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Executive Power and Senate Consent

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I. Introduction

Justice Scalia stands vindicated. The Supreme Court has adopted his declaration that the president wields not "*some of* the executive power, but *all of* the executive power."[1] But despite this victory for the "unitary executive," the president does not enjoy plenary authority over the executive branch. Principal officers—and many inferior officers—must still be appointed "by and with the Advice and Consent of the Senate."[2] Cognizant of its role, the Senate has, with increasing frequency, wielded its confirmation power to block executive branch nominees or delay their confirmation.[3] In response, presidents have relied on reassignments and increasingly strained interpretations of vacancy statutes to staff important executive branch posts.[4] This escalating political struggle over appointments has made the distinction between forms of unitary executive theory ever more important. Under

[1] Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting); accord Trump v. Wilcox, 145 S. Ct. 1415 (2025) (allowing the president to fire "independent" commissioners).
[2] U.S. CONST. art. II, §2, cl. 2.
[3] *See, e.g.* Peter Shane, *Congress' Obstruction Addiction and the Garland Nomination*, Washington Monthly (Sep. 8, 2016), https://www.academia.edu/download/57807322/Washington_Monthly___Congress_Obstruction_Addiction_and_the_Garland_Nomination.pdf; *see also Senate Democrats Block U.S. Attorney Nominees from Serving Communities Across America*, U.S. Senate Committee on the Judiciary (Sept. 3, 2025), https://www.judiciary.senate.gov/press/rep/releases/senate-democrats-block-us-attorney-nominees-from-serving-communities-across-america
[4] *See*, e.g., Dana DiFilippo, *Judges Reject U.S. Attorneys' Bid to Remain on the Job—But White House Blocks Their Order*, N.J. MONITOR (July 22, 2025), https://newjerseymonitor.com/2025/07/22/judges-reject-us-attorneys-bid-to-remain-on-the-job-but-white-house-blocks-their-order/; *NLRB v. Noel Canning*, 573 U.S. 513 (2014); Ben Miller-Gootnick, Boundaries of the Federal Vacancies Reform Act, 56 HARV. J. ON LEGIS. 459, 460 (Summer 2019) (arguing that "[u]nprecedented personnel turmoil" has thrust the Federal Vacancies Reform Act into the spotlight)

the "strong form of the unitary executive,"[5] the president can directly exercise the powers of any executive office without acting through an officer.[6] Under weaker unitary executive theories, the president would have to act through subordinates when required to by Congress, though subordinate officers would always remain subject to binding presidential orders and removal at the chief executive's pleasure.

This note argues that both the original meaning of "Executive Power" and a necessary implication of the Appointments Clause preclude the President from personally exercising powers assigned by Congress to a vacant Senate-confirmed office. The King of England, who was understood to possess the full suite of Executive Power, could not execute the laws himself; there is no reason to believe the Founders departed from that settled understanding of Executive Power when they created a limited presidency. Accepting this presidential power would also render the Appointments Clause a virtual nullity by eliminating the need for Senate-confirmed officers. That would contradict centuries of precedent and strike a serious blow against the checks and balances that preserve good government. Such a result is also entirely unnecessary. The best reasons for a unitary executive—restraining abuses of government power through democratic accountability—are already served by the President's directive authority and an unlimited removal power.

II. English and Founding-Era Practice

This article will apply an originalist analysis to the meaning and scope of the Executive Power. Originalism is the theory that our law is "[w]hatever rules of law we had at the Founding, [...] unless something legally relevant happened to change them."[7] Because the organic law ratified at the Founding was a written instrument, originalism requires adherence to the original meaning of the Constitution's text. Originalism is the superior method of constitutional interpretation for a variety of reasons beyond the scope of this

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[5] Steven G. Calabresi and Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1166 (1992).

[6] Professor Ramsey has directly applied this argument to Execution of responsibilities assigned to vacant offices. Michael Ramsey, *Marty Lederman on the Unitary Executive*, The Originalism Blog (Oct. 7, 2024), https://web.archive.org/web/20250911052401/https://originalismblog.typepad.com/the-originalism-blog/2024/10/marty-lederman-on-the-unitary-executivemicahel-ramsey.html; *see also* Gary Lawson, *Command and Control: Operationalizing the Unitary Executive*, 92 FORDHAM L. REV. 441 (November 2023); *but see* Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) (arguing that the President is limited to direction and removal).

[7] Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J. L. & PUB. POL'Y 817 (Summer 2015).

article, such as its respect for popular sovereignty and semantic coherence.[8] More relevantly, unitary executive theory as deployed today is a product of originalist constitutional scholars and ascendant originalist judges.[9] Using a nonoriginalist framework in this article would thus not only be wrong, but also fail to address the current frame for how constitutional actors think about executive power.

Under an originalist framework, 18th-century English practice matters for any discussion of presidential authority. The Constitution's text is silent about the relationship between the President's "Executive Power," his duties under the Take Care Clause, and his relationship to officers after he appoints them.[10] Given the apparent indeterminacy of the text, founding-era practice can act as evidence to "determine the *public understanding* of a legal text in the period after its enactment or ratification."[11] This is especially true for terms like "Executive Power" which have been the subject of interpretation by English jurists.[12] Additionally, "liquidation"—whereby a particular construction of an indeterminate text can be fixed by "repeated recognitions under varied circumstances of the validity of such an institution"[13]—may give legal weight to post-ratification practice, even if it does not shed light on the original meaning.[14] Whatever the precise rationale, the Supreme Court has given significant weight to continuous government practice when construing questions of Executive Branch management.[15] This tradition strongly counsels against a strong-form unitary executive.

The King of Great Britain could not personally "arrest a man," even for "treason or felony."[16] Rather, the king employed subordinate law enforcement officers and enjoyed the

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[8] Lawrence B. Solum, *Semantic Originalism* 1 (Univ. of Ill. Coll. of Law, Illinois Public Law and Legal Theory Research Papers Series No. 07-24, 2008), http://papers.ssrn.com/abstract=1120244.
[9] Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, The Making of Presidential Administration, 137 HARV. L. REV. 2131 (June 2024).
[10] U.S. Const. art II, § 1, 2, 3. *See also* Seila Law LLC ("'there is no "removal clause" in the Constitution,'")
[11] District of Columbia v. Heller, 554 U.S. 570, 605 (2008).
[12] Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 607, n.261 (1994) (arguing that the "striking similarity between our Executive Power Clause [...] and Blackstone's assertion that '[t]he supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen,'" is evidence for the original meaning of the constitution favoring a unitary executive theory.)
[13] 28 Annals of Cong. 189-91 (1815).
[14] William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019) *but see Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1 (2020) (arguing that liquidation is more consistent with nonoriginalist interpretation than Originalism).
[15] *See e.g.,* Myers v. United States, 272 U.S. 52, 112–172 (1926)
[16] 12 Co. Rep. at 64 (1607); *but see id.* at 63 (confining question to cases where there was "no express authority in law" for the king to prosecute)

plenary power to remove them at will.[17] Separation of law enforcement from the divine right of kings was considered vital for holding law enforcement officers accountable, as only the king's subordinates were personally liable to prosecution or civil lawsuits. In one of the most widely read books of Enlightenment Britain and early America, William Paley specifically listed the need for "certain solemnities, and [attestation] by certain officers of state" before execution of monarchical will as a "manner the constitution has provided for its own preservation" specifically because officers could refuse illegal orders.[18] This was true even though those officers served at-will and the king enjoyed "the *whole* executive power of the laws."[19] There was simply no inconsistency between the wholeness of that executive power and the norm of delegated enforcement that "crown itself cannot now alter but by act of parliament."[20]

The Founders consciously adopted and expanded these restrictions on monarchical power. Much of the Declaration of Independence focused on blatantly illegal law enforcement practices employed by King George III, including him directing prosecutions outside the control of local executives and without independent courts and juries.[21] It would be surprising if the Framers had not merely kept the crown's prosecutorial power intact, but expanded it by vesting prosecutorial functions directly in the president. Unsurprisingly, no early president viewed the prosecutorial power in this manner. While Washington, Adams, and Jefferson all directed U.S. attorneys to begin or end prosecutions, they each acted through properly appointed officials. None purported to dispense with appointments and personally perform prosecutions, even in politically important cases.[22]

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[17] See generally J.L.J. Edwards, The Law Officers Of The Crown (1964).
[18] William Paley, The Principles of Moral and Political Philosophy 265 (Indianapolis: Liberty Fund, 2002).
[19] 1 William Blackstone, Commentaries On The Laws Of England 177 (Philadelphia, J.B. Lippincott Co. 1893).
[20] *Id.* Blackstone was referring to what the Constitution now calls the judicial power as separate from the Executive Power. But Blackstone makes clear that, at the time of his writing, that the courts were legally executive, and the "regal presence" of the king was the one pronouncing judgment. *Id.* at 179. In any event, the norm applied to acts that are still considered executive today.
[21] The Declaration of Independence ¶2 (U.S. 1776) ("He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance."); *see also* 2 Samuel Greene Arnold, History Of The State Of Rhode Island And Providence Plantations 309-10 (New York, D. Appleton & Co. 1859) (describing the "Gaspee affair," where one Lieutenant Duddingston of the Royal Navy abused the king's grant of unilateral power over prosecutions to try colonists in out-of-state courts without a local judge and jury.)
[22] Saikrishna Prakash, *The Chief Prosecutor*, 73 Geo. Wash. L. Rev. 521 (2005).

In his 2003 article, *The Essential Meaning of Executive Power*, University of Virginia Law Professor Saikrishna Prakash provides four reasons why the president is not bound by the English Rule.[23] Most of his rebuttals are mistaken on the facts, and none support the conclusion that "Executive Power" necessarily includes the right to *personally* execute laws.

First, Prakash argues that the President is not categorically weaker than the king because his powers are indefeasible, while the king could be restrained by Parliament.[24] Prakash misunderstands the nature of American sovereignty. In the United Kingdom, the King-in-Parliament "has unlimited power in domestic law because it is *sovereign*."[25] In the United States, "we the *people*" are sovereign.[26] In both nations, the sovereign can alter the structure of government as it pleases, rendering any government power defeasible.[27] Ultimate sovereignty resting with the people, rather than the King-in-Parliament, is a diminishment of *all* government power, not just legislative.[28]

Second, Prakash argues that the British King may have faced more restraints than the American president because he was unaccountable, while the president remains subject to impeachment, lawsuits, and regular election.[29] Prakash is wrong about both British kings and American presidents. The Founders knew that, in practice, English Kings *had* in fact been held to account by Parliament and the people several times since the Norman Conquest by measures much more forceful than mere removal from office.[30] The Framers' decision to channel this de facto accountability into the legal process of Senate conviction (which has never been used on a president) does not imply that the Framers intended to abandon every other common law check on the king.

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[23] Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701 (2003).
[24] *Id.* at 717.
[25] House of Lords Constitution Committee, *The Rule of Law and Parliamentary Sovereignty*, at 226 226 (H.L. 382) (U.K.), https://publications.parliament.uk/pa/ld5801/ldselect/ldconst/151/15110.htm (note 158) (emphasis added).
[26] U.S. CONST. pmbl.
[27] *See* House of Lords, *supra*, note 25; U.S. CONST. art. V.
[28] Prakash also overstates Parliament's power. Unlike Congress, its acts are subject to absolute veto.
[29] Prakash, *supra* note 23, at 718.
[30] In 1215, King John was forced by a collection of nobles (Parliament as we know it did not yet exist) to sign the Magna Carta, the foundation for Anglo-Saxon liberty. Parliament removed two kings: Charles I, by way of a sham trial and execution in 1649, and James II, by finding (over his objection) that he abdicated the throne by fleeing to France. And in 1776, some colonial subjects King George III indicted him and revoked his authority over them. Although one president, Richard M. Nixon, was forced to resign pending impeachment, no president of the United States has been removed from office by Congress. While this is more a testament to the character of American presidents (and British kings) than to the will of Congress, it demonstrates that Prakash's account of kingly unaccountability is incorrect.

Prakash's other examples of accountability fare no better. British monarchs were immune from suit, but the Supreme Court has held that presidents are equally immune from legal, equitable, and criminal accountability for official misconduct.[31] That leaves only regular elections as a unique check on presidential power.[32] But an election is no check on a president content to rule for only four years, and a president's immunity does not expire with his term of office. Regular elections by state legislatures are thus little guarantee that a president can be trusted to self-execute any law.

Third, Prakash claims "[e]very other constitutional provision that grants a power to an entity permits the recipient to exercise the power personally," a reading he calls "common sense."[33] This generalization ignores swaths of the Constitution. "All legislative powers" are "vested in a Congress," under Article I, § 1, but §7 of the same article provides a presidential veto so potent that the president is often called "Chief Legislator."[34] The judicial power is vested in "one Supreme Court," but that Court depends on Congress and the states to create lower courts amenable to its appellate jurisdiction before it can hear most cases.[35] The Senate, with its "sole" power to "try all" impeachments, must accept a presiding officer it does not control when trying the president.[36] And, far from personal execution as "common sense," it "was inconceivable" for "the King to appear in person as plaintiff or defendant" in England even though he wielded both executive and judicial power.[37] Given these examples, there is nothing anomalous about the president needing to appoint an officer before wielding powers of that office, if Congress so directs.

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[31] Nixon v. Fitzgerald, 457 U.S. 731 (1982) (civil damages); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866) (injunctions); Trump v. United States, 603 U.S. 593 (2024) (criminal process). The availability of remedies for illegal enforcement of criminal laws is not merely an academic question. Many unconstitutional laws are challenged in pre-enforcement proceedings against subordinate officials because penalties for their violation are so enormous that persons affected are prevented from resorting to the courts in a defensive posture. *Ex parte Young*, 209 U.S. 123 (1908).

[32] In theory, a president can be sued or tried for unofficial actions. But it is the official acts of the president, like directing illegal prosecutions or otherwise wielding government power for tyrannical ends, that the separation of powers is designed to guard against. The possibility of prosecution for a purely personal act is thus no safeguard for liberty.

[33] Prakash, *supra*, note 23, at 716, 718

[34] *The Chief Legislator* (Presidential Hats Program), George W. Bush Presidential Library & Museum, https://www.georgewbushlibrary.gov/sites/default/files/2021-09/PresidentialHatsPP_Legislator.pdf.

[35] Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850); *see also* Patchak v. Zinke, 138 S. Ct. 897 (2018) (plurality opinion) (allowing Congress to require dismissal of pending federal lawsuits); but *see id.* at 905 (Sotomayor, J., concurring) (limiting the rule to suits against the Federal Government).

[36] U.S. Const. art. I, §3, cl. 6

[37] J.L.J. Edwards, The Law Officers Of The Crown 15 (1964).

Finally, Prakash claims that numerous Founding Fathers spoke in favor of and ultimately practiced direct executive control over law enforcement.[38] But control does not equate to personal execution. As his later analysis of early American prosecutions[39] reveals, founding-era presidents and state executives often *directed* the prosecutorial decisions of properly appointed subordinate officials. But of the dozens of examples of prosecutorial control Prakash cites, *none* include the Chief Executive (of any government) personally instituting a prosecution without an appointed intermediary.[40] If anything, they make clear that the "proper law officer to commence and carry on a prosecution" was one lawfully appointed, and not the executive personally.[41]

Early American officials recognized this practice as demonstrative of a legal rule. In 1855, Attorney General Caleb Cushing aptly summarized it as follows: if the president "approves a law which designates a particular Head of Department as the immediate agent of administration, then his executive discretion in regard to the choice of agent has been exerted … his orders in the matter will be given [… to] the legally designated Head of Department."[42] Cushing's statement echoed earlier opinions by several attorneys general[43]

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[38] Prakash, *supra n. 9*, at 718; *see also* 1 Annals of Cong. 463 (Gales & Seaton eds., 1789) (Madison stating that the executive power is the power of "appointing, overseeing, and controlling those who execute the laws." Noticeably absent is a mention of the President executing the laws himself.)

[39] Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005).

[40] The best example to the contrary stems from the prosecution of Aaron Burr. Prakash cites Leonard W. Levy for the proposition that "Jefferson did not turn the case over to the United States attorney, but acted himself as prosecutor." LEONARD W. LEVY, JEFFERSON & CIVIL LIBERTIES: THE DARKER SIDE 71 (1963). Levy's language is inaccurate. His citation is to correspondence between Jefferson and the United States Attorney for the District of Virginia, George Hay. While Jefferson did send evidence and instruction to Hay, it was Hay himself who presented arguments to the court and actually prosecuted Burr. *See* Letter from George Hay to Thomas Jefferson (May 25, 1807) (moving to commit Burr pre-trial); Letter from Thomas Jefferson to George Hay (May 20, 1807) (providing blank pardons "to be filled up at your discretion"). In fact, Jefferson explained that his actual motive for the letters was the "absence of the Attorney General," and urged Hay to avoid the burden of responding unless truly necessary. Letter from Thomas Jefferson to George Hay (June 5, 1807). While these statements show an unusually active level of supervision over the former vice-president's prosecution, they do not support the notion that Jefferson literally usurped the role of prosecuting attorney. Additionally, Jefferson's tactics in the prosecution—which his administration lost—were criticized and contested at the time. *United States v. Burr*, 25 F. Cas. 2, 14-15 (C.C.D. Va. 1807) ("I ought not to believe that there has been any remissness on the part of those who prosecute on this important and interesting subject"); *see also* LEVY, at 71 ("The object was not to secure justice by having Burr's guilt—or innocence—fairly determined."). If Jefferson acted as a prosecutor, it would only demonstrate why the English rule against direct enforcement was well-reasoned.

[41] 10 Annals of Cong. 184 (1800)

[42] 7 Op. Att'y Gen. 453, 468 (1855) (Cushing, Att'y Gen.)

[43] Cushing's opinion was consistent with Attorney General William Wirt's 1823 opinion: "If the laws, then, require a particular officer by name to perform a duty [...] were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them." The President & Acct. Offs., 1 U.S. Op. Atty. Gen. 624, 625–26 (1823).

that affirmed a strong directive power[44] but precluded the President from executing laws himself where a statute assigned enforcement to a specific officer.[45]

III. The Purpose of the Appointments Clause

Defenders of executive self-enforcement contend that forcing the president to depend on his appointments being confirmed by the Senate would "materially diminish the president's control of law execution."[46] But the very purpose of Senate consent is to check executive power by vetting the officials who exercise it:[47] "[A]dministrative convenience" from unilateral presidential appointments "was deemed to outweigh the benefits of the more cumbersome procedure only with respect to the appointment of 'inferior Officers,'" and even then only as permitted by Congress.[48] The explicit textual check on the executive power created by the Appointments Clause cannot be brushed aside any more than the Executive Power Vesting Clause itself.[49]

The Framers had strong moral and practical reasons for adding this check on an otherwise broad grant of Executive power. As Justice Story remarked, mixed appointments mean that "no serious abuse of the power can take place without the co-operation of two co-ordinate branches, of the government, acting in distinct spheres."[50] The Appointments Clause thus safeguards the "blessings of liberty" from a "gradual concentration" of power

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[44] Attorney General Taney, who would later become Chief Justice, concluded that the president possessed the removal power in part *because* "he could only act through his subordinate officer[s]." 2 Op. Att'y Gen. 858 (1831). Prakash, writing in 2015, asserts that Cushing, Wirt, and Taney were all wrong because the Constitution vests the executive power in the President, and not law officers. Saikrishna Bangalore Prakash, Imperial From The Beginning 190 (2015). While all three Attorneys General knew this, they also understood that Congress could regulate the manner of that executive control by allowing removal instead of direct Presidential law-execution.

[45] The modern Department of Justice maintains that some authorities, like the authority to appoint inferior officers, are constitutionally vested in principal officers and cannot be delegated. *See* Reply Brief For Appellant at 30-31*, United States v. Giraud et al.* 25-2635 (3d Cir. 2025).

[46] Calabresi & Prakash, *supra*, note 12, at 593; Saikrishna Bangalore Prakash, Imperial From The Beginning 190 (2015); Michael Ramsey, *Marty Lederman on the Unitary Executive*, The Originalism Blog (Oct. 7, 2024) https://originalismblog.com/marty-lederman-on-the-unitary-executivemicahel-ramsey/.

[47] *See, e.g.*, 4 Jonathan Elliot, The Debates In The Several State Conventions On The Adoption Of The Federal Constitution 134 (1836) (statement of James Iredell) ("This, in effect, is but a restriction on the President.")

[48] Edmond v. United States, 520 U.S. 651, 660 (1997). "Control" is not the correct term. The President *always* has control over the Executive power—when actually used—through his removal power.

[49] Calabresi and Prakash dismiss the necessary implications of the Appointments Clause as mere "imperfections" in the Constitution. Calabresi & Prakash, *supra*, note 12, at n.202, n. 204. But the sole legal remedy for any "imperfections" in the Constitution is an Article V amendment. Until such an amendment modifies Article II, one must interpret it faithfully, including any "imperfections."

[50] 3 Joseph Story, Commentaries On The Constitution Of The United States § 1525, at 378 (1833).

into either the Executive or Legislative branches of government.[51] At the same time, independent review of appointments incentivizes the president to carefully order his nominations (and their intended conduct) to the common good. Even if one were concerned solely with government efficiency, a modest delay in appointments and the occasional rejection by the Senate is preferable to government business carried out by incompetent, partial, or obsequiously pliant officials.[52] Senate confirmation does not destroy the executive power of the president but rather perfects it.

One could dispute the applicability of the Appointments Clause to the president's personal execution of the laws. After all, the president is selected by electors chosen by state legislatures in a competitive national election, a process far more selective than Senate confirmation. Because this process makes the president "the most democratic and politically accountable official in Government,"[53] it appears that the competence-vetting purposes of the Appointments Clause are unnecessary when he personally executes federal law. The current president has made a similar argument to the Supreme Court with respect to the Major Questions Doctrine, another structural constraint on executive power.[54] Additionally, one could argue that the Take Care or Vesting clauses give the president a personal duty to execute the laws, with or without subordinates.[55]

Under the Constitution, the president is not "the most democratic" official in America. The Supreme Court's statement appears to substitute modern (mostly) direct election of presidents by the people for the selection procedure actually outlined in the Constitution: triply indirect election by electors appointed by state legislatures themselves elected in a "republican" fashion.[56] In contrast, the House was to be directly elected by the people, and the Senate was to be selected through a single layer of mediation in the form of the state legislatures.[57] Moreover, because the presidency is winner-take-all, presidential elections necessarily render powerless minority voices that find representation in Congress. While the Constitution emphatically grants the president control over all executive officers,

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[51] U.S. Const. pmbl; THE FEDERALIST No. 51, at 349 (James Madison) (J. Cooke ed., 1961).
[52] THE FEDERALIST No. 76 (Alexander Hamilton)
[53] Seila Law LLC v. CFPB, 591 U.S. 197, 224 (2020)
[54] Brief of the United States at 36, *Donald J. Trump v. V.O.S. Selections et al*, Case No. 25-250 (Sept. 19, 2025).
[55] Lawson, *supra* note 6, at 458.
[56] U.S. CONST. art. II, § 1, cl. 3; *accord* U.S. CONST. amend. XII. U.S. CONST. art. IV, § 4.
[57] U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. art. I, § 3, cl. 1. Senators are now directly elected by the people under the 17th Amendment, but that Amendment did not modify Article II.

executive authority vis-à-vis the Senate should not be expanded under false pretenses of superior democratic accountability.

Even if *Seila Law*'s description of presidential power is accurate, applying it to allow personal law execution fails to grasp the realities of "personal" presidential power. It was physically impossible for President Washington to execute the laws by himself in 1789;[58] and it would be even less possible today for the president to step in the shoes of several thousand politically appointed officers.[59] Any president asserting "personal" law enforcement powers would in fact be *bypassing* Senate-confirmed positions to direct inferior officers (and many employees)[60] to perform duties normally committed to a Senate-confirmed officer. Where a statute calls for regulatory action, the president—unlikely to be an expert on the area in question—would have to delegate regulation writing to a person or committee of non-officer employees and rubber-stamp it without substantive review. Although these acts may be carried out under the name and even the approval of the "most democratic" official, lines of accountability would be blurred by the lack of legal title or procedure for knowing who is *actually* making the discretionary decisions that principal officers are ordinarily held to account for.[61]

While no president has attempted to bypass the Senate entirely and execute every federal law himself, the recent appointment of Elon Musk to lead the United States Digital Service (now the United States DOGE Service) demonstrates how direct presidential law enforcement unconstitutionally arrogates power to the executive branch. As leader of USDS, Musk could not have been an officer of the United States; his position was not

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[58] 30 WRITINGS OF GEORGE WASHINGTON 334 (J. Fitzpatrick ed. 1939).

[59] *Political Appointee Tracker,* Partnership for Public Service, https://ourpublicservice.org/performance-measures/political-appointee-tracker/

[60] The dividing line between "employees" and constitutional "officers" is likely inconsistent with the original meaning of the Appointments Clause. Jennifer L. Mascott, *Who Are "Officers of the United States"?,* 70 STAN. L. REV. 443, 564 (2018). Properly understood, the Constitution requires any person occupying a continuing position established by law to be an officer. By allowing the Executive Branch to hire citizens without obeying the appointments clause, the modern "employee" categorization has also weakened the Constitution's structural protection of liberty.

[61] Doubtless, appointed officers also subdelegate important responsibilities to employees not examined by Congress. The difference is scale. The President controls some 2,290,000 federal employees, while approximately 1,300 Senate-confirmed officers manage an average of 1,800 employees each. *New Data Shows Trump Administration's Progress in Right-Sizing the Federal Bureaucracy*, U.S. Office of Personnel Management (July 2025), https://www.opm.gov/news/new-data-shows-trump-administration%CA%BCs-progress-in-right-sizing-the-federal-bureaucracy/. Congressional oversight at the upper management level, even if imperfect, clearly constrains shadowy delegations to potentially incompetent employees more than the total lack of mandatory vetting under strong form unitary executive theory. To the extent one is still worried that "employees" govern in the shadows, *see* Mascott, *supra*, note 59.

established by law and his appointment was not made pursuant to the Appointments Clause.[62] In litigation, the government argued that Musk "has no actual or formal authority to make government decisions" but merely "communicate[d] the President's directives."[63] In his public statements, however, the President claimed that Musk *did* have control over executive functions delegated to USDS by Executive Order 14158.[64] The latter statement was far more consistent with Musk's actual authority over federal operations.[65] After Musk's authority was challenged under the Appointments Clause, the courts rejected his claim that he was merely an organ of the President and thus immunized from scrutiny. The administration was only partially victorious because many of Musk's actions had been ratified by constitutionally appointed principal and inferior officers.[66] This reveals the danger and illogic of executive self-execution. Standing on its own, ratification may have sufficed to bring Musk's actions under the separation of powers. However, if the President were understood to "fill-in" and directly exercise the powers of his officers, then *any* action by Musk could have been "ratified" post hoc by the President, despite his lack of Senate confirmation. In such a case, the primary effect of presidential self-execution would not be to enhance democratic accountability, but to completely nullify the Appointments Clause of our Constitution while governance is carried out in the shadows.[67]

The personal duty and wide discretion created by the Take Care Clause also do not authorize the President to circumvent required procedures on how he faithfully executes

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[62] Jeff Powell, *Professor Jeff Powell on the Appointments Clause and Separation of Powers*, Duke University School of Law (Mar. 2025), https://law.duke.edu/news/professor-jeff-powell-appointments-clause-and-separation-powers.

[63] Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction, *J. Doe 1 v. Musk*, No. 8:25-cv-00462-TDC (D. Md. Feb. 24, 2025).

[64] Andrea Shalal and Nandita Bose, *Trump appears to contradict White House, says Elon Musk in charge of DOGE*, Reuters (Feb. 20, 2025), https://www.reuters.com/world/us/trump-appears-contradict-white-house-says-elon-musk-charge-doge-2025-02-20/.

[65] J. Doe 1 v. Musk, No. 25-0462-TDC, at 31 (D. Md. Mar. 18, 2025). (finding that Musk exercised significant governmental authority)

[66] *Id.* at 26.

[67] As he appointed Elon Musk, the President also reformed USDS from the United States Digital Service into the United States DOGE Service. If taken to the logical endpoint implied by executive-enforcement, such a reformulation suffices to create entirely *new* offices. The President would announce an office to enforce any law, delegate powers he saw fit, and then "ratify" official actions by acting as the officer chosen by Congress. Such a power would be breathtakingly inconsistent with the original intent of the Constitutional framers, who "broke from the monarchical model by giving the president the power to fill offices (with the Senate's approval), but not the power to create offices." Trump v. United States, 603 U.S. 593, 646 (Thomas, J., Concurring).

the laws.[68] For example, the "Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case,"[69] but once a case is brought, the Executive must respect (indeed, affirmatively defend) the independence of the judge and jury who will decide it.[70] Likewise, the president enjoys nearly unfettered discretion to *nominate* individuals as officers of the United States,[71] but must accept the Senate's decision to confirm or reject the nominee before directing execution of the statutory responsibilities assigned to that officer.[72] Nomination is the constitutional mechanism for "taking care" that the laws are faithfully executed. Attempting to ignore the Senate and personally execute authorities Congress has chosen to vest in a vacant office would not be "faithfully" executing the law, but rather forbidding the execution of laws—the Appointments Clause and a vesting statute—that the president finds inconvenient. There is no such power.[73]

Reading the Appointments Clause to preclude some law execution absent Senate consent would not excessively interfere with presidential administration. Any restraint against personal exercise of power would only apply where Congress has made the decision to assign a power "exclusively" to an inferior office by statute.[74] Many statutes would likely allow presidential enforcement because they assign power to the Chief Executive (even if they facilitate delegation) or grant power to the United States writ large.[75]

In any event, no amount of Senate obstructionism could cause the executive power to be *exercised* in a manner objectionable to the president. The president can always lawfully order his subordinates to take or refrain from actions assigned to their discretion by

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[68] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.") The Court's decision in Youngstown is notable because the President argued that his violation of laws governing property seizure was necessary to execute laws authorizing procurements for the Korean War.
[69] United States v. Nixon, 418 U.S. 683, 693 (1974)
[70] Berger v. United States, 295 U.S. 78, (1935) (reversing a conviction after a prosecuting attorney misled a jury) ("while he may strike hard blows, he is not at liberty to strike foul ones"); *In re* Neagle, 135 U.S. 1 (1890) (holding that "the general obligation imposed upon the President of the United States by the Constitution to see that the laws be faithfully executed [...] impose upon the Executive department the duty of protecting a justice or judge of any of the courts of the United States").
[71] Hanah M. Volokh., *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745 (2008).
[72] Of course, if the Senate has no opportunity to make a decision because it is in recess, then the President may make temporary appointments. A majority in the Senate can then dispense with such temporary appointments by meeting and adjourning. U.S. Const. art. II, § 2, cl. 3.
[73] Kendall v. United States *ex rel.* Stokes, 37 U.S. 524, 613 (1838).
[74] The President & Acct. Offs., 1 U.S. Op. Atty. Gen. 624, 625–26 (1823).
[75] *See e.g.*, Wilcox v. Jackson, 38 U.S. 498 (1839) (Statutes implicitly allow the president to delegate).

statute; if they refuse direction, the president can summarily fire them.[76] In that case, the powers of their office would lie dormant until a successor was confirmed or Congress reassigned them. Note the asymmetry. The president can always prevent execution of a law through unilateral firings, but must obtain Senate consent to appoint enforcers who can take life, liberty, and property from citizens. So at worst, an uncooperative Senate has "not any power of doing wrong, but merely of preventing wrong from being done" by halting enforcement of certain functions assigned to an executive officer.[77] Such non-enforcement sits much more comfortably within the Constitution's structure, which intentionally establishes the three branches of government as three distinct "veto gates" to federal action.[78] To the extent this vests some level of unreviewable power in Congress that can be abused, the Constitution provides a remedy through biennial elections and state governments that operate independently of federal gridlock.[79]

Elections are likely to be a particularly powerful restraint on the Senate for two reasons. First, the original Constitution vested both the presidential and Senate elections in state legislatures. Election by the same body at the same time would naturally produce a Senate aligned with the political priorities of the president and likely to confirm his nominees absent serious disqualifications. One ought not construe the executive power broadly (or minimize the Appointments Clause) to counter hypothetical unjustified Senate obstructionism when the Constitution creates a structural guard against abuse of that power in the form of concurrent elections by the same body of electors.[80]

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[76] Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014). See *Wilcox*, 145 S. Ct. 1415 (2025); Collins v. Yellen, 141 S. Ct. 1761 (2021); Seila Law LLC v. CFPB, 591 U.S. 197 (2020).

[77] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 111 (1765). While this argument would be true no matter the statutes Congress enacted, the Federal Vacancies Reform Act provides yet another avenue for the President to avoid Senate obstructionism by making temporary appointments and reassignments of Senate-confirmed officers between departments. 5 U.S.C. § 3345 et seq.

[78] Thomas A. Berry, *The President Has a Duty to End the Department of Education*, CATO INSTITUTE (Mar. 21, 2025), https://www.cato.org/blog/president-has-duty-end-department-education; *see also* Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 570 (2005) (acknowledging that Congress can always defang the Executive Power and Commander-in-Chief power by refusing appropriations).

[79] Munn v. Illinois, 94 U.S. 113, 125 (1876).

[80] U.S. CONST. amend. XII; U.S. CONST. art. I § 3, cl. 1, *repealed by* U.S. CONST. amend. XVII. *See also* Katherine Schaeffer, *Single-party control in Washington is common at the beginning of a new presidency, but tends not to last long*, PEW RESEARCH CENTER (Feb. 3, 2021), https://www.pewresearch.org/short-reads/2021/02/03/single-party-control-in-washington-is-common-at-the-beginning-of-a-new-presidency-but-tends-not-to-last-long/ (finding that newly elected Presidents are almost always of the same party as a majority of the newly elected Senate). While the

Additionally, "[t]he censure of rejecting a good [nominee] would lie entirely at the door of the Senate," particularly if the Senate attempted to wholesale prevent the enforcement of popular laws.[81] Senators, no less than presidents, are required to maintain the approval of voters if they wish to stay in office. This electoral check against the Senate is even stronger because of biannual elections, which give the voters an opportunity to throw out obstructionist senators and bolster the president against Congress in the second half of his term, if the voters wish.

IV. Conclusion

The Executive Branch is the energetic heart and sword of the federal government. The Framers wisely entrusted the office with sufficient powers to guide America through both crisis and prosperity. But "this intense power to strike at citizens, not with mere individual strength, but with all the force of government itself"[82] has always been vested in the delegated powers of an agent and checked by Congress. Allowing the president to personally wield and subdelegate law enforcement over the objections of Congress would vitiate the decision of the people to establish a limited presidency. The Constitution does not countenance such a result.

Seventeenth Amendment mandated direct election of Senators, it did not alter the meaning of Executive Power. One should look at the structural features of the 1789 constitution when deciding its scope. Moreover, since every state legislature has assigned its power to select presidential electors to its people, the President and Senate are still elected by the same body.

[81] THE FEDERALIST No. 77 (Alexander Hamilton).

[82] Robert H. Jackson, *The Federal Prosecutor*, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940).