otherwise. *See infra* note 116 and accompanying text. However, I think that is a mistake.

35. *See* LAWSON & SEIDMAN, *supra* note 30, at 134–35.

36. *See* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1875–86 (2015).

37. U.S. CONST. art. II, § 2, cl. 1.

38. *See* Calabresi & Lawson, *supra* note 19, at 136–37.

39. Why have the Opinions Clause at all? Although it is possibly a vestige of earlier plans at the Constitutional Convention for executive councils, in the final unitary design of the executive it does serve the important function of clarifying the President's relationship to the principal officers by foreclosing Congress from creating such officers who report only to Congress and not to the President. It is thus more a limitation on Congress than an empowerment of the President. *See* Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 30–31. Professor Mike Rappaport independently came up with the same analysis of the clause. *See* Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 729 n.137 (crediting Mike Rappaport with the idea).

information is obtained from principal officers via the Opinions Clause or from other sources. One class of answer is "nothing." Perhaps Congress can grant power to subordinate executive officials, and the President has, as a legal matter, nothing to do with how that power is exercised. A second possible answer is that Presidents can fire subordinates if Presidents don't like what they hear from, or about, the subordinates. A third possibility (potentially conjoined with the second) is that the President can countermand the subordinates' action, exercising a veto power over executive decisions. A fourth possibility (potentially conjoined with the second and/or third) is that Presidents can personally assume the subordinates' functions and take the action themselves. All of these are *classes* of answers, because the answer may vary with context. Perhaps there are different answers depending on the executive actions in question. Maybe it matters whether the action is mandatory under the operative statute or whether it involves a measure of discretion. Perhaps it matters whether the executive action involves case-specific adjudication of private rights. Maybe there are some executive functions, such as the pardon power or the commander-in-chief power, that Congress cannot entrust to subordinates under any circumstances. The full spread of possibilities gets very large and complex very quickly.

For purposes of this Essay, I will focus on the subset of congressional statutes that purport to vest power in subordinate executive officials to exercise some measure of discretionary authority but that do not involve presidential functions specifically enumerated in Sections 2 and 3 of Article II. The implications of my analysis may extend more broadly; that is all for another time. Let us deal here with straightforward law execution, namely, carrying out executive duties created by statute rather than by the Constitution itself.

Historically, debate has focused on the first two possibilities. Some scholars have claimed that the President must be able to remove any and all executive officials, regardless of whether Congress has specified a particular tenure of office for those officials,[40] whereas others have claimed that Congress can grant at least some power to officials that is beyond formal presidential control[41] (though Presidents may have informal, non–legally binding methods of control that could be as or more effective than formal legal controls, such as refusing to provide political support for an official whose decision is unpopular with Congress or the people[42]). Neither of these commonly discussed possibilities, however, is supported by the Constitution. Indeed, both are flatly inconsistent with relatively clear constitutional commands. The real question, rather, is whether the President has a countermanding power, a direct decision-making power, or both. This Essay

40. *See, e.g.,* Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal,* 136 HARV. L. REV. 1756, 1761–63 (2023).

41. *See, e.g.,* Peter L. Strauss, *Overseer or "The Decider"?: The President in Administrative Law,* 75 GEO. WASH. L. REV. 696, 759–60 (2007).

42. *See* Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 43, 56–57 (2017).

categorically defends the former and somewhat less vigorously defends the latter.

The case for the foregoing set of propositions is straightforwardly simple: by vesting the "executive Power" in the President and in no one else, the Constitution mandates that the President control in some fashion all exercises of executive power. That is what the Constitution means by vesting power.[43] The real question is what the mechanism (or mechanisms) of control must look like. An unfettered removal power is not only inconsistent with the Constitution's text and structure,[44] but also fails to provide the constitutionally necessary measure of control. A direct decisional authority is not flatly inconsistent with constitutional text, and may even be mandated by it, but such authority nonetheless raises difficult questions about the extent of congressional and presidential power. A countermanding power, however, both provides constitutionally adequate presidential control and avoids the difficult issues posed by assertions of direct presidential decision-making authority.

Is it a strike against such a countermanding power that Presidents have not traditionally claimed or exercised it? If one believes that constitutional rules are a product of practice and custom, then yes, of course that would count against it. If one believes that constitutional rules are a product of the Constitution, then no—the practice either conforms to the Constitution or it does not. In this case, the practice does not conform. Because I believe that the Constitution's meaning comes from the Constitution rather than from what various actors—be they Presidents, Attorneys General, legislators,[45] judges, or academics—say about it, I have little intellectual interest in historical practice.[46] Nonetheless, I will take a look at what various people—

43. *See* Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1380–81 (1994).

44. It might also be inconsistent with historical practice. *See* Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 183–84 (2021); Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 155–59 (2022); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 21–27 (2021). However, as I explain below, that is not something to which I give much weight in ascertaining the text's communicative meaning. *See infra* note 46 and accompanying text.

45. It is commonplace, for example, to look at actions of the First Congress as valuable expositions on constitutional meaning. If the Constitution could speak, I think it would warn us against that practice, as the Constitution pretty obviously contemplates a Congress full of corrupt and venal gasbags. *See* Gary Lawson, *The Constitution's Congress*, 89 B.U. L. REV. 399, 403 (2009). The First Congress lived down to those expectations; its very first enactment was blatantly and obviously unconstitutional. *See id.* at 403–06.

46. The rationale for this methodological preference would require a separate article (or perhaps book), but I will summarize this reasoning generally: persons in positions of actual power are likely to have concerns other than correctly ascertaining the Constitution's communicative meaning. In particular, if those persons are motivated by some conception of the public good, they are likely to be interested in constructing arrangements that will allow the government to function effectively to promote that good. If they are out to line their pockets and those of their cronies, they are likely to be interested in constructing arrangements that will allow the government to function effectively (so that they can efficiently use the

Attorneys General more commonly than Presidents—have said about the relationship between Presidents and subordinates, not as authorities to be followed but as suggestions to be examined. After all, maybe they thought of something that I didn't. We'll see.

II. SUBORDINATE SUBORDINATES

Start with two theories of the relationship between the President and subordinates that seem flatly inconsistent with the Constitution. The first is that Congress can sometimes, and maybe even always, vest law execution power in executive subordinates that the President cannot control.[47] The second is a theory so commonplace in discussions of the unitary executive that it is often taken (wrongly) to *constitute* the idea of the unitary executive—the proposition that the President must be able to remove executive officials for any reason, including disagreement with their policy views or exercises of discretion, regardless of what Congress specifies by statute.[48] Both theories are pretty clearly wrong as a matter of original communicative meaning.

A thoughtful defender of the first view writes that unitarians "view it as self-evident that the President should have directive authority over agency heads."[49] That is because it *is* self-evident that the President should have directive authority—of some kind—over agency heads (and agency legs, and agency arms, and agency torsos). The "executive Power"—all of it[50]—is vested in the President. This pretty much settles who gets to exercise federal executive power. You just have to read one sentence of the Constitution. That is about as self-evident as anything in the Constitution will ever be.

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machinery of government to extract wealth for themselves and their favorite causes). In either case, one would expect constitutional "interpretation" to be shaped at least as much by practical attention to real-world results as by accurate ascertainment of communicative meaning. As a matter of objective communicative meaning, the extent to which the Constitution does in fact generate a fully functional and effective government needs to be the conclusion of an argument rather than a premise.

47. A catalogue of scholars who defend this position on the basis of theory, precedent, practice, and/or policy would fell forests. For a representative sample, see Jed Handelsman Shugerman, *Presidential Removal: The* Marbury *Problem and the Madison Solutions*, 89 FORDHAM L. REV. 2085, 2088 & nn.18–26 (2021).

48. A list of defenses of this position would not be as long as a list of pro-removal books and articles, but it would be long. For two really good representative works, see STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008) and Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014).

49. Robert V. Percival, *Who's In Charge?: Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2488 (2011).

50. Jed Shugerman correctly points out that the word "all" does not appear in the Article II Vesting Clause. *See* Jed Handelsman Shugerman, *Vesting*, 74 STAN L. REV. 1479, 1505–12 (2022). Nor does it appear in the Article III Vesting Clause. That is because (1) the article "the" does the needed work and (2) the Constitution nowhere else vests executive power in anyone. As the cast of the Warner Bros. cartoons would say upon seeing the Article II Vesting Clause: "This is it." *See Bugs Bunny Theme Song, This Is It*, YOUTUBE, https://www.youtube.com/watch?v=F-t8PngHgWY [https://perma.cc/G55N-BM4L] (last visited Oct. 6, 2023).

So, when agencies adjudicate or make rules, what kind of power are they exercising? The obvious answer is: "executive Power." But we just saw that the Constitution vests the "executive Power" in the President, not in subordinates. Does that mean that no person in the executive department other than the President can act? Maybe the President really does personally have to carry out every executive function of government, including adjudicating benefits claims and serving process on defendants?

Of course, it does not mean that. The Constitution knows that there are going to be "executive Departments"[51] whose officers will have "Duties."[52] There would be no point in providing for the impeachment and removal of "Civil Officers"[53] if they had no power to act. There are obviously going to be actors besides the President exercising "executive Power." That much is also self-evident in the same "just read the text" kind of way.

How can both things be self-evident? There are actually two ways to theorize the answer to that seeming puzzle that lead to precisely the same place.

One is to say that the absurd conclusion that *only* the President can exercise executive power, such that *only* the President can execute federal laws, is actually correct rather than absurd—at least as a starting point.

Whenever Congress creates law to execute, the Constitution automatically vests in the President the power to execute that law, whether the statute names the President or some subordinate as the proper recipient of the power. Again, this is what it means to vest "executive Power" in the President.[54] So why bother creating subordinates at all? Because the President has the capacity to subdelegate some portion of the President's delegated "executive Power."[55] Congress, by creating subordinates, creates permissible recipients of those presidential subdelegations that otherwise would not exist (because the Constitution does not create them, and the President, unlike old British monarchs, does not have an office-creating power). Laws creating subordinate executive officials are quintessentially laws that help the President "carry[] into Execution"[56] the President's executive powers by facilitating whatever subdelegations the President chooses to make.[57] Once subordinates exist, perhaps one can even infer an intention to subdelegate from presidential silence in most cases, obviating the need for any formal

51. *See* U.S. CONST. art. II, § 2, cl. 1.
52. *Id.*
53. *Id.* art. II, § 4.
54. *Id.* art. II, § 1.
55. Who delegated "executive Power" to the President? The same hypothetical entity that delegated legislative power to Congress and judicial power to the federal courts: the "We the People" who ordained and established the Constitution in order to manage some portion of its affairs. On the significance and meaning of "We the People," see Gary Lawson & Guy Seidman, *Are People in Federal Territories Part of "We the People of the United States"?*, 9 TEX. A&M L. REV. 655 (2022).
56. U.S. CONST. art. I, § 8, cl. 18.
57. *See* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RSRV. L. REV. 1451, 1475–76 (1997) (describing President George Washington's view of executive officials as his assistants).

instruments of executive subdelegation. Conceptually, however, the executive power all flows directly to the President and then flows outward. By defining the powers and duties of subordinates, Congress can designate permissible, and therefore impermissible, recipients of presidential subdelegation, but Congress cannot unilaterally subdelegate the President's executive power. And once executive power is subdelegated, both general fiduciary principles and the Take Care Clause require the President to retain ultimate responsibility for the actions of subordinates.[58] It would be a clear breach of both implicit and explicit constitutional duties for the President to implement or agree to a subdelegation of executive power that is beyond the President's control.

If one finds this too clever by half (I find it exactly clever enough and think it is the correct conceptual account of the Constitution's allocation of executive power), another route to the same place is to say that the Constitution allows Congress to create actors—other than the President—who will exercise "executive Power," but that any such power *is also, by constitutional command, vested in the President*, whether or not Congress wants that result. Congress, on this account, can actually vest actors with executive power, but it cannot vest them with executive power that is not simultaneously vested in the President. The President can *choose* to let those subordinates exercise their power without presidential participation, but if the President *wants* to exercise "[t]he executive Power" possessed by subordinates, then Congress has no right to stop it.[59] Any statute purporting to vest such power in a subordinate free of presidential control is an obvious violation of the clause that authorizes the creation of the subordinate in the first place: the Necessary and Proper Clause. Congress can create executive offices by virtue of the provision allowing it to enact "all Laws which shall be necessary and proper for carrying into Execution the foregoing [legislative] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[60] Congress can thus create subordinate executive officials to help "carry[] into Execution"[61] the President's vested "executive Power." But vesting authority in people who can act free of presidential control does not "carry[] into Execution" the President's vested power; it *hinders* or *prevents* the actor with constitutionally vested power from carrying it into execution. Executive subordinates must be in aid of the President's constitutionally vested power, not in opposition to it.[62]

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58. *See supra* notes 34–35 and accompanying text.
59. U.S. CONST. art. II.
60. *Id.* art. I, § 8, cl. 18.
61. *Id.*
62. The same reasoning explains why Congress cannot tell courts how to decide cases or authorize clerks to decide motions. *See* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 201–05 (2001). The importance of the requirement that laws under the Necessary and Proper Clause be "for carrying into Execution" federal powers was first emphasized by Professor David E. Engdahl. *See* David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 102–03.

Thus, the most straightforward reasons why Congress cannot create subordinates independent of the President are that (1) the Article II Vesting Clause forbids it and (2) Congress has no enumerated power to do so. This argument, in either of the two foregoing forms, may not qualify as a form of self-evidence, but it is textually unavoidable. The President has *all* of the federal executive power.

III. A ROOM WITH A VIEW?

That does not mean, however, that the President must be able to remove all, or even any, executive subordinates. Indeed, it is clear that the President does not have such a constitutional power. Given the history of the removal question, a full treatment of this topic requires books rather than paragraphs, but here is what I can do in paragraphs at the moment.

The Constitution is not entirely silent on the removal of subordinate executive officials. If those officials qualify as "Civil Officers," then they can be removed through impeachment by the House and conviction by the Senate.[63] Some representatives during the Decision of 1789[64] maintained that because the Constitution expressly provided for this method, it was the *sole* permissible method for the removal of such officials.[65] If that seems absurd, it is only because of history; one can readily imagine a world in which Congress spends much of its energy overseeing, impeaching, and removing executive officials. This is a textually plausible position—at least until one looks behind Door Number Two.

Even in that imaginary world, impeachment and removal would not extend to *employees* who do not qualify as "Officers."[66] Would the employees therefore have life tenure by constitutional command? Surely not. Their positions, recall, do not stem from the Constitution itself. They come either from Congress creating them by statute pursuant to the Necessary and Proper Clause or by other executive actors creating those positions with appropriated funds, if employees are, in this respect, like ink, wagons, or any other office supplies that can be purchased with lump-sum appropriations. In either case, the creating entity can presumably specify for how long the employees are being hired, meaning that tenure and termination in those settings are purely a matter of statute and contract. And because the only difference between officers and employees in this regard is that all officer positions *must* be "established by Law" and thus can *only* be created by Congress, and not by

63. *See* U.S. CONST. art. II, § 4.

64. For a vigorous debate about the Decision of 1789, compare Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006), with Jed Handelsman Shugerman, *The Indecisions of 1789: Inconsistent Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753 (2023).

65. *See* 1 ANNALS OF CONG. 389 (1789) (statement of Rep. James Jackson); *id.* at 477 (statement of Rep. Benjamin Huntington).

66. In all likelihood, there are a lot more officers than people today think. *See* Jennifer L. Mascott, *Who Are "Officers of the United States?*,*"* 70 STAN. L. REV. 443, 454 (2018); James C. Phillips, Benjamin Lee & Jacob Crump, *Corpus Linguistics and "Officers of the United States*,*"* 42 HARV. J.L. & PUB. POL'Y 871, 929 (2019). But even under the strictest test for defining "officer," there are going to be several million federal employees.

executive actors purchasing them like ink or wagons,[67] it is hard to see why Congress cannot set terms of office in the statutes creating those offices. The statutes fix the titles, powers, duties, salaries, and benefits of the offices. The office's term—subject always to shortening through the constitutionally-specified impeachment and removal process—does not seem all that different from those other features that define the office. Accordingly, another position advanced during the Decision of 1789 was that Congress can fix an officer's (or employee's) tenure by statute.[68] For the reasons just given, this one makes a great deal of sense. I happen to think it is correct.

Perhaps, however, the Constitution also speaks in quieter fashion. All documents, as with all forms of communication, presuppose certain background rules.[69] One possible background rule for the Constitution regarding governmental structure is that modes of removal of subordinates parallel their modes of appointment. In the context of the Constitution, that would mean that officers appointed by the President with the advice and consent of the Senate can be removed only by the President with the advice and consent of the Senate, whereas officers appointed by, for example, "Courts of Law" could be removed only by "Courts of Law" (and, of course, by the House and Senate acting through impeachment and removal). This, too, was advanced as an option during the Decision of 1789,[70] as well as during the New York ratification process two years earlier.[71] One could, of course, accept this position as the *default* position, subject to alteration by Congress in the statute creating the office, rather than as a fixed and unalterable constitutional rule. That is, if Congress neglects to specify a mode of removal in the statute creating the office, the Constitution might be thought to fill in a background rule of "removal follows appointment," which Congress can change if it wishes.

These three answers have in common that they *do not* constitutionally commit removal to the President. Under either the wagons and ink option or the background rule option, Congress could choose to give the President unilateral and unlimited removal power in at least some cases (all of them under the second option and inferior officers and employees under the third), but the President would not have inherent removal power. (The President might have such power over employees who are hired *à la* ink or wagons.) All of these positions regarding removal, as we have seen, have textual and structural support, as well as a measure of historical pedigree. So why did people like James Madison in 1789, and lots of scholars and judges today,

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67. *See* Calabresi & Lawson, *supra* note 19, at 101–02.

68. *See* 1 ANNALS OF CONG. 391 (1789) (statement of Rep. George Thatcher); *id.* (statement of Rep. James Jackson); *id.* at 392–93, 500–05 (statement of Rep. Joseph Lawrence); *id.* at 496–98 (statement of Rep. Samuel Livermore).

69. *See* LAWSON & SEIDMAN, *supra* note 30, at 8–11.

70. *See* 1 ANNALS OF CONG. 397–98 (1789) (statement of Rep. Theodorick Bland); *id.* at 391, 473–74 (statement of Rep. Alexander White); *id.* at 393 (statement of Rep. Peter Sylvester); *id.* at 395–96, 490–92 (statement of Rep. Elbridge Gerry); *id.* at 509–10 (statement of Rep. John Page); *id.* at 585–91 (statement of Rep. Michael Jenifer Stone).

71. *See* THE FEDERALIST No. 77 (Alexander Hamilton).

choose a fourth answer and think that the President has unlimited removal power by constitutional command?

One possibility is that they believe that the "executive Power" just includes a power to remove subordinates, so that the vesting of the "executive Power" in the President automatically carries with it a constitutional power of removal. That is indeed a plausible candidate for a background default rule, just as "removal follows appointment" is a plausible candidate for a background rule. But even if it is correct as a background rule, it does not necessarily lead to the result that its advocates sometimes assume.

Suppose for the moment that the presidential removal background rule is correct. As Professor Jed Shugerman has ably demonstrated,[72] and as was suggested above for "removal follows appointment," that does not carry the day unless it means that the "executive Power" includes a *limitless* power of removal. It is quite possible to say that the President has such power as a default, but that Congress can alter that default by specifying different terms or forms of removal. And a limitless presidential constitutional power to remove all executive officials simply does not leap out from the pages of the Constitution. One of the Constitution's most important moves was to make clear that the office-creating power was vested exclusively in Congress, so the President could not, in kingly fashion, create offices to hand out to cronies.[73] It is not *impossible* to separate out the term of an office from its creation, salary, benefits, powers, duties, and all other features that are obviously within the control of Congress,[74] but it is much more natural to see the term of office as part of the office than not. From the other direction, if the Vesting Clause does in fact carry the day, it does so for *all* executive personnel, whether officers or employees. In that case, the President would have unlimited power to remove civil servants. Or is there some way to limit the removal power implied from the Vesting Clause only to some subset of especially important executive officials, such as principal officers? Justice Antonin Scalia thought so,[75] but that may have been more a product of precedent than of logic.

If an unlimited power of removal does not flow naturally from the vesting of executive power, perhaps the Take Care Clause adds another element—and perhaps even an element that would support limiting the removal power to high-level officers. If Presidents have the duty to "take Care that the Laws be faithfully executed," how can Presidents do that if they cannot sack subordinates, or at least important subordinates, who the Presidents think are not doing the job properly? These practical concerns lay behind much of

72. *See* Shugerman, *supra* note 47.

73. *See* CALABRESI & LAWSON, *supra* note 18, at 382–83.

74. Indeed, modern procedural due process law severs the procedures for termination of a statutorily created position from the other elements of the position, including salary and benefits. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 540–41 (1985). This body of doctrine is not distinguished by its intellectual rigor. *See generally* Frank Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85.

75. *See* Morrison v. Olson, 487 U.S. 654, 724 n.4 (1988) (Scalia, J., dissenting). Professor Michael W. McConnell also suggests this move. *See* MCCONNELL, *supra* note 32, at 165–66.

Chief Justice William Howard Taft's reasoning in *Myers v. United States*,[76] and I suspect that they lie behind much of the modern case for a limitless presidential removal power.[77]

There is a fatal flaw in all of the arguments that try to derive a presidential removal power as a structural inference from the need for presidential control of all executive power: a removal power does not actually give the President control of all executive power. The removal power would be a nice power for the President to have, but it does not satisfy the constitutional command of the Article II Vesting Clause.

Imagine a world in which the President can fire anyone at any time for any reason or no reason at all. The President announces to their subordinates certain instructions regarding how subdelegated executive power must be exercised.[78] A subordinate conducts an adjudication or issues a rule based on an interpretation of a statute—or, for that matter, a finding of fact[79]—that is contrary to those presidential instructions. The President finds out and fires the person. But the order or rule is still out there, creating legal rights and obligations until such time as it is repealed or invalidated. True, the fired official can be replaced with someone who will undo the action, but that occurs in real time rather than instantaneously. If the President is truly the repository of all federal executive power, there should not be *any* exercises of that power contrary to the President's instructions. (If the President has not given any instructions, then subdelegees of presidential power have not done anything wrong, provided that the subdelegees act within the scope of their subdelegated authority.) Accordingly, to carry out the commands of the Article II Vesting Clause, the President's instructions must be understood to limit the power of any subdelegee, regardless of what Congress has said in the statute creating the office (because Congress does not have the power to override the Article II Vesting Clause, as any such law would not be "necessary and proper for carrying into Execution" the executive power). The President's instructions thus function as an advance veto of any actions by subordinates that are contrary to those instructions, as they literally deprive the subordinates of power to act in a way contrary to those instructions.

This affirmative-negative power of the President satisfies Article II because it guarantees that nothing happens with the executive power that contravenes presidential directions. Because it does so, it does not leave room for a further inference of a presidential power of removal, which in any event would not provide the same guarantee. This does not conclusively prove that the President has no constitutional removal power, as one might still think that such a power constitutes an essential component of the "executive Power" regardless of its consequences. (I don't think so, for the

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76. 272 U.S. 52 (1926).

77. *See, e.g.*, MCCONNELL, *supra* note 32, at 167.

78. *See, e.g.*, Calabresi & Yoo, *supra* note 57, at 1483 (discussing how President Washington ordered the dismissal of prosecutions).

79. *See generally* Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825 (2019).

reasons given above.) But it does mean that the case for presidential removal power gains nothing from the President's power and duty to supervise exercises of the executive power.

Could the President personally conduct the adjudication or issue the rule, even if the statute purports to vest power directly in the subordinate (for example, the Secretary of Labor)? In other words, in addition to a cancellation power, does the President have a supplanting power? If my account of executive power is correct, in which all executive power automatically vests in the President subject to presidential subdelegation to authorized recipients, then the answer is yes. The President does not *have* to subdelegate power to subordinates if the President would prefer to retain that power personally. Presumably, Presidents would not often find it convenient or prudent personally to execute the laws, but the Constitution gives the President that option if the President wants to take it. The real issue in those circumstances, as Professor Richard Murphy has ably shown in an important article,[80] is whether congressional limitations on how *subordinate executive officials* can act would also limit the President if the President assumed those subordinates' functions. If, for example, the Secretary of Labor can promulgate workplace safety rules only after following certain specified notice-and-comment procedures, would the President have to follow the same procedures if the President personally assumed that function? It would require a separate, and probably much longer, article to sort out all the considerations posed by that problem. The question reduces to whether Congress, in a world with no subordinate executive officials, could authorize the President to act on condition that the President follow specified procedures. For my present purposes, it does not matter how one resolves that question. The President *at least* has the cancellation power as a necessary inference from the Article II Vesting Clause. A supplanting power would be a bonus, though one that Presidents probably would not find especially helpful.

As it happens, Presidents do not appear to have found a cancellation power especially helpful either, as, to my knowledge, no President has expressly sought to exercise it in the strong form described above. Instead, from 1789 onwards, Presidents have focused on the power to remove subordinates—to the point of risking impeachment and removal from office in order to assert removal power.[81] Presidents have obviously viewed the removal power as a more powerful, flexible, and useful method of control than a cancellation power. Isn't it better to have someone you trust doing the job than to have to cancel out everything that an unfaithful subordinate might do?

Of course it is better, especially since a cancellation power can prevent subordinates from doing something contrary to presidential wishes but cannot really force subordinates to act affirmatively in a way that the

80. *See* Richard W. Murphy, *The DIY Unitary Executive*, 63 ARIZ. L. REV. 439 (2021).

81. Umm, Andrew Johnson? *See Impeachment Trial of President Andrew Johnson, 1868*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-johnson.htm [https://perma.cc/4VAN-PA3R] (last visited Oct. 6, 2023).

President would prefer.[82] That is why Presidents have always preferred a removal power to a cancellation power. So would I if I were President. It is not at all surprising that Presidents have hyper-focused on removal and only occasionally relied on cancellation. That does not make it constitutionally correct. Congress would surely like to be able to make law without going through bicameralism and presentment. It is surely easier to have a joint resolution, a single house resolution, or a committee resolution undo an agency's action than to have to pass legislation. That does not mean that Congress can actually do it the short way.[83] Federal actors have what the Constitution gives them, not what they want.

IV. JUST SAY NO

Because of the consistent focus on the removal question, we have a great deal of doctrine regarding removal and essentially none regarding either cancellation or supplanting. More precisely, we have no relevant *judicial* doctrine on cancellation or supplanting. There is actually a substantial body of *executive* doctrine on those questions, in the form of dueling opinions of Attorneys General across the nineteenth century. Richard Murphy has recently canvassed these opinions in fine fashion,[84] so a brief summary here is all that is needed.

The story begins with Joseph Wheaton. During the War of 1812, Wheaton was a Deputy Quarter Master General. According to his own lights, he was a genius at logistics—and a brilliant military strategist as well[85]—and wisely and prudently forwarded large sums of money for supplies across multiple campaigns. When he submitted his claims for reimbursement, however, the auditors in the U.S. Department of the Treasury took a different view. They sat on his claims for long periods of time, refused reimbursement for many of them, and at one point even found that he owed the government a substantial sum.[86] As Wheaton put it, "the little minds of the accounting officers became alarmed, and their Argus eyes were all opened to find something wrong in Wheaton's department."[87] Congress evidently agreed with at least the part of his complaint that involved delay and enacted a private bill requiring "the proper accounting officers of the treasury department . . . to settle and adjust the account of Joseph Wheaton, while acting in the quartermaster's department . . . upon the principles of equity and justice."[88] Wheaton was dissatisfied with the final adjustment, and he

82. I am grateful to Christine Chabot for highlighting the negative character of the cancellation power.

83. *See* Immigr. & Naturalization Servs. v. Chadha, 462 U.S. 919, 944–45 (1983).

84. *See* Murphy, *supra* note 80, at 450–54.

85. For Wheaton's glowing account of his deeds, see APPEAL OF JOSEPH WHEATON, LATE DEPUTY QUARTER MASTER GENERAL AND MAJOR OF CAVALRY, TO THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA (1820), https://www.loc.gov/resource/gdcmassbookdig.appealofjosephwh00whea/ [https://perma.cc/L734-XF58].

86. *Id.* at 24.

87. *Id.* To be fair, it was not so much a hundred eyes as two that concerned Wheaton: he thought he got screwed by the Third Auditor. *See id.* at 24–25.

88. Act of Mar. 3, 1819, ch. 76, 6 Stat. 232.

appealed to both Congress and the President.[89] President James Monroe referred the matter to Attorney General William Wirt, who responded in a formal opinion on October 20, 1823.[90]

General Wirt noted that he "would proceed at once to the expression of an opinion on the merits of his claims, but that there is a preliminary inquiry which must be first made . . . and that is, whether it is proper for you [to] interfere in this case at all?"[91] Wirt concluded that "[i]t appears to me that you have no power to interfere . . . . My opinion is, that the settlement made of the accounts of individuals by the accounting officers appointed by law is final and conclusive, so far as the executive department of the government is concerned."[92] The next year, Wirt repeated his position even more emphatically, noting that the President has "no right to interfere . . . with the accounting department . . . . the interference of the *President* in any form would, in my opinion, be illegal."[93] Wirt offered no new arguments to support this conclusion.

Why would Wirt think that Congress could vest authority in accounting officers that is beyond the President's control?

Wirt's reasoning, if taken at face value, makes almost no sense. Wirt's chief argument is that the President could not possibly personally execute the tasks required of the executive department.[94] That is perhaps a good argument against the President choosing to exercise a power of supervision in any particular instance, but it is not an argument against the existence of the power. Somewhat more plausibly, Wirt argued that Congress had foreclosed presidential review by vesting authority directly in the treasury officers, leaving the President only to "take care that the laws be faithfully executed" by making sure that subordinates are performing their jobs honestly (and by firing them if they do not).[95] That argument, of course, begs all relevant questions by assuming that Congress both intends *and has power* to deny to the President either a cancellation or supplanting power. It is not an actual argument against the power. Wirt made no mention of the Article II Vesting Clause; the bulk of his analysis was a simple recitation of statutes that purported to vest final authority in subordinate officers.[96] Congress, of course, purports to do many things; the question in this case is whether the Constitution permits what Congress purports to do.

As a legal argument, Wirt's opinion is astonishingly weak. The astonishment recedes a bit, however, when one reflects on why a lawyer of

89. Wheaton eventually got a few hundred bucks out of Congress for his troubles. *See* Act of May 17, 1824, ch. 86, 6 Stat. 302.

90. The President & Acct. Officers, 1 Op. Att'ys Gen. 624 (1823).

91. *Id.* at 624–25.

92. *Id.* at 625, 629.

93. The President & Acct. Officers, 1 Op. Att'ys Gen. 678, 680 (1824) (emphasis in original); *see also* The President & Acct. Officers, 1 Op. Att'ys Gen. 705, 706 (1825) (conclusorily repeating the same position).

94. *See* The President & Acct. Officers, 1 Op. Att'ys Gen. 624, 628–29 (1823).

95. *See id.* at 625–28.

96. *See id.* at 626–28.

Wirt's abilities[97] would try to remove the President from the affairs of the executive department.

President Monroe, when asked to review the accounting officers' decisions about Wheaton, did not personally review the records. Instead, the President stuck the Attorney General with the task.[98] At the time, being Attorney General was not a remunerative job, either financially or professionally. There was no U.S. Department of Justice to supervise until the department was created in 1870.[99] The Attorney General was not paid very much; Attorneys General were expected to earn their income primarily by acting as private lawyers *while they were also* serving as Attorney General.[100] If you were William Wirt, would you want the President shoving stacks of papers at you—without any additional pay?[101]

It is, of course, possible that Wirt's opinion was honestly motivated—and just badly reasoned. In any event, it was not followed by his successor, John Macpherson Berrien, who in 1829 concluded that, although Congress could limit the power of subordinate officials, such as auditors of military accounts, to overrule each other, the Secretary of War always had authority to reconsider the decisions of auditors, "acting (as, in matters connected with his department, he is presumed always to act) by the direction of the President."[102] Foreshadowing the structure seemingly contemplated by the Supreme Court in 2021,[103] the President, according to Berrien, directs the Secretary, who can then, on presidential orders, direct subordinates.[104] Two years later, Roger B. Taney was even more explicit about the President's power of review: "The party may carry his appeal from the Secretary of War before the President."[105]

Taney, however, switched positions within a year. In 1832, he examined statutes seeming to vest final executive decisional authority in auditors and concluded:

> These laws, as well, indeed, as those which preceded them on the same subject, appear to me not to contemplate any appeal to the President; and I think, therefore, that the decision of the Comptroller in this case is

97. Wirt was highly respected as a lawyer. *See* H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL 13–14 (1999).

98. *See supra* note 94 and accompanying text.

99. *See* Act of June 22, 1870, ch. 150, 16 Stat. 162; Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 122 (2014).

100. *See* Shugerman, *supra* note 99, at 131.

101. I am grateful to Steve Calabresi for bringing these considerations to my attention.

102. Decisions of Acct. Officers—to What Extent Final, 2 Op. Att'ys Gen. 302, 303 (1829).

103. *See* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1986 (2021). For a discussion of how *Arthrex* recognizes the importance of presidential *decisional authority* and not just presidential *removal authority*, see Jennifer L. Mascott & John F. Duffy, *Executive Decisions After* Arthrex, 2021 SUP. CT. REV. 225.

104. *See* Decisions of Acct. Officers—to What Extent Final, 2 Op. Att'ys Gen. 302, 303 (1829).

105. Accts. & Acct. Officers, 2 Op. Att'ys Gen. 463, 464 (1831). In 1834, the 1829 decision was reaffirmed. *See* Accts. of Gen. Parker & Acct. Officers, 2 Op. Att'ys Gen. 652, 653 (1834).

> conclusive upon the executive branch of the government, and that the President does not possess the power to enter into the examination of the correctness of the account, for the purpose of taking any measures to repair the errors which the accounting officers appointed by law may have committed. The party who supposes that justice has not been done to him must seek relief in court when a suit is brought against him, or may bring his claims to the consideration of Congress; and these, in my opinion, are the only means of redress . . . if the accounting officers have erred in their decision.[106]

There was no further analysis, and there was no reference to prior opinions.[107]

Taney's revised views, which accorded with Wirt's position, were adopted in 1846 by General John Mason.[108] The President was asked to reconsider findings of fact in a pension claim that turned on length of service in the Revolutionary War seven decades earlier. Mason was direct:

> [T]he constitution assigns to Congress the power of designating the duties of particular subordinate officers; and the President is to take care that they execute their duties faithfully and honestly. He has the power of removal, but not the power of correcting, by his own official act, the errors of judgment of incompetent or unfaithful subordinates.[109]

The only rationale offered for this conclusion, beyond reference to the prior opinions, was a rehash of Wirt's transparently weak argument that the President could not possibly review every decision.[110]

The various opinions denying the President power to review subordinate decisions were summarized, without additional argument, in 1852.[111] Shortly thereafter, however, Wirt's reasoning—which had never been further developed by his successors—was dissected and decisively rejected by Attorney General Caleb Cushing in 1854.[112] After surveying the variety of statutory provisions providing, or not providing, for presidential supervision of affairs of the executive departments,[113] Cushing dismissed Wirt's 1823 opinion as ill-considered:

> Had the idea presented itself as a mere question of the *order* of business, to the effect that the President should act upon the subordinate officers through the heads of departments, it might have answered as a matter of convenience, but not one of legal necessity. But the idea utterly excludes the authority of the President, and so, while recognising the authority of the head of department, in effect makes the latter also superior to the President:

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106. Accts. & Acct. Officers, 2 Op. Att'ys Gen. 507, 509–10 (1832).
107. *See id.*
108. *See* Power of the President Respecting Pension Cases, 4 Op. Att'ys Gen. 515 (1846).
109. *Id.* at 515.
110. *See id.* ("Considering the high constitutional duties of the President, which occupy his whole time, it requires no argument to show that he could not acquit himself, by their adequate performance, if he were to undertake to review the decisions of subordinates on the weight or effect of evidence in cases appropriately belonging to them.").
111. *See* Jurisdiction of the Acct. Officers, 5 Op. Att'ys Gen. 630, 635–36 (1852).
112. *See* Off. & Duties of Att'y Gen., 6 Op. Att'ys Gen. 326, 342–44 (1854).
113. *See id.* at 339–40.

> which is in conflict with universally admitted principles. Such an assumed anomaly of relation, therefore, as this idea supposes, resting upon mere opinion or exposition, must, of course, yield to better reflection, whenever it comes to be a practical question demanding the reconsideration of any Attorney General.[114]

Cushing's primary concern in this opinion was to lay out the functions of the Attorney General, not to articulate a comprehensive theory of presidential power.[115] A year later, Cushing took up that cudgel, elaborating on his reasoning in a remarkable opinion that sets out a theory of Article II strikingly similar to the view outlined in this Essay.[116]

Cushing's central observation was that, in the Constitution, "no case occurs of the communication of power directly to any Head of Department . . . ."[117] Just so; the Constitution vests "executive Power" in the President, not in any congressionally created subordinates.[118] This means that "no Head of Department can lawfully perform an *official* act against the will of the President; and that will is, by the Constitution, to govern the performance of all such acts."[119] If the President gives an instruction, no subordinate can act on behalf of the executive department in a way that contravenes that instruction. That is the essential content of the unitary executive.

To be sure, Cushing carves out several exceptions from this principle, one of which is valid. First, he exempts from presidential direction "acts purely ministerial"[120]—i.e., the kind of acts that would be subject to mandamus if not performed or performed properly[121]—and that seems fine. If an action is truly legally required in that mandatory fashion, then it does not matter whether the President gives instructions or not. The law is the law. The President's cancellation power applies only to exercises of lawful discretion. Cushing's other exception, however, is more problematic. He suggests that Congress can place power outside of the President's control when that power is not "executive," as when the Attorney General adjudicates claims under a treaty.[122] This cannot be right. The Attorney General's power in that circumstance must be legislative, executive, or judicial. It certainly is not legislative power. If it is judicial power, it can only be exercised by Article III judges. It is plainly executive power and thus must be subject to presidential control. Cushing is also mistaken, I believe, in thinking that Congress can control the *form* in which the President gives instructions to

114. *Id.* at 343–44.
115. *See id.* at 333–36, 347–48.
116. *See* Rel. of the President to the Exec. Dep'ts., 7 Op. Att'ys Gen. 453 (1855).
117. *Id.* at 465.
118. *See id.* at 460 ("[B]y the explicit and emphatic language of the Constitution, *the executive power* is vested in the President of the United States.").
119. *Id.* at 469–70.
120. *Id.* at 470.
121. *See id.*
122. *See id.* at 470–71.

subordinates.[123] It is hard to see how such a law "carr[ies] into Execution"[124] rather than hinders the President's executive power. On the whole, however, Cushing's opinion impressively reflects the constitutional text and structure.

CONCLUSION

The Constitution vests "[t]he executive Power" in the President and in no one else.[125] As a result, no federal executive power can be exercised contrary to presidential instructions. Any attempt to do so by subordinates, with or without statutory support from Congress, is simply void. Those subordinates, during their statutory term of office, can collect their salaries and benefits and enjoy the view from their offices. But they cannot contravene the President's instructions, even if they don't like the President or the instructions. The Constitution does not allow a Deep State.

123. *See id.* at 481.
124. U.S. CONST. art. I, § 8, cl. 18.
125. *Id.* art. II, § 1, cl. 1.