

WHAT WILL GUARD THE GUARDIANS?: COMBATING THREATS TO AN INDEPENDENT JUDICIARY THROUGH LESSONS LEARNED FROM THEORIES OF INHERENT EXECUTIVE POWER

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There is a growing threat to the independence of the federal judiciary. It is not the threat described by opponents of the recent criticisms of judges that have garnered great attention over the past year. Instead, a subtler, more institutional, and more dangerous attack is in progress. In recent years, proposals have been made for Congress to prohibit the hiring of certain law clerks and require the disclosure of retired judges' bench memos and correspondence with other judges. The first of those proposals has become law, and the calls for the other are growing. This unprecedented threat raises a question not yet considered: When it comes to judges' prerogatives over clerks, work papers, and communications with colleagues, how should theories about inherent executive power inform the meaning of inherent judicial power?

This article argues that if one believes that Congress lacks the power to regulate the hiring of certain presidential aides and to require the disclosure of former presidents' privileged papers, then Congress also lacks the power to regulate the hiring of law clerks or to require the disclosure of judicial work product. In other words, building on a distinction between internal and external limits on congressional power recently discussed by Professor Richard Primus, I argue that if Article II of the Constitution provides the internal grant of power to the President, and the external restriction on the power of Congress, that is defended by proponents of a unitary executive and a robust executive privilege, then we should apply that understanding to Article III by reading Article III to provide a similar internal grant of power to federal judges and a similar external restriction on the power of Congress.

As the founding generation understood from its experience with weak state courts and the ineffective Articles of Confederation, liberty depends on an independent judiciary. And an independent judiciary

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depends on applying to the judiciary the same separation-of-powers principles that protect the presidency. Judges are among the most important guardians of our rights, and separation-of-powers principles are what guard those guardians—whether the threats come from a demagogue seeking the presidency, or from the “impetuous vortex” that Federalist 48 called a Congress prone to “everywhere extending the sphere of its activity.”

INTRODUCTION

This article is about power—the inherent power that federal judges have over their subordinates and communications, and the external limits on the power of Congress to intrude on these prerogatives of federal judges. In considering those limits on congressional power, the article considers a question unexplored by the literature on executive and judicial power: How should theories of a robust executive power inform our understanding of federal judges’ preclusive power over their personnel and their communications with colleagues?

Whereas the debate over whether Congress can regulate matters like the President’s selection and removal of subordinates is “[o]ne of the oldest and most venerable debates in U.S. constitutional law,”¹ that is far from the case with regard to the federal judiciary. This article begins to fill that gap in the literature on federal judges’ inherent power. It argues: if the Constitution places the external restriction on Congress’s power proposed by advocates of the unitary executive theory and of a robust executive privilege, then the Constitution provides a similar external restriction on Congress’s power to regulate the federal judiciary. Such external restrictions on Congress are necessary to preserve the judiciary’s status as an independent, co-equal branch of government.

Current threats to federal judges’ prerogatives in this field demonstrate the importance of this question. For example, in recent years, Congress has prohibited the selection of noncitizen law clerks, while also exercising control over the hiring of other Supreme Court

1. STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3* (2008). Literature defending the unitary executive theory is extensive. See, e.g., Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41 (1986); David P. Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19 (1986); Lee S. Liberman, *Morrison v. Olson: A Formalist Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313 (1989); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); CALABRESI & YOO, *supra*. As is literature criticizing it. See, e.g., Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); A. Michael Froomkin, *The Imperial Presidency’s New Vestments*, 88 NW. U.L. REV. 1346 (1994). Other highly respected scholars neither completely endorse nor completely oppose the theory. See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

staff. In addition, there have been repeated proposals for Congress to require retired judges to disclose their bench memos, conference notes, and correspondence with colleagues.²

Throughout this article, I refer to the President and federal judges' control of "office management" as shorthand for their control over the selection and removal of their personnel and over their communications with colleagues. By controlling these matters, they control their "offices." Of course, the office supervised by the President (the entire executive branch) has millions of people in it, whereas the office supervised by a federal judge (her chambers) has only a few people in it. By "office management," I am often not referring to the management of a literal office space or office building, but rather to the management of the employees and the communications that the relevant constitutional actor is empowered to control.

Further, while the term "office management" refers to the way a judge manages her communications, chambers, and employees of the court, it does not encompass the way judges interact with litigants that come before the court. As a result, my conception of office management does not apply to issues of practice such as the adoption of the Federal Rules of Evidence, the Conformity Act, and the Rules Enabling Act. These all deal with the way courts interact with litigants in the courtroom rather than employees or colleagues in the judges' chambers.

Part I below describes the gap that exists in the literature on federal judges' inherent power over office management, and it contrasts the gap with the extensive literature on the President's inherent power over office management.

Part II then argues that, if there is merit to the literature defending a robust concept of the President's inherent power over office management, we should embrace a similarly robust concept of federal judges' inherent power over office management. This argument finds support in the strong parallels between the founding era history, constitutional text, constitutional structure, and historical practices that inform defenses of executive office management and those that should inform our understanding of judicial office management. Each of Part

2. In the late 1990s, Edward Lazarus, a former clerk of Justice Blackmun, released *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court*, a book detailing deliberations that occurred while Lazarus served at the Supreme Court. The book was met with controversy regarding the revelation of intimate details of the judicial process. In response, Judge Alex Kosinski wrote "[the] tradition of deliberative secrecy . . . leads to an openness of discussion that enhances deliberations." Alex Kozinski, *Conduct Unbecoming*, 108 YALE L. J. 835, 874 (1999) (reviewing EDWARD P. LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998)).

II's subsections explores one of these parallels.

Part II.A compares founding era influences on the executive to the era's influences on the judiciary. Just as the weakness of state executives (and the absence of a federal executive) enabled the excesses of the Articles of Confederation era, so too did the weakness of state courts (and the absence of federal courts). The Constitutional Convention's debates, drafts, rejected proposals, and adopted amendments indicate a choice to curb those excesses through a strong executive. And the Convention's debates, drafts, rejected proposals, and adopted amendments show a similar choice to curb those excesses through a strong, independent federal judiciary. I argue that it is time to fuse the literatures on this common history in a way that provides evidence that what unitary executive theorists believe about inherent executive power should inform our understanding of inherent judicial power.

Part II.B moves from the history and process that informed the Constitution's text to the text itself. Most notably, there are striking similarities between the wording and grammatical construction of the Vesting Clauses of Article II (executive) and Article III (judiciary). In light of these clauses' similarities, their stark differences with Article I's Vesting Clause, and inferences from other clauses in Articles II and III, the text provides evidence that the Constitution empowers judges with an inherent power to control office management similar to that which advocates of robust, inherent executive power believe presidents enjoy.

Part II.C moves from text to structure. It argues that the Constitution's tripartite structure is further evidence that the judges enjoy the same inherent power to control office management proposed for presidents by advocates of robust inherent executive power.

Part II.D considers historical practice. It notes that when constitutional text, structure, and founding-era history are unclear, scholars and courts respect historical practice, especially for separation of powers questions. Just as robust-executive-power proponents have respected the unbroken record of Presidents' refusal to cede their inherent power over office management, we should respect the practice of more than two centuries through which judges' inherent power to control office management has been largely unchallenged.

Part III applies my theory of an inherent judicial power over office management to existing statutes and legislative proposals. It argues that it is likely unconstitutional for Congress to prohibit the selection of noncitizen law clerks and require the disclosure of retired judges' papers. It also discusses two counter-arguments and proposes two areas for further inquiry.

Part IV concludes with a summary of my thesis that the existing literature on inherent executive power over office management should

inform what existing scholarship has not yet explored about inherent judicial power. When we consider lessons learned from the literature about inherent executive power, we see that inherent judicial power precludes congressional attempts to intrude on federal judges' authority over office management. Judges have the prerogative to select their own team of advisers, and engaging with those advisors and other judges through un-chilled communications is vital to the informed and independent judicial decision-making envisioned by the framers and protected by the Constitution.

I. WHAT CURRENT THEORIES SAY ABOUT INHERENT JUDICIAL AND EXECUTIVE POWER

This section provides a brief overview of current scholarship on inherent judicial and executive power. Although much has also been written about inherent judicial power, very little of it covers office management, like federal judges' power to control their subordinates and their communications with clerks and colleagues. In contrast, a great deal of the literature on inherent executive power covers office management. Part I.A reviews the literature on inherent judicial power. Part I.B reviews the literature on inherent executive power.

A. A Gap Exists in the Literature on Judges' Inherent Power to Control Law Clerk Selection and Judicial Communications

As Professors James Liebman and William Ryan have stated in their seminal article on inherent judicial power, “[t]he extent of Congress’s power to define the shape and authority of the federal judiciary has remained a riddle for more than 200 years.”³ Although Article III’s first sentence provides that “[t]he judicial power of the United States, shall be vested” in federal courts, including any lower courts Congress chooses to create,⁴ “the records of the [Constitutional] Convention contain absolutely no discussion of the phrase ‘judicial power.’”⁵ On the one hand, it is settled law that “there are some features of judicial power that are so fundamental to the character and nature of a court that they are insulated from the other branches by Article III.”⁶ On the other

3. James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 705 (1998).

4. U.S. CONST. art. III, § 1.

5. William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 767 (1997).

6. Louis J. Virelli III, *The (Un)constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181, 1216 (2011) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *Link v.*

hand, the precise identity of those features remains unsettled.

Most of the literature on inherent judicial power focuses on whether power granted to federal judges by Article III's Vesting Clause (1) precludes Congress from sometimes stripping courts of jurisdiction, (2) allows judges to make rules of courtroom procedure in the absence—or even in defiance of—congressional action, (3) provides supervisory powers over dockets and litigants, and (4) precludes Congress from directly instructing judges how to decide a case or directly instructing a particular judge not to decide a case. This section addresses each of these four categories in that order, while noting that none of the four groups of literature directly concern office management or provide a definitive answer to the question of whether Congress can regulate clerk hiring or require judges to disclose their papers.

First, one body of academic literature addresses the extent that Congress can control federal courts' jurisdiction. During the second half of the twentieth century, “federal courts scholarship concerning congressional control over the authority of Article III courts has focused predominantly on the question of jurisdiction: Which, if any, federal courts may or must be available to adjudicate which cases or controversies?”⁷ And that vigorous debate has, to put it mildly, continued.⁸ The question of whether courts have jurisdiction to decide a case, however, is different from the question of what powers a court has when it has jurisdiction to decide a case. Once courts have jurisdiction over certain cases, what inherent authority over office management do they need in order to decide those cases?

Second, in the past two decades, as Professor Evan Caminker has observed, there has been something of “a shift in focus away from the

Wabash, 370 U.S. 626, 630–31 (1962)).

7. Evan Caminker, *Allocating the Judicial Power in a “Unified Judiciary,”* 78 TEX. L. REV. 1513, 1513 n.1 (2000) (citing Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990); Martin H. Redish, *Article III and the Judiciary Act of 1789: Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633 (1990); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960); Lawrence Gene Sager, *The Supreme Court, 1980 Term - Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984)).

8. See, e.g., JAMES E. PFANDER, *ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES* (2009); Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043 (2010).

questions of ‘when and where’ [i.e., jurisdiction] to the question of ‘how’: When Article III courts have jurisdiction to adjudicate . . . how may or must those courts do so?”⁹ An element of this question is a long-running debate about how much Congress can regulate courtroom procedure and how much authority federal courts have to make procedural rules in the absence of congressional regulation, or even perhaps in defiance of it.¹⁰ But these questions of rules of procedure—“exclusively forward looking” rules, “in contrast to . . . the resolution of particular disputes through judicial opinions”—are, similar to jurisdictional questions, not the same as questions of office management. Questions of rules of procedure focus on the federal judiciary’s power to control the parties before it—the power to control parties’ interactions with the judiciary and the parties’ conduct in the courtroom. Questions of office management focus on the judiciary’s power to control its own conduct—the manner in which it fulfills its duty to resolve disputes.

Third, another element of adjudication involves judges’ supervisory powers.¹¹ Although such powers may sound like they would encompass office management—like judges’ control over their clerks and papers—the literature on judges’ supervisory powers generally addresses actions that take place in public, like sanctioning misbehavior by litigants,¹² setting the times for court sessions,¹³ and “manag[ing] litigation from the filing of the complaint (or appeal) until the entry of judgment.”¹⁴ The literature tends not to include behind-the-scenes questions of office management.

Fourth, a final element of adjudication is the question of what power Congress has to control the outcome of cases—whether Congress has the power to directly instruct judges how to decide a case¹⁵ or directly instruct a particular judge not to decide a case.¹⁶ While writing persuasively about the latter, Professor Louis Virelli has praised Robert Pushaw, James Liebman, William Ryan, and David Engdahl as “some

9. Caminker, *supra* note 7, at 1514.

10. See, e.g., Ryan, *supra* note 5; Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001); Linda S. Mullenix, *Judicial Power and The Rules Enabling Act*, 46 MERCER L. REV. 733 (1995); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697 (1995); John H. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1929).

11. See, e.g., Pushaw, *supra* note 10.

12. *Id.* at 776.

13. *Id.* at 853.

14. *Id.*

15. See, e.g., Liebman & Ryan, *supra* note 3.

16. See, e.g., Virelli, *supra* note 6; Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535 (2012) [hereinafter Virelli, *Supreme Court Recusal*].

of the most prominent commentators” on the former.¹⁷ Other prominent scholars who have explored the question include Elizabeth Lear¹⁸ and Amy Coney Barrett.¹⁹ I view this element, with its focus on the case’s outcome, as somewhat distinct from the second element listed above, with its focus on the procedures that precede an outcome.

Although not undisputed, a consensus has emerged that “the core of the judicial power” granted by Article III’s Vesting Clause “is the authority to adjudicate and resolve Article III cases and controversies.”²⁰ That adjudicatory authority “must include the ability to decide individual cases over which the court has jurisdiction independently and completely.”²¹ And while that is an inherent power internal to Article III’s creation of the federal judiciary, it is also an external limit on the Article I power of Congress to legislate.

In Professors Liebman and Ryan’s powerful and exhaustive study of the Article III Vesting Clause’s drafting history, they assert that “the Constitution vests Article III judges with . . . five crucial qualities constituting ‘[t]he judicial Power’: (1) independent decision of (2) every—and the entire—question affective the normative scope of supreme law (3) based on the whole supreme law; (4) finality of decision, subject only to reversal by a superior court in the Article III hierarchy; and (5) a capacity to effectuate the court’s judgment in the case and in precedentially controlled cases.” Liebman and Ryan argue that the Constitution “requires [federal judges] to exercise” these qualities and “forbids Congress to withdraw” them. They are thus, to build on a distinction between internal and external limits on congressional power recently discussed by Professor Richard Primus, internal grants of power to federal judges and external limits on the power of Congress.²²

But is office management among those “five crucial qualities” that are external limits on congressional regulation of the judiciary? And do theories of inherent executive power inform the answer to that question? Part III of this article draws on the lessons of the literature described in

17. Virelli, *supra* note 6, at 1214 (citing David E. Engdahl, *Intrinsic Limits of Congress’s Power Regarding the Judicial Branch*, 1999 B.Y.U. L. REV. 75 (1999); Liebman & Ryan, *supra* note 3; Pushaw, *supra* note 10; Ryan, *supra* note 5).

18. Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147 (2006).

19. Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813 (2008).

20. Caminker, *supra* note 7, at 1519.

21. *Id.*; Virelli, *supra* note 5, at 1216.

22. Liebman & Ryan, *supra* note 3, at 884; cf. Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576 (2014). The internal/external terminology is borrowed from Professor Primus’s article, although Primus uses the terminology in a different context. I am not arguing that Professor Primus’s article is consistent (or inconsistent) with my thesis.

Part II.B to argue for the connection between an inherent executive power over office management and an inherent judicial power over office management. If Presidents have the authority to control office management free from congressional interference, so too do federal judges.

B. Theories of Inherent Executive Power Protect the President's Control Over Personnel Selection and Privileged Communications

Just as proponents of inherent judicial power ascribe significant meaning to Article III's Vesting Clause, proponents of inherent executive power ascribe significant meaning to Article II's Vesting Clause, which "vest[s]" a single President with "the executive power." They believe that one element of inherent executive power is the President's authority to select, control, and remove those who act for him within the executive branch, as described in Part I.B.1.²³ Likewise, proponents of a robust executive privilege believe that another element of inherent executive power is the President's power "to control files, records, and papers of the office" so he can engage in candid internal communications un-chilled by the prospect of public disclosure (Part I.B.2).²⁴ I believe they are two sides of the same coin: the Constitution implies a robust executive privilege if it implies the traditional elements of the unitary executive theory.

This is true for at least two reasons. First, executive privilege and the traditional elements of the unitary executive theory originate from the same parts of the Constitution—most importantly, Article II's Vesting Clause and the government's tripartite structure.²⁵ Second, each fulfills a similar purpose: Simply put, without them, the President cannot adequately execute the laws. That's so because (1) without the ability to receive privileged advice and issue privileged communications un-chilled by the threat of disclosure, he cannot adequately manage his administration; (2) likewise, without the ability to appoint, direct, and

23. *Myers v. United States*, 272 U.S. 52, 117 (1926) ("[A]s part of his executive power he should select those who were to act for him under his direction in the execution of the laws [A]s his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible").

24. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 514 (1977) (Burger, C.J., dissenting).

25. Although the Supreme Court and many scholars agree that both principles are constitutionally based and grounded in the Vesting Clause and the Constitution's tripartite structure, see *infra* Part I.B.1; Part I.B.2, not everyone—or even every unitary executive theorist—agrees, see Saikrishna B. Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143 (1999) (noting that "a chief executive armed with a constitutional right to conceal communications surely would be a more effective enforcer of federal law and superintendent of foreign affairs" but doubting that executive privilege is constitutionally required from an originalist perspective).

remove executive officers, he likely cannot adequately manage his administration; and (3) without the ability to adequately manage his administration, he cannot effectively execute the laws, because he cannot possibly be expected to execute the entirety of federal law by himself.

My conception of the literature on Article II views proponents of robust executive privilege and the unitary executive theory as advocating that Article II provides an internal grant of power to the President and an external restriction on the power of Congress.²⁶ There are not only certain things—law execution; command of the military; pardoning federal prisoners—that the President can do (internal). There are also certain things that Congress can't do to the President (external). Among the external limits placed by Article II on Congress are that it cannot interfere with the President's execution of the laws. One way Congress has tried at times to do that is by unconstitutionally restricting his "select[ion of] those who were to act for him under his direction in the execution of the laws" and "his power of removing those for whom he can not continue to be responsible."²⁷ And another way it tries to do that is through requiring the disclosure of presidential communications. Each is a similar kind of interference in that it interferes with the President's office management, and each is prohibited by the Constitution.

1. Unitary Executive Theory

The unitary executive theory proposes an answer to the question of how much inherent power the President enjoys over his subordinates. Although its proponents sometimes disagree about its precise contours,²⁸ they agree that "whatever executive power might exist must be exercised subject to presidential supervision and control."²⁹

This question arose immediately after the Constitution's ratification. In the Decision of 1789, "after extensive debate in which many of the Framers participated, [the First Congress] decided that the President alone had power to remove the head of the Department of Foreign Affairs."³⁰ Congress then altered the enabling statutes for the War and

26. Cf. Primus, *supra* note 22, at 578–79.

27. *Myers v. United States*, 272 U.S. 52, 117 (1926).

28. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158 n.10 (1992) ("There are several versions of the unitary executive theory . . .").

29. CALABRESI & YOO, *supra* note 1, at 20.

30. Miller, *supra* note 1, at 67.

Treasury Departments to reflect this conclusion.³¹ “Eminent constitutional commentators, such as Joseph Story and James Kent, regarded this series of congressional decisions . . . as definitely establishing that removal was an inherent executive power vested in the president by Article II of the Constitution.” In 1926, the Supreme Court endorsed that reading of Article II in *Myers v. United States*,³² but nine years later, it reversed course in *Humphrey’s Executor v. United States* (1935).³³ Since then, its decisions on the extent of the President’s power over his subordinates have been somewhere between “rather confusing”³⁴ and “hopelessly contradictory.”³⁵ The question has thus remained “[o]ne of the oldest and most venerable debates in U.S. constitutional law.”³⁶

In 1984, Professor Peter Strauss reinvigorated the academic debate over the unitary executive with an argument that “as Congress structures the government, it must recognize certain constraints,” including “the President’s substantial independent authority to communicate with and give directions to those who administer the laws.”³⁷ Subsequent scholars soon argued for even less room than did Strauss for Congress to make presidential subordinates independent of the President.³⁸ Professor Geoffrey Miller concluded, “Congress may not constitutionally deny the President the power to remove a policy-making official who has refused an order of the President to take an action within the officer’s statutory authority.”³⁹ Similarly, Professor David Currie proposed “that Congress cannot effectively control the exercise of executive power by making the tenure of those who administer the laws dependent upon congressional whim.”⁴⁰

Although many distinguished scholars on both sides of the question have made significant contributions to the literature since then—among

31. CALABRESI & YOO, *supra* note 1, at 35.

32. *Myers v. United States*, 272 U.S. 52 (1926).

33. *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

34. Liberman, *supra* note 1, at 336.

35. Calabresi & Rhodes, *supra* note 28, at 1167.

36. CALABRESI & YOO, *supra* note 1, at 3.

37. Strauss, *supra* note 1, at 581; *see also* Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541, 544–45 (1994) (“The modern academic debate about presidential power to execute the laws began promisingly in 1984 with a leading article by Professor Peter Strauss, who argued thoughtfully for the constitutionality of some agency ‘independence,’ while recognizing that the President had to retain at least minimal powers of control over all federal law execution.”).

38. Calabresi & Prakash, *supra* note 37, at 545 (“Over the next few years, a number of prominent scholars, led by Professors Geoffrey Miller and Stephen Carter, weighed in forcefully on the unitary executive side, arguing in favor of full presidential control of all execution of the laws.”).

39. Miller, *supra* note 1, at 44.

40. Currie, *supra* note 1, at 32.

them Lee Liberman Otis in her critique of *Morrison v. Olson*;⁴¹ Justice Elena Kagan, in her seminal article “*Presidential Administration*,”⁴² and Professor Akhil Reed Amar, in his seminal study, *America’s Constitution: A Biography*⁴³—it is unlikely that any has been more prolific or more forceful in defense of the unitary executive theory than Professor Steven Calabresi. Coauthoring at times with prominent scholars such as Kevin Rhodes,⁴⁴ Saikrishna Prakash,⁴⁵ and Christopher Yoo,⁴⁶ and authoring at other times on his own,⁴⁷ Calabresi has argued that the Constitution’s text, structure, and history, as well as more than two centuries of presidential practice, support the proposition that “all federal officers exercising executive power must be subject to the direct control of the President.”⁴⁸ Such control, according to the most robust version of the unitary executive theory, includes the authority to tell subordinates what executive actions to take,⁴⁹ to countermand executive actions by disobedient subordinates,⁵⁰ and to “select” and “remov[e]” subordinates who “act for him under his direction.”⁵¹

Unitary executive theorists often begin the defense of their theory by referring to Article II’s first clause, the Vesting Clause: “The executive

41. Liberman, *supra* note 1.

42. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247 (2001) (showing, despite some formal limits placed by Congress on the President’s removal power, “the recent trend toward presidential control over administration generally”).

43. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 197 (2005) (“What Article II did make emphatically clear from start to finish was that the president would be personally responsible for his branch.”).

44. *See, e.g.*, Calabresi & Rhodes, *supra* note 28.

45. *See, e.g.*, Calabresi & Prakash, *supra* note 37.

46. *See, e.g.*, CALABRESI & YOO, *supra* note 1.

47. *See, e.g.*, Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995) [hereinafter Calabresi, *Normative Arguments*]; Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U.L. REV. 1377 (1994) [hereinafter Calabresi, *Vesting Clauses*].

48. Calabresi & Rhodes, *supra* note 28, at 1158; *see also* Miller, *supra* note 1, at 58 (“[T]he relevant considerations (listed in approximate order of importance) are these: (1) text; (2) structure; (3) history; (4) function; (5) prescription; (6) remedy; and (7) case law.”).

49. Calabresi & Rhodes, *supra* note 28, at 1166.

50. *Id.*

51. *Myers v. United States*, 272 U.S. 52, 117 (1926); *see also* Calabresi & Rhodes, *supra* note 28, at 1166 (“unlimited power to remove at will any principal officers (and perhaps certain inferior officers) who exercise executive power”). Although some scholars and jurists focus more on the power to remove than the power to appoint, others consider them two sides of the same coin. *See, e.g.*, Myers, 272 U.S. at 117. Moreover, even aside from those who expressly embrace both powers, the hollowness of any power to remove if the removed officer cannot be adequately replaced, suggests a strong link. This issue is further discussed below in Part III.D.

One additional clarification: There are factors that unitary executive theorists would not want Presidents to consider when removing subordinates, and that the Fourteenth Amendment’s Equal Protection Clause, applied to the federal government through the Fifth Amendment’s Due Process Clause, would not allow Presidents to consider. Those illegal factors include race and gender.

Power shall be vested in a President of the United States of America.”⁵² They believe this Clause “actually does what it says it does, i.e., vests (or grants) a power over law execution in the President, and it vests that power in him alone.”⁵³ This “crystal clear” vesting of the “executive Power” in “a single individual”⁵⁴ means “Congress may not create other entities independent of the President and let them exercise his ‘executive Power.’”⁵⁵ Other clauses in Article II confirm “the hierarchical structure of Article II”⁵⁶—including the Take Clause (how can the President be required to “*take care* that the Laws be faithfully executed” if he cannot control those who execute them?); the Opinions Clause (why should the President require the Opinion, in writing, of “the principal Officer in each of the executive Departments,” if he cannot then issue directives to those officers?); and the Militia Clause (why empower the President to execute the law during a crisis making him Commander in Chief of the Militia when “called into the actual Service of the United States” if he is not also responsible for executing the laws in peace time?).⁵⁷ According to unitary executive theorists, the “pre-ratification history fully supports these understandings, and little in the post-ratification history calls any of this into question.”⁵⁸ They also find support in the Constitution’s tripartite structure, which “recognizes only three kinds of federal powers: legislative, executive, and judicial.”⁵⁹ The implications of that structure for the preservation of the President’s control over the executive branch flow from “checks and balances theory”: “the withdrawal of a portion of a branch’s powers is just as destabilizing and dangerous as a partial usurpation, at least unless a similar amount of

52. U.S. CONST. art. II, § 1.

53. Calabresi & Prakash, *supra* note 37, at 549; *see also* Liberman, *supra* note 1, at 315 (describing unitary executive theory that the Vesting Clause “grants the President the entire executive power of the United States, and grants it to him alone”); Currie, *supra* note 1, at 31 (among the “critical concerns” that underlie the Vesting Clause was the framers’ “need to concentrate executive power in the hands of a single person”).

54. Miller, *supra* note 1, at 58.

55. Calabresi & Prakash, *supra* note 37, at 663.

56. *Id.*

57. *Id.* at 583–85, 663. There is some disagreement among unitary executive theorists over whether the Take Care Clause grants power or confirms while limiting it; in other words, while they all believe the Take Care Clause supports the unitary executive theory, they disagree about whether it requires his control over subordinates or confirms his control over subordinates. *Compare* Froomkin, *supra* note 1, at 1373 (“Many thoughtful commentators have argued that the Take Care Clause (rather than the Vesting Clause) requires the President have complete control over the executive branch.”), *with* Calabresi & Prakash, *supra* note 37, at 583 (“[The phrase] ‘*shall take care*’ . . . suggests an obligation of watchfulness, not a grant of power. This obligation could not be fulfilled unless the Article II Vesting Clause was, in fact, already a substantive grant of executive power to the President.”).

58. Calabresi & Prakash, *supra* note 37, at 663.

59. Currie, *supra* note 1, at 35.

power is taken away from the other branches as well.”⁶⁰

In addition, unitary executive theorists find support for their theory in judicial precedents old and new. In 1926, in *Myers v. United States*, reasoning that the President has the constitutional authority to remove executive officers, the Supreme Court upheld President Wilson’s removal of a postmaster, despite a statute prohibiting removal absent Senate approval.⁶¹ In 1976, in *Buckley v. Valeo*, reasoning that the President has constitutional authority to appoint executive officers, the Court invalidated a statute allowing members of Congress to make appointments to the Federal Election Commission.⁶² In 2010, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, reasoning that Congress cannot obstruct the President from holding executive officers accountable, the Court held unconstitutional a statute that empowered administrators protected from at-will removal to appoint other administrators who are also protected from at-will removal.⁶³ These cases stand for the proposition that “Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed.”⁶⁴

Although a host of additional precedents embrace propositions at least related to those expounded by *Myers*, *Buckley*, and *Free Enterprise Fund*,⁶⁵ others conflict with them.⁶⁶ Most notably (and, according to unitary executive theorists, infamously), the Supreme Court held in *Humphrey’s Executor v. United States* that Congress could prohibit the President from firing, absent cause, a Federal Trade Commissioner.⁶⁷ The unitary executive theory is thus not a settled matter of law, but a theory—defended by a one group of scholars,⁶⁸ rejected by a second

60. Liberman, *supra* note 1, at 351.

61. *Myers v. United States*, 272 U.S. 52 (1926).

62. *Buckley v. Valeo*, 424 U.S. 1 (1976).

63. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

64. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 690 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (quoting *Buckley*, 424 U.S. at 136 (quoting *Myers*, 272 U.S. at 163–64)) (emphasis omitted).

65. See, e.g., *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252 (1991); *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983); *Springer v. Gov’t of Philippine Islands*, 277 U.S. 189 (1928); *Parsons v. United States*, 167 U.S. 324 (1897); see also Froomkin, *supra* note 1 (describing these cases).

66. See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988); *Wiener v. United States*, 357 U.S. 349 (1958); *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935); see also Froomkin, *supra* note 1 (describing these cases).

67. *Humphrey’s Ex’r*, 295 U.S. at 632.

68. See *infra* note 1 (first group of scholars).

group,⁶⁹ embraced only in part by a third group,⁷⁰ arguably respected by an unbroken line of Presidents,⁷¹ and disrespected on occasion by Congress and the courts.⁷²

2. Executive Privilege

The principle of executive privilege protects the President from disclosing information that originates in the executive branch.⁷³ “It is now a well-established constitutional power—one with a longstanding history in American government, going back to the George Washington administration.”⁷⁴ Among its variations are privileges “for state secrets, for information the disclosure of which would jeopardize law enforcement activities (e.g., names of informers), and for intra-branch deliberative communications.”⁷⁵ This section focuses on the third of those three varieties, because the protection of intra-executive-branch deliberative communications is the most analogous of the three to intra-judicial-branch deliberative communications. In particular, this article focuses on the protection of communications after the President has left office, since the type of disclosure recently proposed for the federal judiciary would require retired judges to disclose their work product papers.

In his distinguished study of both sides of the executive-privilege debate, Professor Mark Rozell says defenders of “a properly constrained executive privilege” base their argument “on (1) its theoretical and constitutional underpinnings; (2) the historical precedents for its exercise; (3) the demands of national security; (4) the need for candid, internal White House deliberations; (5) limitations on the congressional power of inquiry; (6) historical necessities; and (7) the widely accepted secrecy practices of the coordinate branches of government.”⁷⁶

69. See, e.g., Froomkin, *supra* note 1; Lessig & Sunstein, *supra* note 1 (rejecting textual and historical justification for unitary executive theory, although suggesting structural and normative reasons for some presidential control over law execution).

70. See, e.g., Strauss, *supra* note 1.

71. See CALABRESI & YOO, *supra* note 1, at 4 (“all of our nation’s presidents have believed in the theory of the unitary executive”).

72. See *infra* note 62.

73. Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon’s Shadow*, 83 MINN. L. REV. 1069 (1999) (“Executive privilege is the right of the President and high-level executive branch officers to withhold information from Congress, the courts, and ultimately the public.”).

74. *Id.* at 1069.

75. PETER M. SHANE & HAROLD H. BRUFF, *SEPARATION OF POWERS LAW: CASES AND MATERIALS* 320 (2d ed. 2005).

76. MARK J. ROZELL, *EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY* 5 (3d ed. 2010). Of course, just as there is extensive scholarship opposing the unitary executive theory, there is extensive scholarship opposing executive privilege. “[T]he leading arguments

As it has done with regard to the unity of the executive, the Supreme Court has embraced elements of the above arguments to hold that executive privilege is constitutionally based.⁷⁷ But just as the scope of the unitary executive theory remains unsettled as a matter of current law, so too does the scope of executive privilege. And just as advocates of the most robust version of the unitary executive believe current law has taken too narrow a view of the President's power in this field, so too do advocates of robust executive privilege.

No case illustrates this better than *Nixon v. Administrator of General Services*, which considered whether Congress could require the General Services Administrator to seize the tapes and papers of former President Richard Nixon after he left office and publish them “except where a privilege is affirmatively established.”⁷⁸ Citing *United States v. Nixon*—a three-year-old precedent decided while Nixon was still in office—the Court reaffirmed that executive privilege is constitutionally based: “This Court held in *United States v. Nixon* . . . that the privilege is necessary to provide the confidentiality required for the President's conduct of office. Unless he can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends.”⁷⁹ And it extended a President's executive privilege beyond “the individual President's tenure” because “[t]he confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic.”⁸⁰

The majority did not, however, invalidate the statute requiring the GSA to seize former President Nixon's tapes and papers. Advocates of a robust executive privilege, such as the dissenters described below, saw—and see—the decision as misguided. However, before discussing the dissents, it is worth noting that among the reasons members of the majority embraced for its decision were reasons that would likely not protect a statute requiring judges to disclose their deliberative-process

against the legitimacy of executive privilege . . . are that (1) there is no constitutional grant of executive privilege, (2) the Framers' fear of tyranny prevented such a power from being granted, (3) the public and the coordinate branches of government have a right to know what the executive branch is doing, and (4) presidents have abused the power of executive privilege.” *Id.* (summarizing academic arguments against executive privilege).

77. *United States v. Nixon*, 418 U.S. 683, 711 (1974).

78. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 440 (1977).

79. *Id.* at 448–49 (quoting with approval the Solicitor General's brief) (internal quotation marks omitted).

80. *Id.* at 449 (quoting with approval the Solicitor General's brief) (internal quotation marks omitted).

papers. For example, they reasoned that the statute “expressly recognize[d] the need both ‘to protect any party’s opportunity to assert any legally or constitutionally based right or privilege’” (which, in the context of judges’ deliberative process papers, would likely exempt everything).⁸¹ They also reasoned that regulations required by the statute to protect privileged communications had not yet been promulgated (which, again, offers little support for the prospect of requiring the disclosure of judges’ deliberative process papers).⁸² They deferred to the sitting President’s support for the statute (support that would be unlikely to come from all sitting judges, even in the highly unlikely event their opinion would be made public).⁸³ And they considered former President Nixon, because of the nature of Watergate, to be in a “unique” position (which would not apply to any other public figure, including retired federal judges—unless they too resigned from office in disgrace).⁸⁴

Through its narrow opinion, the majority reaffirmed the principle of executive privilege and attempted to preclude the disclosure of truly privileged communications. But the dissenters would have gone much farther and invalidated the statute. Chief Justice Burger attacked the statute with an appeal to text, structure, and history. Referring to Article II’s Vesting Clause, he called the statute an “attempt by Congress to exercise powers vested exclusively in the President—the power to control files, records, and papers of the office, which are comparable to internal workpapers of Members of the House and Senate.”⁸⁵ Referring to the Constitution’s tripartite structure, he asserted that “to preserve the constitutionally rooted independence of each branch of Government, each branch must be able to control its own papers.”⁸⁶ And referring to history, he cited “the unbroken practice since George Washington with respect to congressional demands for White House papers,” which had been “that ‘while either house [of Congress] may request information, it cannot compel it.’”⁸⁷ Chief Justice Burger also, relevantly for our purposes, drew a direct connection between the President’s papers and judges’ (and legislators’) papers: “up to now, it has been the implied

81. *Id.* at 444.

82. *Id.* at 495 (Powell, J., concurring).

83. *Nixon*, 433 U.S. at 498 (Powell, J., concurring).

84. *Id.* at 550 (Rehnquist, J., dissenting) (“The position of my Brothers Powell and Blackmun is that today’s opinion will not result in an impediment to future Presidential communications since this case is ‘unique’—appellant resigned in disgrace from the Presidency during events unique in the history of our Nation.”).

85. *Id.* at 514 (Burger, C.J., dissenting).

86. *Id.* at 511 (Burger, C.J., dissenting).

87. *Id.* at 509–10 (Burger, C.J., dissenting) (quoting WILLIAM HOWARD TAFT, *THE PRESIDENCY* 110 (1916)).

prerogative of the President—as of Members of Congress and of judges—to memorialize matters, establish filing systems, and provide unilaterally for disposition of his workpapers.”⁸⁸

Like Chief Justice Burger, Justice Rehnquist dissented on the grounds that without control of his papers, the President cannot carry out “the executive power” vested in him by Article II. He argued that the decision “poses a real threat to the ability of future Presidents to receive candid advice and to give candid instructions.”⁸⁹ He called the result “at odds with our previous case law on separation of powers” that would “daily stand as a veritable sword of Damocles over every succeeding President and his advisers.”⁹⁰ Because the “intrusion” into the exercise of executive power “permeates the entire decision process” by casting a shadow over “the daily operation of the Office of the President” in which he must “gather the necessary information to perform the countless discrete acts which are the prerogative of his office,” Rehnquist distinguished the decision “from our previous separation-of-power decisions”—including, perhaps, even decisions he disagreed with—because they “dealt with much more specific and limited intrusions.

Although the Supreme Court has never overturned *Nixon v. GSA*, many scholars have embraced the decision’s dissents. Moreover, when Congress later passed the Presidential Records Act of 1978, it exempted policy deliberations—the primary concern of the *Nixon* dissenters—from required disclosure.⁹¹ Since then, retired presidents have been afforded increasingly greater control of their papers, with Executive Order No. 13,233 requiring the papers’ archivist to “deny access to any privileged record until both [the former and current] presidents agree to release the records or until a final, non-appealable court order requires their release.”⁹² Of course, as stated above, the purpose of this article is not to defend the scholarly and judicial literature on robust executive privilege—or to defend the unitary executive theory—but rather to propose that *if* those bodies of literature are sound, their lessons should inform our understanding of Article III and federal judges’ inherent authority to control office management.

* * *

88. *Nixon*, 433 U.S. at 515 (Burger, C.J., dissenting).

89. *Id.* at 545 (Rehnquist, J., dissenting).

90. *Id.*

91. SHANE & BRUFF, *supra* note 75, at 373 (citing exemption 5 of 44 U.S.C. § 2201–07).

92. Marcy Lynn Karin, *Out of Sight, But Not Out of Mind: How Executive Order 13,233 Expands Executive Privilege While Simultaneously Preventing Access to Presidential Records*, 55 STAN. L. REV. 529, 547–48 (2002).

To sum up, the current literature on the unitary executive theory and executive privilege is best viewed as supporting the proposition that Article II provides an internal grant of power to the President and an external restriction on congressional interference that disrupts the President's office management. The remainder of this article attempts to apply that understanding to Article III by arguing that Article III provides an internal grant of power to judges and an external restriction on the power of Congress to interfere in a way that disrupts a federal judge's office management.

II. WHY INHERENT EXECUTIVE POWER THEORIES SHOULD INFORM INHERENT JUDICIAL POWER

Most analyses of constitutional questions—particularly by defenders of the unitary executive—consider the Constitution's text, structure, and history; when ambiguity remains, they also consider historical practices.⁹³ Likewise, this part of the article considers the history, text, structure, and practice that proponents of inherent executive power use to support the unitary executive theory and executive privilege. As it does so, it argues that there are strong similarities between (on the one hand) that history, text, structure, and practice and (on the other hand) the history, text, structure, and practice that inform inherent judicial power. These similarities suggest that if the President has the authority—protected from congressional interference—to select key subordinates and control key communications, so too do federal judges. With regard to office management, the founding era history, text, structure, and practice are too similar to treat the executive and judicial branches differently.

93. See, e.g., Virelli, *Supreme Court Recusal*, *supra* note 16, at 1562–63 (“Without greater textual guidance on the matter, constitutional history, practice, and structure become crucial . . .”); Primus, *supra* note 22, at 586 (“Constitutional analyses standardly discuss argument from text, history, and structure in precisely that order: text, history, structure. The body of this Article deliberately reverses the sequences: structure, history, text.”); Miller, *supra* note 1, at 58 (“[T]he relevant considerations (listed in approximate order of importance) are these: (1) text; (2) structure; (3) history; (4) function; (5) prescription; (6) remedy; and (7) case law.”). Like Professor Primus, I discuss history—or at least pre-framing history—before the text because I believe it is important to first understand the background history that informed the framers’ textual choices. Like Professor Miller—and Professors Calabresi and Yoo, whose book *The Unitary Executive* is an exhaustive study of presidential practices in the two centuries since the founding—I also put significant weight on the importance of prescription: “If a practice of government has persisted for many years without significant controversy, then this is evidence that the practice is constitutional, or has become so by prescription.” Miller, *supra* note 1, at 84. I discuss prescription in the section of this article about practice.

*A. Founding Era History*⁹⁴

In order to understand why the framers made the choices they made when drafting and ratifying the Constitution, it is necessary to understand the eleven years that preceded the Constitutional Convention, because “the general experience of government since 1776 informed every aspect of the Constitution of 1787.”⁹⁵ It was a period in which legislatures dominated. State courts and state executives were relatively weak. Federal courts and a federal executive were nonexistent. The result, in the eyes of many, including many of the delegates at the Constitutional Convention, was chaos—particularly for the protection of private property, the rule of law, and the raising and coordination of force to exert the will of the government, whether it be on the battlefield during the Revolutionary War or in western Massachusetts during Shays Rebellion. In response, the framers “created two essentially novel federal institutions: the presidency and the national courts.”⁹⁶

It is not surprising that at the outset of independence, Americans put more faith (and power) in legislatures than in executives or judges. The most recent English executive was the hated King George III. And the English model for judges—“to administer justice impartially by applying pre-existing law to the facts in a particular case, then rendering a final and binding judgment that the political branches could not alter”⁹⁷—made judges independent from the passions and popular forces that legislatures were more responsive to. In the early chapters of a revolution fueled by such passions, this seemed like a good idea.

It wasn't. The absence of a federal executive had a nearly ruinous effect on the American military effort during the Revolutionary War. Control of the military campaigns transferred from multiple congressional committees, to a committee of five congressmen, to a committee appointed by congressmen, and, finally, toward the end of the war, to a Secretary of War still somewhat controlled by Congress. The result was a system that left Washington's army largely unclothed and unsheltered at Valley Forge, that gave conflicting and countermarching orders to armies on the march, and that “failed, and

94. The history described in this section is a pro-federalist reading of the founding era history. While competing schools of thought existed in the founding era, and different takes on that history exist today, a pro-federalist reading of history is instructive for the purposes of this article because the unitary executive theory is often built upon a pro-federalist reading of early American history. See Jeremy D. Bailey, *The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton*, 102 *Am. Pol. Sci. Rev.* 453, 454 (2008).

95. Miller, *supra* note 1, at 68.

96. Calabresi & Rhodes, *supra* note 28, at 1199.

97. Pushaw, *supra* note 10, at 741.

failed lamentably,” due mainly to “inefficiency and waste.”⁹⁸

The weakness of state executives was almost as disastrous. Often appointed by the legislatures for one-year terms, often without a veto power, often without appointment and removal powers to control their subordinates, and often subject to oversight by an executive counsel, governors were too weak to check state legislatures.⁹⁹ “Everywhere, state legislatures abused their absolute power and ran roughshod over civil liberties.”¹⁰⁰ Chief among the problems was what James Madison called “vicious legislation” enacted by majority factions to take the property of minority factions.¹⁰¹ He referred to it as “the ‘injustice’ and ‘mutability of the laws of the States.’”¹⁰² Observing that an unchecked legislature can be as despotic as an unchecked monarch, Thomas Jefferson agreed with Madison: “173 despots would surely be as oppressive as one.”¹⁰³

Unitary executive theorists trace the origins of their theory that a single, strong President must have the power to control all executive officers “to the framers’ disdain for the weak executive branches created for the federal government by the Articles of Confederation and for the states by post-1776 state constitutions written immediately after American independence.”¹⁰⁴

But the framers’ held a similar disdain for the weak judicial branches created for the federal government and for the states. In fact, “one of the Founders’ overriding purposes” was “curtailing the legislative dominance over judges (and the executive) that characterized American governments in the 1780s.”¹⁰⁵

Because state judges were often elected, and always lacked life tenure and salary protections, they provided a poor check against the “vicious legislation” that framers like Madison and Hamilton feared. Hamilton spoke for those framers when he wrote that they “can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system, which leaves the former dependent for pecuniary resources on the occasional grants of the latter.”¹⁰⁶

Proponents of the debt-relieving legislation that framers like Madison and Hamilton feared took the opposing view about the importance of a

98. CALABRESI & YOO, *supra* note 1, at 33 (quoting Thach); *see also* Miller, *supra* note 1, at 68–69.

99. *Id.* at 31.

100. *Id.*

101. *Id.* (quoting Madison).

102. Liebman & Ryan, *supra* note 3, at 710.

103. CALABRESI & YOO, *supra* note 1, at 31 (quoting Jefferson).

104. *Id.* at 30.

105. Pushaw, *supra* note 10, at 830–31.

106. Currie, *supra* note 1, at 37 (quoting Hamilton).

strong judiciary independent of interference by the people or the people's representatives. Speaking in favor of Shays' Rebellion in rural Massachusetts, a farmer said, "The great men are going to get all we have and I think it is time for us to rise and put a stop to it, and have no more courts, nor sheriffs, nor collectors nor lawyers."¹⁰⁷ In fact, during Shays' Rebellion, advocates of debt relief made courthouses not just a symbolic target, but a literal target, as mobs seized courthouses to keep them from issuing orders against delinquent debtors. The insurrection escalated from courthouse closings, to the raising of clashing armies, to martial law. It was a significant factor in the call for a constitutional convention and in the delegates' desire for a strong executive and a strong judiciary—both of which had proved wanting in Massachusetts.

After the Constitutional Convention convened, the delegates made a series of choices to ensure the independence and strength of the executive branch. Every constitutional blueprint proposed at the convention "recognized that execution of laws was a duty of the Executive."¹⁰⁸ And time and again, the delegates rejected proposals that would sap the executive's independence and strength. They voted down a proposed "council within the executive branch," which "suggests that the President was not to be subject to internal checks over his or her responsibility to see that the laws be faithfully executed."¹⁰⁹ They also rejected a tripartite executive, because, in James Wilson's words, "a single magistrate . . . giv[es] most energy dispatch and responsibility to the office."¹¹⁰ And they refused to allow Congress to choose the President.¹¹¹ Each of these three failed proposals mirrors elements of the weak state-executive model the framers wished to avoid, and each choice is among those unitary executive theorists often point to in support of their theory that the Constitution gives a strong, independent President the authority to select and remove executive officers.

The delegates made similar choices to avoid elements of weak state-judicial models and ensure the independence and strength of the federal judiciary "as a check on (or, better, a filter for) state law inconsistent with 'the supreme Law of the Land.'"¹¹² That is one reason why the twin provisions of life tenure and salary protection for federal judges "went virtually unchallenged throughout the Convention . . . and prompted debate exclusively on the question of how best to insure

107. HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492-PRESENT 92 (3d ed. 2003).

108. Calabresi & Prakash, *supra* note 37, at 608.

109. Miller, *supra* note 1, at 70.

110. CALABRESI & YOO, *supra* note 1, at 33.

111. *Id.* at 34.

112. Liebman & Ryan, *supra* note 3, at 703.

independence.”¹¹³ Alexander Hamilton wrote that “nothing can contribute more [than such protections] to the independence of judges’ serving as ‘the bulwarks of a limited Constitution against legislative encroachments,’ particularly given that no similar ‘prospect of . . . independence . . . is discoverable in the constitutions of any of the States in regard to their own judges.’”¹¹⁴

The convention also rejected a series of proposals that would have weakened judges’ independence from congressional and executive interference (just as it had rejected proposal to weaken the President’s independence). They rejected a proposal to require judges to advise other branches and to require the Chief Justice sit with members of other branches on a Privy Council, thus “[h]ewing to the Convention’s consistently strong commitment to judicial independence and effectual judicial decision of the whole case.”¹¹⁵ They likewise rejected a proposal “for executive removal of federal judges on the application of Congress.”¹¹⁶ And most importantly for the purposes of this article, they rejected a proposal that “the judicial power shall be exercised in such manner as the Legislature shall direct.”¹¹⁷ This decision was consistent with the framers’ understanding that “legislation concerning courts could not destroy or seriously undermine their independence and functioning.”¹¹⁸ Each of these three failed proposals would have replicated some of the weaknesses of the state judiciaries—but just as the framers wanted to avoid replicating weak state executives, they also wanted to avoid replicating weak state judiciaries.

In short, the delegates came to the Constitutional Convention concerned about what Madison called the “vices” of the Articles of Confederation, including “the want of an effectual controul in the whole over its parts.” Only by creating a strong executive and a strong judiciary independent of Congress could they avoid “leav[ing] the whole at the mercy of each part” and “sacrific[ing]” “the general interest . . . to local interests.”¹¹⁹ In the case of the executive branch, that concern led to the creation of a President who can control subordinates. And the similarity between the concerns animating the executive branch’s creation and those animating the judicial branch’s—as well as the similar courses that Article II and Article III followed at the convention—offers some preliminary indication that the framers may

113. *Id.* at 713.

114. *Id.* at 769 (quoting Hamilton).

115. *Id.* at 744.

116. *Id.* at 747.

117. Liebman & Ryan, *supra* note 3, at 754.

118. Pushaw, *supra* note 10, at 830.

119. Liebman & Ryan, *supra* note 3, at 699.

well have intended for the Constitution to give judges the same power over office management that they gave the President.

B. Constitutional Text

1. The Vesting Clauses of Articles II and III

The Vesting Clause of Article II is among the foundations of the unitary executive theory. It provides that “[t]he executive Power shall be vested in a President.”¹²⁰ To those who believe the President has inherent authority to control office management, the Vesting Clause’s grant of “[t]he executive Power” (an imprecise but meaningful term) to “a President” (rather than to multiple presidents or to a committee) gives the President—and him alone, without congressional interference—the authority to select and remove executive officers,¹²¹ as well as the authority to refuse to disclose presidential papers.¹²² According to them, Article II’s Vesting Clause “can no more be overridden or supplemented by Congress than can the First Amendment.”¹²³

Unitary executive theorists have often compared the Vesting Clause of Article II to the Vesting Clause of Article III, which provides, “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”¹²⁴ They draw inferences from Article III (judiciary) for Article II (executive). In this section, I discuss those similarities, but I then do the opposite: I draw inferences from Article II (executive) for Article III (judiciary). In particular, I argue that the similarities between Article II’s Vesting Clause and Article III’s Vesting Clause suggest that if the former vests the President with authority over office management, the latter likewise vests federal judges with authority over office management.

Among those who have analyzed the similarities between the Vesting Clauses of Article II and Article III are Steven Calabresi and Kevin Rhodes. They note at least four relevant similarities between the

120. U.S. CONST. art. II, § 1.

121. Calabresi & Prakash, *supra* note 37, at 663.

122. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 515 (1977) (Burger, C.J., dissenting) (“Control of Presidential papers is, obviously, a natural and necessary incident of the broad discretion vested in the President in order for him to discharge his duties.”).

123. Calabresi & Prakash, *supra* note 37, at 582; *see also* Currie, *supra* note 1, at 31 (among the “critical concerns” that “underlie” the Vesting Clause “was the need to concentrate executive power in the hands of a single person”).

124. U.S. CONST. art. III, § 1. For unitary executive theorists making the comparison, *see, e.g.*, Miller, *supra* note 1, at 59 (“Additional support for this construction might be found by comparing the language of Article II with that of Article III.”); Calabresi & Rhodes, *supra* note 28, at 1158, 1175–76.

clauses, which “contain nearly identical language in parallel grammatical formulations.”¹²⁵ First, their language and grammatical formulations distinguish them from Article I’s Vesting Clause, which provides, “All legislative Powers *herein granted* shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”¹²⁶ By limiting legislative powers to those “herein granted,” the Constitution denies Congress a general grant of legislative power and limits Congress to the exercise of the eighteen expressed powers in Section 8 of Article I. In contrast, by granting the President the “executive power” and federal judges the “judicial power,” the Constitution does not limit the President and federal judges to a limited list of expressed powers. It thus attempts, “perhaps unsuccessfully, to bolster the status of their respective departments as co-equal departments of the national government relative to the department that the Framers perceived to be the most dangerous—the Congress” (a fear described in Part II.A above).¹²⁷

Other similarities between the Vesting Clauses of Articles II and III include “their potential function as substantive, if somewhat nebulous, grants of power,”¹²⁸ their identification of which “officers and institutions” may exercise the power granted (regardless of whether the power is granted in the Vesting Clauses, as most unitary executive theorists believe, or elsewhere),¹²⁹ and “the use of the ‘shall be vested’ formulation.”¹³⁰ With regard to that final, “more important” similarity, the two clauses’ “exactly parallel linguistic formulations . . . dictate that ‘shall’ be interpreted in the same way in both Vesting Clauses.”¹³¹ Thus, if Article II’s Vesting Clause means the executive power “shall”—i.e., will or must, without exception—belong to the President in a manner that is an external limit on congressional intrusion into the President’s authority over office management, Article III’s Vesting Clause likely means the judicial power “shall”—i.e., will or must, without exception—belong to federal judges in a manner that is an external limit on congressional intrusion into federal judges’ authority over office management.

To sum up, there are important textual similarities between the Vesting Clauses of Articles II and III. And among scholars in the

125. Calabresi & Rhodes, *supra* note 28, at 1158.

126. U.S. CONST. art. I, § 1 (emphasis added).

127. Calabresi & Rhodes, *supra* note 28, at 1176.

128. *Id.*

129. *Id.* at 1179.

130. *Id.* at 1178.

131. *Id.*

field¹³² and within the case law,¹³³ there is a consensus that Article III's Vesting Clause grants judges inherent power "of a case-management or supervisory nature 'to manage [a court's] own affairs so as to achieve the orderly and expeditious disposition of cases'" and inherent power "to adjudicate and resolve Article III cases and controversies."¹³⁴ However, what has been relatively unexplored—because Article III's Vesting Clause has been used to inform Article II's, rather than, as here, the converse—is whether a judge's inherent power includes the authority to control office management. This section of this article argues that the textual similarities between the Vesting Clauses of Articles II and III are evidence of an answer to that question: If Presidents' inherent authority includes the power to control office management, so too does the inherent authority of federal judges.

2. Enumerated Limits on the Vesting Clauses

In addition to the similarities between the Vesting Clauses of Articles II and III, the similarities between those Articles' other clauses also suggest that if Presidents' inherent power includes authority over office management, the inherent power of federal judges also does. In the same way that unitary executive theorists find support for their reading of Article II's Vesting Clause in the clauses that follow it, the clauses that follow Article III's Vesting Clause provide support for a similarly robust and broad reading of the Constitution's grant of the "judicial power." And whereas unitary executive theorists have noted these similarities to inform Article II, they can and should also inform Article III.¹³⁵

Among the most significant divides between proponents and opponents of the unitary executive theory is the question of whether

132. See, e.g., Liebman & Ryan, *supra* note 3, at 753 ("The directive nature of the 'shall extend to' language remains critical, however. If the legislature were to tell federal courts to exercise something less than 'the Judicial Power' in cases within their jurisdiction, the courts would be required to ignore that directive because the Constitution itself, through sentence [1], dictates that 'the Judicial Power shall extend to' those cases."); Ryan, *supra* note 4, at 783–84 ("Because this power is undefined, and because the Constitution does not invest the judiciary with any other power, at least some core judicial functions must inhere within the very grant of judicial power.").

133. See Virelli, *supra* note 6, at 1213–14 n.178 (citing *Chambers v. NASCO*, 501 U.S. 32 (1991); *Michaelson v. United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 266 U.S. 42, 65–66 (1924); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871); *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)).

134. Caminker, *supra* note 7, at 1519.

135. See, e.g., Calabresi & Prakash, *supra* note 37, at 574 ("Since Section 2 of [Article III] only tells us to which categories of cases or controversies the general grant of 'the judicial Power' extends, the entire Article fails to make sense if there is an implicit 'herein granted' limitation in Article III, Section 1. . . . Reasoning by analogy, it makes little sense to read such an implicit limitation into the analogous Article II Vesting Clause.").

Article II's Vesting Clause is a general grant of power (as described above) or whether it is a reference to specific powers enumerated later in Article II. The primary candidates for those enumerated powers are found in the six clauses of Article II's Section 2:

[1] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; [2] he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and [3] he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

[4] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and [5] he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[6] The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Although there is disagreement among unitary executive theorists on this point,¹³⁶ many of them believe that these six clauses do not enumerate powers; instead, they “give[] content [to], explain[], describe[], and substantially limit[]” the general grant of “the executive power” given to the President in Article II's Vesting Clause.¹³⁷ Most importantly for our purposes is the way they “substantially limit[]” executive power in a way that differed from “the executive power possessed by the King of England and described by the Framers' idol, the ‘celebrated Montesquieu.’”¹³⁸ The President is Commander in Chief

136. Lee Liberman Otis, for example, seemed to suggest in Liberman, *supra* note 1, that the Take Care Clause grants power that is perhaps not otherwise granted.

137. Calabresi & Rhodes, *supra* note 28, at 1196.

138. *Id.* at 1196–97; *see also id.* at 1196–99 (elaborating on this interpretation of Article II,

of the militia *only* “when called into the actual service of the United States.”¹³⁹ He may ask officials for opinions in writing *only* “upon any Subject relating to the Duties of their respective Offices.”¹⁴⁰ He may pardon *only* “for Offences against the United States” and not “in Cases of Impeachment.”¹⁴¹ He may make treaties *only* “by and with the Advice and Consent of the Senate.”¹⁴² He may nominate ambassadors, ministers, judges, and other officers *only* “by and with the Advice and Consent of the Senate.”¹⁴³ And he may make recess appointments *only* “by granting Commissions which shall expire at the End of their next Session.”¹⁴⁴

Like Section 2 of Article II (as interpreted by unitary executive theorists), the provisions of Article III that follow the Vesting Clause also curb the power granted in the Article’s Vesting Clause. They do so in two ways—two ways even more blatant than the six more subtle limitations of Article II’s Section 2.¹⁴⁵ First, one provision states that no inferior federal courts will exist except those that Congress chooses to “ordain and establish.”¹⁴⁶ Second, another clause provides that Congress can make “exceptions” to the Supreme Court’s appellate jurisdiction.¹⁴⁷ Under the same *expressio unius* canon of construction used for Article II to support the unitary executive theory, the framers’ decision to enumerate two congressional powers, and not others, has consequences for Article III’s construction.¹⁴⁸ As Professor Virelli has written, “the Framers’ choice to empower Congress to affect Supreme Court appellate jurisdiction suggests a countervailing intent to preclude congressional intrusion into those exercises of the Judicial power . . . that are not expressly subjected to congressional authority under Article

Section 2).

139. U.S. CONST. art. II, § 2.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. See Virelli, *supra* note 6, at 1208 (“Article III contains two provisions that are commonly thought of as qualifying the judicial power vested in the federal courts: the provision empowering Congress to ‘ordain and establish’ the inferior courts, and the ‘Exceptions Clause’ of section 2, which empowers Congress to make exceptions’ to the Court’s appellate jurisdiction.”).

146. U.S. CONST. art. III, § 1.

147. *Id.* at § 2.

148. The interpretative canon “*expressio unius exclusio alterius*” translates to “the mention of one thing implies the exclusion of another thing.” *Indep. Ins. Agents of Am., Inc. v. Hawke*, 43 F. Supp. 2d 21, 23 n.1 (D.D.C. 1999). When it applies, it means that “‘expressing one item of [an] associated group or series excludes another left unmentioned.’” *Chevron U.S.A. v. Echazabal*, 536 U.S. 73, 80 (2002) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)).

III.”¹⁴⁹

Part III.B of this article discusses why, as the Supreme Court has frequently held that Congress’s “‘greater’ power to withdraw jurisdiction [does not] encompass[] the ‘lesser’ power to regulate any jurisdiction that is conferred”¹⁵⁰—and why Congress’s “greater” power to withdraw jurisdiction does not include the “lesser” power to regulate office management. For now, my only contention is that if proponents of the unitary executive theory are correct that the framers’ decision to curb executive power in Section 2 of Article II implies that the executive power may not be curbed in ways (like the regulation of office management) not listed in that section, then the framers’ decision to even more blatantly curb the reach of judicial power in Section 2 of Article III implies that the judicial power may not be curbed in ways (like the regulation of office management) not listed in that section.

Similarly, the framers’ decision to grant Congress some power over executive personnel in Section 4 of Article II has consequences for Article III’s construction. Section 4 of Article II grants Congress the power to appoint inferior officers.¹⁵¹ Under the *expressio unius* canon of construction, the absence of a similar provision in Article III granting Congress the power to appoint judicial personnel suggests the framers did not intend for Congress to have this power within the judiciary. Further, Article II’s Section 4 grants Congress the power to impeach “Civil Officers,” which includes judicial personnel.¹⁵² The framers’ decision to specify Congress’s means of controlling judicial personnel (impeachment), coupled with the absence of any other express grant of authority to Congress to control judicial personnel, suggests Congress’s power over judicial personnel is limited to its impeachment powers prescribed in Article II, Section 4. Congress’s power over judicial personnel, therefore, is even more limited than its power over executive personnel.

In sum, the similarity of the framers’ decision to enumerate certain exceptions to executive and judicial power suggests that if control over office management is not among the powers that Congress can take away from the President (something we know because limits on office management are not among the limitations on “the executive power” listed after the Vesting Clause of Article II), then likewise, control over

149. Virelli, *Supreme Court Recusal*, *supra* note 16, at 1569–70.

150. Liebman & Ryan, *supra* note 3, at 885; *see also* Virelli, *supra* note 6, at 1209 (“[T]he Framers’ choice to empower Congress to affect Supreme Court appellate jurisdiction suggests a countervailing intent to preclude congressional intrusion into those exercises of the judicial power—like recusal—that are not expressly subjected to congressional authority under Article III.”).

151. U.S. CONST. art. III, § 4.

152. U.S. CONST. art. II, § 4.

office management is not among the powers that Congress can take away from federal judges (something we know because control over office management is not among the limitations on “the judicial power” listed after the Vesting Clause of Article III).

C. Constitutional Structure

As was the case with the Constitution’s text and historical background, if the Constitution’s structure suggests a strong, independent executive with the authority to control its office management, I argue that the same structure is evidence of a strong, independent judiciary with the authority to control its office management.

Proponents of the unitary executive theory and a robust executive privilege find significant support from (1) the Constitution’s tripartite division of powers, (2) its purportedly strict separation of powers, and (3) the resulting equilibrium among the three branches. So too do proponents of a robust executive privilege. And each of these three aspects of the Constitution’s structure apply with equal force to the judiciary, providing more evidence that the Constitution’s structure protects the judiciary from congressional interference with office management to whatever extent it protects the executive from congressional interference with office management.

First, unitary executive theorists place great emphasis on the Constitution’s tripartite division of powers.¹⁵³ Because “[t]he first three articles of the Constitution establish three and only three branches of government,” and because “[t]he overall philosophy of the Constitution is that the national government was a government of limited powers,” there can be no “independent fourth branch of government” that executes the law in a manner unsupervised by the President.¹⁵⁴ Instead, contrary to the belief of unitarians’ opponents who believe Congress can restrict the power of the President to select and remove heads of so-called independent agencies, “the President, as head of the executive branch, must have a considerable degree of constitutional authority to supervise and guide the activities of administrative agencies.”¹⁵⁵

Unitary executive theorists who believe the Constitution’s tripartite structure means there can be “only three types of *institutions* of government staffed by three types of *personnel*” find further support in Article VI’s Oaths or Affirmations Clause, which requires “only three

153. See, e.g., Currie, *supra* note 1, at 35 (“The Constitution recognizes only three kinds of federal powers: legislative, executive, and judicial.”).

154. Miller, *supra* note 1, at 65.

155. *Id.* at 67.

types of federal officers or personnel” to swear oaths of allegiance to the Constitution.¹⁵⁶ If the framers had imagined a category of federal officials whom Congress can remove from executive control, the Oaths or Affirmations Clause would have referred to them. Instead, it refers to legislative, executive, and judicial officials.¹⁵⁷ Professors Calabresi and Prakash argue that “it is absurd to conclude that the Constitution requires oaths of members of Congress and of executive and judicial officers, but that it does not require oaths from federal administrative officers.”¹⁵⁸

Second, as implied by the preceding paragraphs, most unitary executive theorists interpret the Constitution’s structure to require a relatively strict separation of powers. Like Madison, they believe, “[i]f it be essential to the preservation of liberty that the Legis[ative,] Exec[utive,] & Judiciary powers be separate . . . it is essential to a maintenance of the separation, that they should be independent of each other.”¹⁵⁹ That means “Article II’s vesting of the President with all of the ‘executive Power’ [gives] him control over all federal governmental powers that are neither legislative nor judicial.”¹⁶⁰

Third, unitary executive theorists believe the Constitution creates—and requires the preservation of—an equilibrium of power among the three branches of government. As described in Part II.A, those framers were concerned in part about the threat of the too powerful state legislatures that caused problems during Articles of Confederation era.¹⁶¹ Madison, for example, saw the legislature, unless checked, “everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”¹⁶² Unitary executive theorists believe the framers addressed this concern by creating “three competing, co-equal, and coordinate departments.”¹⁶³ They argue that the “critical insight of checks and balances theory” is “that the relative power of the branches is central to preservation of the equilibrium among them.”¹⁶⁴ When you weaken one, you indirectly strengthen the relative power of the others.¹⁶⁵ Thus, “the withdrawal of a portion of a branch’s powers is

156. Calabresi & Prakash, *supra* note 37, at 566–67.

157. U.S. CONST. art. VI (“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .”).

158. Calabresi & Prakash, *supra* note 37, at 567–68.

159. Currie, *supra* note 1, at 32 (quoting Madison).

160. Calabresi & Prakash, *supra* note 37, at 568–69.

161. *See infra* Part II.A.

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

163. Calabresi & Rhodes, *supra* note 28, at 1216.

164. Liberman, *supra* note 1, at 351.

165. The same point has been made by two of the most powerful critics of the originalist case for

just as destabilizing and dangerous as a partial usurpation, at least unless a similar amount of power is taken away from the other branches as well.”¹⁶⁶ So, for example, when Congress takes away the President’s power to select, supervise, and remove executive officers, Congress upsets the equilibrium of power mandated by the Constitution.

The same three considerations are equally important to defenders of a robust executive privilege.¹⁶⁷ In his opposition to Congress’s decision to force the disclosure of a retired president’s records, like unitary executive theorists, Chief Justice Burger stressed the importance of the three branches’ coequal nature, arguing that Congress had “invaded the historic, fundamental principles of separate powers of coequal branches of Government.”¹⁶⁸ And invoking the same strict separation and independence that unitary executive theorists rely on, he claimed Congress violates “well-established principles of separation of powers” when it “compels or coerces the President, in matter relating to the operation and conduct of his office.”¹⁶⁹ Citing precedents providing that “neither department [of Government] may . . . control, direct or restrain the action of the other”¹⁷⁰ and that “the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments,”¹⁷¹ Burger concluded that “to preserve the constitutionally rooted independence of each branch of Government, each branch must be able to control its own papers.”¹⁷²

Like Chief Justice Burger, legal scholars in favor of executive privilege make similar arguments based on the Constitution’s structure. For example, Professor Strauss argues that Congress would upset the equilibrium of powers “[i]f it required all presidential communications to be open without equally requiring that of congressional communications,” because “the suspicion would be inescapable that an

the unitary executive theory. See Lessig & Sunstein, *supra* note 1, at 115 (“[I]ndependence can be understood as a form of aggrandizement.”). While disagreeing with the classic arguments in favor of the unitary executive theory, Professors Lessig and Sunstein tentatively argue in favor of some presidential supervision as a normative matter. See *id.* at 85–86.

166. Liberman, *supra* note 1, at 351.

167. They are also important to even those defenders of versions of executive privilege that are strong, but not without outer limits. See *United States v. Nixon*, 418 U.S. 683, 705 (1974) (“[T]he privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties.”); *id.* at 708 (“The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.”).

168. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 505 (1977) (Burger, C.J., dissenting) (emphasis added).

169. *Id.* at 506 (Burger, C.J., dissenting).

170. *Id.* at 509 (Burger, C.J., dissenting) (quoting *Mass. v. Mellon*, 262 U.S. 447, 488 (1923)).

171. *Id.* (Burger, C.J., dissenting) (quoting *O’Donoghue v. United States*, 289 U.S. 516, 530 (1933)).

172. *Id.* at 511 (Burger, C.J., dissenting).

assault on the Presidency, rather than an assurance of fair or acceptable procedure, was at the root of the measure; and accordingly, it ought not survive.”¹⁷³ They thus reflect the same concern as unitary executive theorists “that the relative power of the branches is central to preservation of the equilibrium among them.”¹⁷⁴

To whatever extent each of these structural considerations support the President’s authority over office management, they also support federal judges’ authority over office management. If the tripartite division of power precludes Congress from making executive officers independent of the President or making presidential papers subject to disclosure, it offers similar protection from congressional interference for the judiciary. If the Oaths and Affirmations Clause confirms that there are three types of federal personnel and thus precludes federal personnel independent of one of the three branches, it does so not just for executive-branch personnel but also for judicial-branch personnel. If a strict separation and independence of each branch from the others is necessary to protect the executive against the legislature’s “impetuous vortex,”¹⁷⁵ it is also necessary to protect the judiciary from the same legislature. And if protections against congressional regulation of presidential office management is precluded by the need for each “competing, co-equal, and coordinate”¹⁷⁶ branch to maintain its “relative power” to “preserv[e] the equilibrium among them,”¹⁷⁷ the same need precludes similar congressional regulation of judicial office management.

Although structural arguments similar to these have not been made in the context of office management and have not been made to draw implications for federal judges’ office management from the President’s inherent power over office management, arguments similar to these have been used by legal scholars and courts when describing other elements of inherent judicial power. Arguing for an inherent judicial power to preclude certain congressional regulations of judicial procedure, Professor Ryan argues that “if the judiciary is to remain a co-equal branch, its decisionmaking function must remain unimpaired.”¹⁷⁸ Arguing for an inherent judicial power that precludes congressionally imposed recusal rules for Supreme Court justices, Professor Virelli

173. Strauss, *supra* note 1, at 659.

174. Liberman, *supra* note 1, at 351.

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

176. Calabresi & Rhodes, *supra* note 28, at 1216.

177. Liberman, *supra* note 1, at 351.

178. Ryan, *supra* note 5, at 790; *see also id.* at 784–85 (“For if there is one common thread running through recent separation of powers cases, it is the belief that the core functions of each branch must be protected from undue intrusion by either of the other branches.”).

quotes Hamilton quoting Montesquieu's statement that "there is no liberty if the power of judging be not separated from the legislative and executive powers."¹⁷⁹ In a statement whose mirror image could have come from any number of structural arguments by scholars and judicial opinions in defense of the President's authority over office management, Professor Virelli quotes the Supreme Court's recent declaration that "the 'judicial Power of the United States' . . . can no more be shared' with another branch than 'the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.'"¹⁸⁰

D. Historical Practice: 1789–2016

In addition to considering constitutional text, constitutional structure, and founding era history when interpreting the Constitution, legal scholars and courts also consider longstanding governmental practices, particularly when the constitutional text, structure, and founding era history are unclear. "If a practice of government has persisted for many years without significant controversy, then this is evidence that the practice is constitutional, or has become so by prescription."¹⁸¹ As Justice Frankfurter wrote in *Youngstown*, "a systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned, engaged in by presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II."¹⁸²

Even if a longstanding executive practice has provoked controversy or been opposed by another branch, many unitary executive theorists believe that when the executive branch has "consistently fought a construction of the Constitution" sporadically asserted by Congress or

179. Virelli, *supra* note 6, at 1192 (quoting Hamilton (quoting Montesquieu)).

180. *Id.* (quoting *Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011)). Echoes of the *Stern*'s statement can be heard in, for example, unitary executive theorists' statement that "Congress can no more use the Necessary and Proper Clause to override the constitutional trinity of powers and the vesting of all executive power with the President than it could use the Clause to override the First Amendment to 'carry[] into execution' the Alien and Sedition Acts." Calabresi & Prakash, *supra* note 37, at 588.

181. Miller, *supra* note 1, at 84.

182. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); see also CALABRESI & YOO, *supra* note 1, at 25 (quoting Justice Frankfurter's concurrence); *id.* at 25 n.19 (citing for the same proposition *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803); *Mo. Pac. Ry. Co. v. Kansas*, 248 U.S. 276, 283–84 (1919); *The Pocket Veto Case*, 279 U.S. 655, 688–89 (1929); *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 327–28 (1936); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 315 (1937); *Dames & Moore v. Regan*, 453 U.S. 654, 668–69, 686 (1981)).

the courts, the executive branch's "opposition is enough to stop an argument" for executive power "from being foreclosed by historical practice."¹⁸³ That was the approach taken by Chief Justice Taft (a strong proponent of the unitary executive) in his opinion for the Court in *Myers v. United States*, when he "deferred to [the President's removal] practice despite Congress's affirmative attempt in 1863 to limit the scope of executive removal."¹⁸⁴ Similarly, in the *Pocket Veto Case*, "the Court concluded that constitutional meaning had already been established by longstanding practice and could not later be overridden by a congressional change of heart."¹⁸⁵

Although Congress and the courts have not always embraced the unitary executive theory,¹⁸⁶ unitary executive theorists find it highly significant that "the historical record shows that presidents almost always object or fight when Congress trespasses on their constitutional power to execute the laws free from legislative control."¹⁸⁷ For example, in their historical survey of presidential supervision of the executive branch, Professors Calabresi and Yoo include a case study of President Jackson's formal protest of a Senate resolution censuring him for firing his Treasury Secretary over the subordinate's refusal to withdraw federal deposits from the Bank of the United States.¹⁸⁸ Citing

183. CALABRESI & YOO, *supra* note 1, at 418 (citing Chadha).

184. Virelli, *supra* note 6, at 1198.

185. *Id.* at 1199.

186. *See, e.g.*, Tenure of Office Act of 1867, ch. 154, 14 Stat. 430 (1867) (imposing removal restrictions on President with regard to Cabinet officials); Ethics in Government Act of 1978, Pub. Law No. 95-521, 92 Stat. 1824 (imposing removal restriction on President with regard to Independent Counsels); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958); *Morrison v. Olson*, 487 U.S. 654 (1988); *see also* CALABRESI & YOO, *supra* note 1, at 16 ("[B]road limits on presidential power to remove nonpolicymaking civil servants in the executive branch date back only to the 1970s, not to the 1880s . . ."). At other times, Congress and the courts have embraced the unitary executive theory. *See, e.g.*, *Miller*, *supra* note 1, at 67 (Decision of 1789); 1887 repeal of Tenure of Office Act, ch. 154, 14 Stat. 430 (1867); *Myers v. United States*, 272 U.S. 52 (1926); *Shurtleff v. United States*, 189 U.S. 311 (1903). Professors Calabresi and Yoo discuss these decisions at CALABRESI & YOO, *supra* note 1, at 27.

187. CALABRESI & YOO, *supra* note 1, at 28; *see also id.* at 4 ("Big fights about whether the Constitution grants the president the removal power have erupted frequently, but each time the president in power has claimed that the Constitution gives the president power to remove and direct subordinates in the executive branch. And each time the president has prevailed, and Congress has backed down.").

188. *Id.* at 105–22. In addition to a chapter on each president's supervisory practices, Calabresi and Yoo's history includes four case studies on President Jackson's removal of his Treasury Secretary, President Johnson's removal of his War Secretary, President Franklin Roosevelt's support of the Brownlow Committee's reorganization report, and the fall of the Independent Counsel following President Clinton's impeachment. *Id.* at 105–22, 179–87, 291–301 ("Even though Roosevelt eventually yielded on each of the major issues, he did begin by vigorously asserting the president's right to control all executive functions of the federal government and saw his views accepted to some extent by both the House and Senate."); *id.* at 11 ("The Reagan, Bush, and Clinton administrations all came to think the independent counsel law was both unconstitutional and unwise, even though the Supreme Court had upheld its constitutionality in *Morrison v. Olson*, over the lone dissent of Justice Scalia.").

Article II's Vesting Clause, the Constitution's tripartite division of powers, and "the practice of near forty-five years," Jackson argued that because he was "responsible for the entire action of the executive department, it was but reasonable that the power of appointing, overseeing, and controlling those who execute the laws—a power in its nature executive—should remain in his hands."¹⁸⁹ He called "the power of removal" and "that of appointment" to be "unchecked."¹⁹⁰ (He took a similar view of his power to withhold internal communications with the fired secretary.¹⁹¹) Jackson was vindicated in 1835 when the House refused to consider a bill to limit his removal power, in 1836 when the Senate declined to re-charter the Bank of the United States, and in 1837 when the Senate expunged its previous censure resolution.¹⁹² "Jackson earned a personal triumph, and thus symbolically his reading of executive powers gained political confirmation."¹⁹³

In 1867 and 1868, President Andrew Johnson's similar defiance of an attempt by Congress to restrict his removal power led to "one of the most important events in American history in maintaining the separation of powers ordained by the Constitution."¹⁹⁴ In vetoing a bill to limit his authority to remove certain officials without Senate approval, Johnson said, "That the power of removal is constitutionally vested in the President of the United States is a principle which has been not more distinctly declared by judicial authority and judicial commentators than it has been uniformly practiced upon by the legislative and executive departments of the government."¹⁹⁵ Congress overrode Johnson's veto, and after Johnson fired his Secretary of War without the Senate's approval, the House of Representatives impeached him. His acquittal by one vote in the Senate "was due to his strong defense of the unitary executive and to several senators who agreed with this defense,"¹⁹⁶ and his stance received further vindication in 1887, when Congress repealed

189. *Id.* at 111 (quoting Jackson) (internal quotation marks omitted).

190. CALABRESI & YOO, *supra* note 1, at 112 (quoting Jackson) (internal quotation marks omitted).

191. "The executive is a coordinate and independent branch of the Government equally with the Senate, and I have yet to learn under what constitutional authority that branch of the Legislature has a right to require of me an account of any communication . . . made to the heads of Departments acting as a Cabinet council." *Id.* at 108–09 (quoting Jackson) (internal quotation marks omitted).

192. *Id.* at 118–19.

193. *Id.* at 119 (quoting Leonard White) (internal quotation marks omitted).

194. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 692–93 (2008) (Kavanaugh, J., dissenting) (citing WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 215–16, 230–31, 250 (1992); *Raines v. Byrd*, 521 U.S. 811, 826–28 (1997)).

195. CALABRESI & YOO, *supra* note 1, at 180 (quoting Johnson) (internal quotation marks omitted).

196. *Id.* at 174.

the Tenure of Office Act.¹⁹⁷ Proponents of a unitary executive believe, “The contentious Johnson episode ended in a way that discouraged congressional restrictions on the President’s removal power and helped preserve Presidential control over the Executive Branch.”¹⁹⁸

Even when Congress has placed removal restrictions on officers less senior than the Secretary of Treasury or War, like the heads of so-called independent agencies, Presidents have still pushed back. Between the repeal of the Tenure of Office Act and the Supreme Court’s 1935 decision in *Humphrey’s Executor*, each President “treated these agencies in the same manner as purely executive agencies, directing their operations and removing commissioners who disagreed with the president’s vision for the enforcement of law.”¹⁹⁹ Even after *Humphrey’s Executor* held that a removed Federal Trade Commissioner was entitled to back pay after being removed by President Roosevelt without cause, “FDR continued to assert his authority over the independent agencies and to remove members as he saw fit.”²⁰⁰ And every president who followed him “issued policy directives to the independent agencies; included them in executive orders mandating ethical standards, ex parte contacts, and procurement rules; and subjected them to centralized budget and regulatory review by the Office of Management and Budget.”²⁰¹

Proponents of a robust executive privilege—including a robust privilege for retired presidents—make a similar historical argument. In his dissent in *Nixon v. General Services Administration*, Chief Justice Burger called the majority’s decision a “grave repudiation of nearly 200 years of judicial precedent and historical practice.”²⁰² He argued that President “Washington established the tradition by declining to produce papers requested by the House of Representatives relating to matters of foreign policy.”²⁰³ Quoting from *Curtiss-Wright*, he said the “wisdom” of Washington’s decision “was recognized by the House itself and has never since been doubted.”²⁰⁴ The majority’s contrary decision to compel the production of former President Nixon’s papers, according to Burger, was wrong in part because it repudiated “nearly 200 years of judicial precedent and historical practice”²⁰⁵ during which time it was

197. *Free Enter. Fund*, 537 F.3d at 692 (Kavanaugh, J., dissenting).

198. *Id.* (Kavanaugh, J., dissenting).

199. CALABRESI & YOO, *supra* note 1, at 300.

200. *Id.*

201. *Id.* at 425.

202. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 504 (1977) (Burger, C.J., dissenting).

203. *Id.* at 510 (Burger, C.J., dissenting).

204. *Id.* (Burger, C.J., dissenting) (quoting *Curtiss-Wright*) (internal quotation marks omitted).

205. *Id.* at 504 (Burger, C.J., dissenting).

“the implied prerogative of the President—as of Members of Congress and of judges—to memorialize matters, establish filing systems, and provide unilaterally for disposition of his workpapers.”²⁰⁶

It is not the purpose of this article to show that presidents’ historical practices support the unitary executive theory and a robust executive privilege. Rather, my purpose is to show how their proponents rely on historical practices for support, and to argue that if they are correct that those practices support the President’s inherent power over office management, there is as strong an argument to support federal judges’ inherent power over office management. In fact, the historical-practices argument for federal judges is likely even stronger: Judges have never endorsed an intrusion into this sphere of their inherent power, and Congress has hardly ever—and only very recently—challenged this longstanding practice.

Never in the nation’s history has Congress ever required the disclosure of federal judges’ papers.²⁰⁷ And never before 2009 has Congress passed a blanket prohibition against federal judges hiring noncitizen law clerks.²⁰⁸ Any attempt by Congress to upset that two-centuries-long absence of regulation of the judiciary should—if longstanding government practices are as important as proponents of inherent executive power argue—provoke a response similar to how the Court responded to a statute requiring federal courts to reopen certain final judgments: “Apart from the statute we review today, we know of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation. That prolonged reticence would be amazing if such interference were not

206. *Id.* at 515 (Burger, C.J., dissenting). Chief Justice Burger and, in his separate dissent, Justice Rehnquist, rely not just on the practices but on the pronouncement of multiple presidents. *Id.* at 517–18 (Burger, C.J., dissenting) (“[S]ince the President . . . is the recipient of many confidences from others, and since the inviolability of such confidence is essential to the functioning of the constitutional office of the Presidency, it will be necessary to withhold from public scrutiny certain papers and classes of papers for varying periods of time. Therefore . . . I hereby reserve the right to restrict the use and availability of any materials . . . for such time as I in my sole discretion, may specify . . .” (quoting President Lyndon Johnson)); *id.* at 522 (“It must be obvious to you that if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, *it must be equally applicable to a President after his term of office has expired* when he is sought to be examined with respect to any acts occurring while he [was] President.” (quoting President Harry Truman) (emphasis added)); *id.* at 552 (Rehnquist, J., dissenting); *id.* at 552–53 (“And if any commander is going to get the free, unprejudiced opinions of his subordinates, he had better protect what they have to say to him on a confidential basis But when it comes to the conversations that take place between any responsible official and his advisers or exchange of little, mere slips of this or that, expressing personal opinions on the most confidential basis, those are not subject to investigation by anybody; *and if they are, will wreck the Government.*” (quoting President Dwight Eisenhower) (emphasis added)).

207. See Kathryn A. Watts, *Judges and Their Papers*, 88 N.Y.U. L. REV. 1665 (2013).

208. See *infra* Part III.A.1.

understood to be constitutionally proscribed.”²⁰⁹

209. *Plaut v. Spendthrift Farm*, 514 U.S. 211, 230 (1995). Moreover, although federal courts have never had the opportunity to establish a historical record of defying congressional attempts to regulate judges’ office management in the manner presidents have defied congressional attempts to regulate presidents’ office management, there is a history of federal courts striking down other “obstructions to the discharge of their work.” Felix Frankfurter & James M. Landis, *Power of Congress Over Procedure in Criminal Contempts in ‘Inferior’ Federal Courts – A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1023 (1924). And although “[c]ases employing longstanding government practices to resolve separation of powers disputes between the legislative and judicial branches are less common” than executive power cases, there are “enough examples . . . to confirm the role of governmental practice in informing our constitutional understanding of the judiciary’s power to act under Article III, either without congressional authorization or in ways seemingly inconsistent with congressional mandates.” Virelli, *supra* note 6, at 1199. For example, in *Chambers v. NASCO, Inc.*, based in part on tradition, the Court upheld “the inherent power of a federal court to sanction a litigant for bad-faith conduct.” 501 U.S. 32, 35 (1991); *see also* Virelli, *supra* note 6, at 1199 (discussing *Chambers*). In *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962), despite a congressionally enacted rule of procedure that could be interpreted to require a motion in order to dismiss a case, the Court held, “The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an ‘inherent power,’ governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”. *See also* Virelli, *supra* note 6, 1199–200 (discussing *Link* and quoting the above quotation).

The Inherent Powers Doctrine predates the founding of the United States and gives courts wide latitude in how they perform the judicial function. The basic premise, described in *ITT Community Development Corp. v. Barton*, is that “a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) to process the litigation to a just and equitable conclusion.” 569 F.2d 1351, 1359 (5th Cir. 1978). These “tools” can include many things. For example, one such tool is the “authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties . . .” *Ex Parte Peterson*, 253 U.S. 300, 312 (1920). Another is the authority to impose sanctions. *See Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323 (2d Cir. 1999). Courts also use their inherent power to consolidate cases, set dates or time limits, and manage evidence, witnesses, and discovery. *See* Joseph J. Anclien, *Broader is Better: The Inherent Power of Federal Courts*, 64 N.Y.U. SURV. OF AM. L., 37, 44–47 (2008).

The Inherent Powers Doctrine is certainly similar to the analogy presented in this article. As the Fifth Circuit pointed out in *Barton*, however, the Inherent Powers Doctrine is subject to limitation by Congress. 569 F.2d at 1359. A more robust version of the Inherent Powers Doctrine, which limits the ability of Congress to restrict the discretion of judges in carrying out the judicial function, would lead to the same conclusion supported by this article that, if the proponents of the Unitary Executive Theory are correct, then a similar inherent judicial power exists as well.

A word on the principle articulated in *Plaut*. Because many unitary-executive theorists rely on historical practice—including the scarcity throughout history of statutes abridging the executive powers in question—I have made such scarcity part of my argument that unitary-executive theorist should embrace a similar theory with regard to judicial office management. Although I see reasons for such reliance, I take no position on the reliance’s overall merit. A thorough and eloquent argument against skepticism of a statute’s novelty was recently made by Professor Leah Litman in *Debunking Anti-Novelty*, 66 DUKE L.J. (forthcoming 2017) (manuscript at 1) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2843763). She rejects the primary justification for the anti-novelty rhetoric, “which is that legislative novelty suggests the previous Congresses assumed similar legislation to be unconstitutional.” *Id.* at 15–16. And she instead explains congressional inaction and legislative novelty may be due to the institutional forces that make enacting federal laws difficult: “the Constitution’s requirements for Congress to make law; congressional procedures; and the nature of the legislative function.” *Id.* at 17. Furthermore, congressional inaction and legislative novelty may be due to judicial interpretations of the Constitution or precipitating changes. *Id.* at 22–32. Litman discusses three key reasons for why legislative novelty should not be used as evidence of a statute’s unconstitutionality. *Id.* at 37–64. First, “conventional sources of constitutional law do not

* * *

In short, there are strong similarities between the text, structure, history, and longstanding practices that inform inherent executive power and inherent judicial power. Those similarities suggest that if unitary executive theorists are correct that there is an internal grant of power to the President to control his office management, there is also an internal grant of power to each federal judge to control her office management. Likewise, if there is an external limit on Congress's authority to interfere with executive office management, there is also an external limit on Congress's authority to interfere with judicial office management. The next part of this article explores applications of this theory of an inherent judicial power over office management, addresses counterarguments, and introduces areas for further research.

III. HOW AN INHERENT JUDICIAL POWER THAT IS INFORMED BY INHERENT EXECUTIVE POWER CAN PROTECT AGAINST CURRENT THREATS TO JUDICIAL INDEPENDENCE

Federal court scholarship is full of investigations into direct attempts by Congress to regulate the judiciary, including jurisdiction stripping and *Klein*-style outcome mandates.²¹⁰ However, at times, Congress has

suggest that legislative novelty matters or should matter to a determination about whether a statute is constitutional." *Id.* at 38. Second, "[t]he contrast between the Court's anti-novelty rhetoric and the *McCulloch* principle therefore illustrates why legislative novelty should not be used as evidence that a statute is unconstitutional." *Id.* at 47. And third, "legislative novelty should not be used as means to limit Congress's powers by presumptively rendering unconstitutional all new federal statutes structuring agencies, or presumptively rendering unconstitutional all new federal statutes on the ground that they likely exceed the scope of Congress's delegated powers." *Id.* at 58. She concludes by suggesting that although legislative novelty should not be used to determine whether a statute is unconstitutional, "the fact that Congress has never passed a similar statute may provide some assurances that finding the statute unconstitutional will not result in many other statutes also being held unconstitutional" when judges are applying "an under-enforced constitutional norm." *Id.* at 66.

210. See Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 UNIV. COLO. L. REV., 581, 583 (1985). With regard to jurisdiction stripping, Professor Martin Katz argues the Court's opinion in *Boumediene v. Bush*, 553 U.S. 723 (2008), has serious implications on the ability of Congress to strip jurisdiction from federal courts. He noted that, although the Military Commissions Act of 2006 precluded even justices from hearing a habeas petition by a person deemed to be an enemy combatant, the Supreme Court heard the case anyway "as if Congress could not preclude the Court from taking the case." Martin J. Katz, *Guantanamo, Boumediene, and Jurisdiction-Stripping: the Imperial President Meets the Imperial Court*, 25 CONSTITUTIONAL COMMENTARY 377, 409 (2009). In regards to the jurisdiction of lower federal courts, Professor Katz argues that "[a]t least in certain types of cases, some entity must be available to perform fact-finding. And while it is not clear that this entity must be a lower federal court, it does need to be disinterested and independent." *Id.* at 408.

The dissenters in 2016's *Bank Markazi v. Peterson* argued that it presented a *Klein*-like question outside the bounds of Congress's power. Chief Justice Roberts, in his dissent, argued that "Congress . . . enact[ed] a statute . . . that for this case alone eliminates each of the defenses standing in

explored indirect, more subtle methods of impeding the judiciary. They do not directly attack the judicial function, but they interfere with judges' ability to exercise that function. These new flashpoints are the latest fronts in a longstanding tug-of-war between the legislative and judicial branches. The constitutionality of two examples of such affronts to judicial independence, interference with the selection of law clerks and the release of judicial communications, will be explored in this section.²¹¹

A. Congressional Regulation of Law Clerk Selection and Judicial Communications Is Likely Unconstitutional

In recent years, proposals have been made to prohibit the selection of noncitizen law clerks and to require the disclosure of retired judges' work product papers. The first of these proposals has already been enacted into law, and there are undoubtedly strong policy arguments in favor of the other two proposals—what student of judicial history (or Article III junkie) *wouldn't* want to read every retired Justice's bench memos, conference notes, and letters to colleagues? But without passing judgment on whether these proposals would be good public policies, section III.A of this article argues that the constitutionality of these proposals is doubtful. Sections III.B and III.C explore counterarguments. And Section III.D discusses fields for further research.

1. The Selection of Law Clerks

In the 1880s, federal judges began to hire law clerks.²¹² The first judge to hire a clerk, Justice Horace Grey, "believed that having a young, bright lawyer on hand to act as a sounding board and editor would enhance the quality of his legal reasoning and writing."²¹³ In the

respondents' way." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1329 (2016) (Roberts, C.J. dissenting).

211. Other candidates for unconstitutional interference might include limits on courts' citations to foreign law, proposals to prohibit unpublished opinions, and congressional control over Supreme Court staff hiring. For example, the Counselor to the Chief Justice's maximum salary and retirement program are determined not by the Court but by statute. 28 U.S.C. § 677(a) (2012). Congress also mandates restrictions on volunteers that the Counselor to the Chief Justice may accept to assist with public programs. 28 U.S.C. § 677(c). The same title and chapter of the United States Code also grants to the Supreme Court the ability to appoint other staff positions, including a clerk of the court, a marshal, a reporter, a librarian, law clerks, and secretaries. 28 U.S.C. §§ 671–677 (2012).

212. TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK 1* (2006).

213. MIRA GUR-ARIE, *LEGAL AND COURT STAFF IN THE UNITED STATES JUDICIARY: SEMINAR ON THE MANAGEMENT OF THE ASSISTANT PERSONNEL TO JUDGES* (Nov. 22–26, 2004), <http://www.fjc.gov/sites/default/files/2012/StaffEng.pdf>.

more than a century since then, the number and role of clerks have grown. Today, “[d]ifferent judges use clerks differently, some only to exchange ideas, or to check footnotes, or to research records, others, after discussion, to draft opinions.”²¹⁴

From the time Justice Grey hired his first federal law clerk, judges enjoyed tremendous discretion in their hiring practices. But in 2009, Congress changed that tradition by prohibiting the employment of law clerks who are not citizens of the United States.²¹⁵ Until that change in the law, in recent years, federal judges hired approximately “a few dozen” noncitizen law clerks each year.²¹⁶

If there is a constitutional limitation on congressional regulation of federal judges’ control over office management, the question arises whether Congress’s prohibition on noncitizen law clerks is constitutional. Although the question requires a more thorough exploration than what is possible here, there are strong reasons to believe that the answer is no—Congress’s prohibition is likely not constitutional.

Regulation of law clerk selection has a lot in common with the regulation of the selection of executive officers that unitary executive theorists believe Congress cannot engage in. To begin with, there is even less history of congressional regulation of law clerk selection and removal than there is a history of congressional regulation of the President’s office management.²¹⁷ The Court’s analysis of a similarly

214. Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 154 (1990).

215. 5 U.S.C. § 3101 (2012); *see also* Employment of Noncitizens, Memorandum from James C. Duff, Director, Admin. Office of the U.S. Courts 1–2 (Aug. 23, 2010) (“We recently discovered a provision in the massive omnibus appropriations bill, passed by Congress in December, that significantly changed the long-standing rules on the employment of noncitizens by the U.S. Government, including the Judiciary Under prior law, agencies and the Judiciary were generally prohibited from hiring noncitizens, but exceptions permitted the hiring of citizens of several designated countries, as well as citizens of countries ‘allied with the United States in a current defense effort.’ Those exceptions have been removed from the law.”); *id.* at 2 (“[T]his new law likely will have its greatest immediate impact on judicial law clerks”); Beth Wickmire & Christine Fritton, *Requirements for International Students to Clerk in State and Federal Courts*, NALP BULLETIN, May 2010 (“Congress has prohibited the use of appropriated funds to pay federal employees whose post of duty is in the continental United States unless they are U.S. citizens or meet one of a very few limited exceptions.”).

216. This estimate—“a few dozen each year”—is a very rough estimate; it comes from a post by David Lat, an expert who frequently comments on federal clerkship hiring. David Lat, *Clerkship Application Season: Clarifications About Non-Citizen Clerks*, ABOVE THE LAW (Sept. 14, 2010), <http://abovethelaw.com/2010/09/clerkship-application-season-clarifications-about-non-citizen-clerks/>; *see also* Tony Mauro, *Can Federal Courts Pay Non-Citizen Law Clerks?*, BLOG OF LEGAL TIMES (Sept. 3, 2010), <http://legaltimes.typepad.com/blt/2010/09/can-federal-courts-pay-non-citizen-law-clerks.html> (“The federal courts are grappling with the consequences of a little-noticed new law that bars payment of federal salaries to non-U.S. citizens. The law could affect more than two dozen currently hired judicial law clerks who hail from nations including Canada and Australia.”).

217. *See supra* Part II.D.

unprecedented regulation of the judiciary would appear to apply with similar force here: “Apart from the statute we review today, we know of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation. That prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed.”²¹⁸

Perhaps more important is the similarity between a law clerk’s relationship with her judge and an executive officer’s relationship with the President. Judge Patricia Wald has described the judge–clerk relationship as “the most intense and mutually dependent one I know of outside of marriage, parenthood, or a love affair.”²¹⁹ A federal judge “is totally dependent on herself, her law clerks, and her staff [of one or two secretaries], for an output of forty or more published opinions in a year and dozens of unpublished, nonprecedent-setting opinions.”²²⁰ That is not to say that clerks do judges’ jobs for them; they don’t. “But an excellent versus a mediocre team of clerks makes a huge difference in the judge’s daily life and in her work product.”²²¹ It is little wonder that Judge Alex Kozinski said, “Getting a good fit, both among the incoming clerks and between the clerks on the one hand and the judge and secretaries on the other, is absolutely indispensable.”²²²

In terms of how closely they work with their bosses, clerks probably resemble presidential elbow aides more than they resemble any other members of the executive branch. Elbow aides “are literally at a President’s elbow, with offices a few feet or at most a few hundred feet from his own desk. The President . . . may see those personal aides many times in one day. They are indeed the President’s ‘arms’ and ‘fingers’ to aid in performing his constitutional duty to see ‘that the laws [are] faithfully executed.’”²²³ Examples of presidential elbow aides include the Chief of Staff, the National Security Advisor, and the White House Counsel.

Among presidential elbow aides, the closest executive analogue to a law clerk might be the White House Counsel—an attorney whose selection and removal Congress likely could not constitutionally regulate. In fact, one Supreme Court Justice has said that he views a law clerk as his lawyer. In part because she has no opportunity to “talk . . . in depth about a case” with anyone other than her clerks, Judge Wald writes, “Most of us are not Holmes or Cardozo; we are often unsure of

218. *Plaut v. Spendthrift Farm*, 514 U.S. 211, 230 (1995).

219. Wald, *supra* note 214, at 153.

220. *Id.*

221. *Id.*

222. Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1709 (1991).

223. *Harlow v. Fitzgerald*, 457 U.S. 800, 824–25 (1982) (Burger, C.J., dissenting).

our analyses or even our conclusions. We need to test ideas before exposing them to the hard probing of colleagues. We need assurances, but even more important, criticism from knowledgeable persons who are loyal and unambiguously committed to us.”²²⁴ She adds, “We have, on occasion, to let our guard down, to speculate, to experiment, to argue, even to make frank and sometimes uncharitable appraisals of our colleagues’ drafts and suggestions.”²²⁵

The hiring of law clerks in Japan presents an example of how this affront to the judicial function might work in practice. In Japan, controlling the hiring of clerks is an effective way for the political body to influence the court. Unlike clerks in the United States, Japanese Supreme Court clerks are not selected by the judges they serve, but by an administrative body known as the General Secretariat.²²⁶ And unlike clerks here, who work for a specific justice, Japanese clerks work in groups according to their area of expertise.²²⁷ Moreover, Japanese clerks are frequently selected in part “for their conservatism, in the form of strict adherence to judicial orthodoxy and precedent—if not also ideology.”²²⁸ The Japanese Supreme Court’s docket, unlike that of the United States Supreme Court, is mandatory.²²⁹ This, in combination with the group assignment format, means that each justice must rely heavily on the clerks as a collective body, and allows the General Secretariat, which selected the clerks, to have considerable influence over the justices’ opinions. If Congress were to create a body similar to the General Secretariat, it could exert considerable influence over the justices.

Judge Wald’s emphasis on the need to speculate and experiment without being chilled by outside criticism of misguided hypotheses leads to another area where the proposed regulation of judicial office management is constitutionally dubious—the required disclosure of retired judges’ work product papers.

2. The Papers of Retired Judges

In recent years, there has been an increasing number of prominent calls for Congress to require retired judges to disclose their work papers, which typically include “draft opinions, exchanges of memos among the Justices approving of or requesting changes in opinions, memos from

224. Wald, *supra* note 214, at 153.

225. *Id.*

226. David S. Law, *How To Rig the Federal Courts*, 99 GEO. L. J. 779, 800 (2011).

227. *Id.* at 801.

228. *Id.* at 800.

229. *Id.* at 802.

law clerks, handwritten notes, and notes taken of the discussions at the Court's closed-door conferences where cases are discussed and decided."²³⁰ Among the most thorough and thoughtful of those calls for disclosure is Professor Kathryn Watts's excellent and provocative *Judges and Their Papers*.²³¹ While acknowledging that "the judiciary's independence, collegiality, confidentiality, and integrity have been called into question by the release of other judges' papers," Professor Watts notes significant other policy reasons for making them accessible to researchers and the public.²³² She concludes that Congress should "declar[e] judicial papers to be public property that shall be made reasonably accessible to the public."²³³ Others in recent years, including a prominent federal judge, a leading law professor in the field of federal courts, journalists, and editorial boards, have made similar proposals.²³⁴

As was the case regarding the constitutionality of Congress's prohibition on noncitizen clerks, the constitutionality of the proposed congressional requirement that retired judges disclose their papers requires a more thorough exploration than what is possible here. But, once again, there are strong reasons to believe that if there is a constitutional limitation on congressional regulation of federal judges' control over office management, then Congress cannot require retired judges to disclose their papers.

Most, if not all, of the arguments that opponents of Congress's

230. Stephen Wermiel, *Using the Papers of U.S. Supreme Court Justices: A Reflection*, 57 N.Y.L. SCH. L. REV. 499, 500 n.1 (2012–13).

231. Watts, *supra* note 207.

232. *Id.* at 1672.

233. *Id.*

234. RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY 20–21 (2016) ("The idea that judges own their work product (other than their published judicial output) strikes me as absurd."); Tony Mauro, *Justices Need To Show Us Their Papers*, USA TODAY (May 4, 2016), <https://www.usatoday.com/story/opinion/2016/05/04/supreme-court-justices-papers-transparency-column/83881862/> ("In an era when the public demands maximum transparency and accountability, the time has arrived for Congress to keep justices from shielding—or torching—documents the public deserves to see."); Eric Segall, *Invisible Justices Part IV: The Justices' Papers*, DORF ON LAW (Feb. 10, 2016), <http://www.dorfonlaw.org/2016/02/invisible-justices-part-iv-justices.html> ("One way historians, Court commentators, law professors and their students, as well as the public at large, can better understand the highest Court in the land is with reasonable access, after retirement, to the Justices' records. If the Justices themselves do not promulgate such rules, Congress should do so, just as it did for the President and Vice-President of the United States."); Jill Lepore, *The Great Paper Caper: Someone Swiped Justice Frankfurter's Papers. What Else Has Gone Missing?*, NEW YORKER (Dec. 1, 2014), <http://www.newyorker.com/magazine/2014/12/01/great-paper-caper> ("History is patient. But perhaps the time has come to ask, How long is too long to wait?"); Watts, *supra* note 207, at 1665 ("[J]udges' working papers should be treated as governmental property—just as presidential papers are."); Editorial, *Safeguarding History*, WASHINGTON POST (Sept. 6, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/05/AR2009090502349.html> ("[T]he country needs a sensible and formal policy on how justices preserve and disseminate material they produce while performing their public duties [I]f the judiciary cannot or will not act, Congress should.").

requirement that former presidents disclose their papers would apply with equal, if not greater, force in the context of retired federal judges' papers. Just as there was no history of requiring former presidents to disclose their papers, even proponents of disclosure of judges' papers acknowledge there is a "longstanding tradition" of not requiring any disclosure from retired federal judges.²³⁵ And just as the President's ability to adequately do his job would arguably be impaired by chilled advice affected by the threat of future disclosure, the same would be true of ability of judges and their clerks "to speculate, to experiment, to argue."²³⁶ As the Court said when it first confirmed the constitutionally protected nature of executive privilege, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."²³⁷

This is not mere speculation. We know from Chief Justice Rehnquist's confirmation hearings that what a clerk writes in a bench memo might later be used against him. Opposition to Rehnquist's nomination to be an Associate Justice in 1971 was fueled by controversy about a controversial bench memo he wrote while clerking for Justice Robert Jackson, in which he expressed views that were not consistent with the Constitution's promise of equal protection under the law.²³⁸ Any clerk familiar with Rehnquist's story might be inclined to pull her punches if she knew the words she wrote could be used against her two decades later. It is no wonder that after Justice Thurgood Marshall willed his papers to the Library of Congress, Chief Justice Rehnquist protested the Library of Congress's immediate and arguably unauthorized release of those papers by writing, "I speak for a majority of the active Justices of the Court when I say that we are both surprised and disappointed by the Library's decision to give unrestricted public access to Justice Thurgood Marshall's papers."²³⁹

In fact, not only would the same foundations of executive privilege apply to retired judges' privilege to keep their communications with clerks and colleagues confidential, but some version of the attorney-client privilege would likely strengthen the protection, since judges properly view clerks as their lawyers. In short, for any proponents of an

235. Watts, *supra* note 207, at 1674–85 ("The Longstanding Tradition of Treating Judicial Papers as a Species of Private Property").

236. Wald, *supra* note 214, at 153.

237. *United States v. Nixon*, 418 U.S. 683, 705 (1974).

238. Lepore, *supra* note 234. The controversy was reignited when President Reagan nominated him to be Chief Justice in 1986. Rehnquist's memo attracted so much attention and generated so much opposition to his nomination that it likely drew fire away from that year's other nominee to the Supreme Court—Antonin Scalia.

239. *Id.*

inherent executive power that includes a robust executive privilege that protects former presidents' papers from required disclosure, it would be very difficult to distinguish retired judges' papers in a way that would allow disclosure.

B. The Tribunals and Exceptions Clauses Do Not Allow Congress to Intrude on Clerk Selection and Judicial Communications

One counterargument to this article's thesis—that if there are limits on congressional regulation of the President's power over office management, there are similar limits on such regulation of federal judges—begins with express powers of Congress: the Tribunals Clause, which gives Congress the power to create (or not to create) inferior federal courts;²⁴⁰ and the Exceptions Clause, which gives Congress the power to make exceptions to the Supreme Court's appellate jurisdiction.²⁴¹ Skeptics of this article's thesis might argue that Congress's greater power to strip federal courts of jurisdiction implies a lesser power to regulate federal judges' control over office management. “As one federal district judge put it, ‘to paraphrase the scripture, the Congress giveth, and the Congress taketh away.’”²⁴² There are, however, at least three reasons to reject this counterargument.

First, the Supreme Court has repeatedly and consistently rejected the argument that Congress's “greater” power to withdraw jurisdiction encompasses the “lesser” power to regulate any jurisdiction that is conferred.²⁴³ In their groundbreaking article, “*Some Effectual Power*”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, Professors Jim Liebman and William Ryan note that “in *Hayburn's Case*, *Gordon*, and *Plaut*” the Court “barr[ed] Congress from granting jurisdiction while conditioning the court's power to effectuate its judgments on some approving, or on the absence of some disapproving, executive or legislative action”; “in *Ableman*, *Martin*, and *Cohens*,” the Court “by implication, at least, forbid[] Congress to grant federal jurisdiction but subject Article III court decisions to state court review”; “in *Marbury*, *Klein*, and *Yakus*,” the Court “forb[ade] Congress

240. U.S. CONST. art. I, § 8 (“Congress shall have the power . . . To constitute Tribunals inferior to the supreme Court”); *see also* U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

241. U.S. CONST. art. III, § 2 (“In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

242. Engdahl, *supra* note 17, at 105 (quoting Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 55 (D.D.C. 1973)).

243. Liebman & Ryan, *supra* note 3, at 885.

to grant jurisdiction but tell the court to ignore the bearing of the Constitution or give the Constitution Congress's interpretation or surrender jurisdiction whenever the court's interpretation of the Constitution differs from Congress's"; "in *Martin, Crowell*, and the Mixed Question Cases," the Court "forb[ade] Congress to grant jurisdiction but limit the court's power to reverse the constitutional-normative judgments a state court or federal administrator made in applying supreme law to the facts"; "and in *Boerne* and *Reynoldsville*," the Court "forb[ade] Congress after granting the Supreme Court jurisdiction, and forb[ade] state courts, to deprive the Court's judgments of stare decisis effect."²⁴⁴

Second, as Professors Liebman and Ryan state, "[t]here is a good reason why the Court has given this answer: The precise goal of the Framers' hard-fought compromises culminating in Article III and the Supremacy Clause was to cede to Congress the 'greater' power while forbidding it to exercise the 'lesser.'"²⁴⁵ Through a lengthy and difficult series of debates and compromises at the Constitutional Convention between nationalists (like Madison and other future federalists) who wanted federal courts to act as a check on unjust state laws and opponents (like future antifederalists) who feared federal power, the nationalists conceded a federal judiciary of "no (or very little)" mandatory jurisdiction²⁴⁶ in exchange for their opponents' concession of a federal judiciary with an unmodifiable independence.²⁴⁷ In other words, not only are "jurisdiction" and "the judicial power" different; framers like Madison traded the former for the latter. Thus, as Professor Louis Virelli has stated, "jurisdiction is a prerequisite for a court's ability to decide issues of law and fact, but does not explain how those issues should be decided, or even whether the judicial branch shares some of its authority to render decisions with the political branches."²⁴⁸

Third, unitary executive theorists reject the similar argument that because Congress can create executive offices it can regulate the President's supervision of those offices. In one of the earliest articles among the modern literature defending the unitary executive theory, Professor Geoffrey Miller argues that Congress's "creation" of independent agencies does not give Congress control over them or make them Part of the legislative branch, which he calls a "fallacy . . . too

244. *Id.* at 886.

245. *Id.*

246. *Id.* at 754.

247. *See id.* at 752, 758.

248. Virelli, *supra* note 6, at 1209; *see also id.* at 1222–23 (the term "jurisdiction" was "understood by the Framers to be distinct from 'judicial power'"); Engdahl, *supra* note 17, at 104–32; Currie, *supra* note 1, at 38 ("unfortunate notion that the greater power included the lesser").

grotesque to bear elaboration.”²⁴⁹ Similarly, Professor Calabresi has argued against opponents of the unitary executive theory who “imply that because Congress has the power to create and structure every post in the executive department but two, it must therefore also have the power to give ‘top executive branch officers protection from dismissal for policy differences with the President.’”²⁵⁰ He argues that “the apparently lesser power is not actually a lesser one since its exercise involves changing the constitutional balance of power whereas congressional creation of new offices does not.”²⁵¹

In short, there are strong arguments that Congress’s greater power to create inferior courts and limit federal jurisdiction does not give Congress carte blanche to regulate federal courts. The argument against such a “lesser” power is consistent with Supreme Court case law, the drafting of Article III, and the unitary executive theory.

C. The Necessary and Proper Clause Does Not Allow Congress to Intrude on Clerk Selection and Judicial Communications

A second counterargument to this article’s thesis might claim that Congress can regulate any discretion federal judges have over office management because Congress has the power under the Necessary and Proper Clause “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”²⁵² And to be sure, since Chief Justice Marshall’s opinion in *McCulloch v. Maryland*,²⁵³ the Necessary and Proper Clause has often been interpreted broadly.²⁵⁴ But the Necessary and Proper Clause is not without limits, and as numerous scholars have demonstrated, those limits do not allow Congress to “hamstring the judiciary in performing its constitutional functions.”²⁵⁵

As Professor Robert Pushaw has written, that understanding was held by the founders, who “underst[ood] that ‘legislative power,’ although plenary as to substantive laws regulating the conduct of citizens generally, had limits as applied to government itself. Specifically, legislation concerning courts could not destroy or seriously undermine

249. Miller, *supra* note 1, at 64.

250. Calabresi, *Vesting Clauses*, *supra* note 47, at 1400 (quoting A. Michael Froomkin, *The Imperial Presidency’s New Vestments*, 88 NW. U. L. REV. 1346 (1994)).

251. *Id.*

252. U.S. CONST. art. I, § 8.

253. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

254. *See, e.g., United States v. Comstock*, 560 U.S. 126 (2010).

255. Pushaw, *supra* note 10, at 833.

their independence and functioning.”²⁵⁶ Pushaw argues that understanding of the limits of legislative power over courts was “likely incorporated into the Constitution” because “England recognized this sphere of independent judicial authority” and because “one of the Founders’ overriding purposes”—as described in greater detail above—was “curtailing the legislative dominance over judges (and the executive) that characterized American governments in the 1780s.”²⁵⁷ He therefore concludes that “the Necessary and Proper Clause can most sensibly be interpreted as authorizing Congress only to effectuate . . . indispensable inherent powers—not to eliminate or materially impair their exercise and thereby effectively destroy the executive and judiciary.”²⁵⁸ If control over office management is indispensable to the President—as proponents of the unitary executive theory and a robust executive power argue—then there is reason to believe it is indispensable to federal judges; and if it is indispensable, then the Necessary and Proper Clause does not allow Congress to take it away.

Professor David Engdahl has proposed an even narrower reading of the Necessary and Proper Clause with regard to regulations of the judiciary. He argues that the Clause is “a one-way ratchet: it only authorizes ‘Laws . . . for carrying into Execution’ the ‘Powers vested by this Constitution . . . in any Department or Officer,’ not for diminishing those powers or interfering with their independent exercise by the respective branches.”²⁵⁹ Because “[t]he words ‘for carrying into Execution’ are wholly unsuited to authorize laws which diminish, curtail, or interfere,” the Clause “only empowers Congress to help effectuate the discretion confided to that other branch.”²⁶⁰ As Professor Virelli has said, “Congress’s power under the Necessary and Proper Clause must end where the ‘inherent’ judicial power bestowed upon the Court by Article III begins,” because otherwise the Clause would “render[] Congress supreme among the three Branches of government”—a notion that is “anathema to our constitutional system.”²⁶¹

Unitary executive theorists rely on a similar reading of the Necessary and Proper Clause. Although they “concede that Congress has broad power under the Necessary and Proper Clause to structure the executive department, just as Congress has broad power under that clause to structure the inferior federal courts,” they argue that “Congress cannot

256. *Id.* at 830.

257. *Id.* at 830–31.

258. *Id.* at 833.

259. Engdahl, *supra* note 17, at 161.

260. *Id.* at 102–03.

261. Virelli, *Supreme Court Recusal*, *supra* note 16, at 1571–72.

structure the executive department in ways that would deprive the President of his constitutional power to control that department.”²⁶² Citing the work of Professors Gary Lawson and Patricia Granger regarding the “almost jurisdictional sense” in which the framers used the word “proper,” Professors Calabresi and Rhodes write that “Congress can no more use the Necessary and Proper Clause to override the constitutional trinity of powers and the vesting of all executive power with the President than it could use the Clause to override the First Amendment to ‘carry[] into execution’ the Alien and Sedition Acts.”²⁶³

In short, like Professor Engdahl and likeminded federal courts scholars, unitary executive theorists argue that even if the Necessary and Proper Clause should be read expansively, it should not be read to “allow Congress to tell constitutionally empowered actors how they can implement their exclusive powers.”²⁶⁴ Rather, it only “permit[s] Congress to *help* itself, the President, and the federal judiciary *exercise their own respective powers*.”²⁶⁵

D. Areas for Further Inquiry: Selection Versus Removal and Congress’s Spending Power

Although there are reasons to believe federal judges’ inherent authority over office management precludes the congressional regulation discussed above in Part III.A—if federal judges enjoy the inherent authority over office management that proponents of inherent executive authority believe, as discussed in Part II—there are at least two fields that I believe would benefit from further research.

First, more research is needed on the unitary executive theory’s implications for the President’s power to select subordinates, which is part of the analogy to federal judges’ power to select subordinates. Some unitary executive theorists have (correctly, I believe) viewed selection and removal as two sides of the same coin. For example, in *Myers*, Chief Justice Taft wrote that “as part of his executive power [the President] should select those who were to act for him,” and “as his selection of administrative officers is essential to the execution of the laws by him, so much be his power of removing those for whom he can not continue to be responsible.”²⁶⁶ Under Taft’s view, and that of my preliminary hypothesis, the President’s need to be able select his team is as important as the need to be able to remove people from his team.

262. Calabresi & Rhodes, *supra* note 28, at 1168.

263. Calabresi & Prakash, *supra* note 37, at 587–88.

264. *Id.* at 591.

265. *Id.* at 591–92.

266. *Myers v. United States*, 272 U.S. 52, 117 (1926).

Because any power to remove would be a hollow power if the President could not adequately replace the removed officer, the President cannot carry out his constitutional duties without either.

Other unitary executive scholars have focused more on the power to remove than the power to select.²⁶⁷ This may be for three reasons. First, most of Congress's arguably unconstitutional regulations in this field concern removal restrictions, so they may have received more attention for simply that reason.²⁶⁸ Second, in general employment law, more freedom is often given to employers at a hiring stage than at a firing stage; thus, in the context of executive hiring and firing, some theorists may view the executive's freedom from hiring restrictions as a "lesser included" freedom of the freedom from firing limitations. Third, Congress does have the express constitutional authority to advise and consent on the appointment of "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."²⁶⁹ And "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."²⁷⁰ Nevertheless, neither clause gives Congress authority to categorically exclude whole groups of people from presidential appointment, especially if the appointment is for a presidential "elbow aide" with a relationship as close to the President as a law clerk has to a federal judge.

Consider, for example, the constitutionality of a hypothetical law saying that a Democratic President cannot select anyone other than a Republican to be the White House Chief of Staff. Or the White House Counsel. Or the National Security Advisor. Or consider a hypothetical law saying that anyone who did not run for President *against* the current President is ineligible to serve in those three positions. There is no history of any of these elbow aides requiring the advice and consent of the Senate. They have little in common in terms of influence and proximity to the President with "inferior officers" like career civil servants whose selection is traditionally regulated.²⁷¹ And it is hard to

267. See, e.g., Calabresi & Rhodes, *supra* note 28, at 1166.

268. See, e.g., *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); *but see Morrison v. Olson*, 487 U.S. 654 (1988) (discussing appointment and removal rules for independent counsel); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667 (D.C. Cir. 2008) (holding unconstitutional the appointment of officials protected from removal by officials protected from removal).

269. U.S. CONST. art. II, § 2.

270. *Id.*

271. Cf. CALABRESI & YOO, *supra* note 1, at 7 ("We fully support such merit-based hiring criteria and note that presidents have little incentive to fire carryover civil servants if presidents are unable to fill those jobs with dedicated loyalists from their own presidential campaigns.").

imagine a President being able to carry out his constitutional duties if his most senior staff is comprised of political opponents interested in frustrating his political will. As Professors Calabresi and Prakash write in the context of removal, “[i]t would make little sense to force the President to deal with officers who fundamentally disagree with his administrative or political philosophy.”²⁷²

Even assuming Congress has the power to make the selection of presidential elbow aides subject to the Senate’s advice and consent, the *expressio unius* canon of construction suggests that requiring Senate confirmation is the *only* means by which Congress can regulate their selection.²⁷³ It cannot pass a blanket rule prohibiting the selection of certain groups of people to serve in the White House. This rule serves a functional, as well as textual, purpose: It requires the Senate to go on record, with regard to a particular nominee, if it is going to oppose the person the President selected, and if opposing that particular nominee has political costs to his opponents, his opponents cannot avoid that cost by avoiding a vote on the nominee.

Thus, to sum up, although I believe more research is needed to better explore whether the unobstructed selection of presidential elbow aides is as constitutionally protected as their unobstructed removal, my preliminary hypothesis is that Chief Justice Taft was correct when he wrote of selection and removal as two sides of the same unitary-executive coin.

Second, I hope to conduct more research regarding Congress’s spending power. As Professor Virelli has written, “there is no question that the ultimate authority to provide funding for the coordinate Branches lies squarely and solely with Congress.”²⁷⁴ Does that mean that Congress can interfere with an inherent executive or judicial power over office management so long as Congress frames the interference as an exercise of its spending power?

I do not believe it can. In the individual-rights context, although Congress’s spending power is broad, its outer limits are governed by the unconstitutional-conditions doctrine. Congress can, for example, choose whether or not to fund student activity groups’ publications to encourage diverse views, but it cannot condition that funding on a student group

272. Calabresi & Prakash, *supra* note 37, at 598; *see also* Currie, *supra* note 1, at 32 (“The persons . . . to whose immediate management [the administration of government is] committed . . . ought to be considered as the assistants or deputies of the chief magistrate; and, on this account, they ought to derive their offices from his appointment, or at least from his nomination, and ought to be subject to his superintendence.”) (quoting Alexander Hamilton).

273. *Cf.* Calabresi & Rhodes, *supra* note 28, at 1182 (“Congress’s appointment vesting power curtails only the President’s power to appoint inferior officers and, by implication, to control their removal. It does not interfere with the President’s power to appoint principal officers . . .”).

274. Virelli, *supra* note 16, at 1595.

refraining from publishing a religious magazine.²⁷⁵ Similarly, in the federalism context, Congress has broad discretion to decide whether to fund state programs, but it cannot use its spending power to coerce states into allowing the federal government to commandeer state agencies.²⁷⁶ And in the separation-of-powers context, it is unlikely Congress can use its spending power to avoid the Constitution's textual and structural protections of other branches' independence.

To begin with, those who would argue that Congress's spending power allows it to interfere with the constitutionally protected prerogatives of another branch of government make a mistake similar to those who argue that Congress's "greater" power to create an executive agency or create an inferior federal court necessarily includes the "lesser" power to interfere with a President's control over office management or an inferior federal judge's control over office management.

Moreover, if Congress's spending power can be used to interfere with the inherent powers of other branches, it could just as easily be used to interfere with the express powers of other branches in ways that few would defend. Assume, for example, that the President's express Commander-in-Chief power means he has the authority to order a certain military unit to seize a certain hill during a conflict that Congress has authorized and funded. Assume also it would be unconstitutional for Congress to pass a law over his veto prohibiting him from ordering the military to seize that hill. The analysis should not change if Congress framed the restriction as an exercise of its spending power by continuing to fund the military conflict but refusing to fund any military action to seize that one particular hill.

The same analysis would apply to other express presidential powers, like the pardon power. Assume it would be unconstitutional for Congress to pass a law saying the President cannot pardon certain federal offenders. It seems unlikely that Congress's spending power, broad though it may be, would allow it to strip funding for anyone in the Justice Department who advises the President to pardon those same federal offenders.²⁷⁷

If Congress cannot use its spending power to upset the balance of power between Congress and the President, it ought not be able to use it to upset the balance of power between Congress and federal judges.²⁷⁸

275. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995).

276. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

277. *Cf. Engdahl*, *supra* note 17, at 102 (Congress can "creat[e] offices to conduct investigations or screen clemency requests"; but can't make law "*inhibiting* the President's discretion" over pardons).

278. Relatedly, for a thoughtful commentary on how comments by Senator John McCain raise concerns that Congress might use another express power—the power to hold hearings and investigate—

Thus, although Congress has framed its prohibition of noncitizen clerk selection as an exercise of its spending power, if Congress cannot outright prohibit federal judges from selecting noncitizen clerks, it likely cannot provide funding for citizen clerks while denying funding for noncitizen clerks.

IV. CONCLUSION

Theories of the unitary executive and robust executive privilege have many proponents and many opponents. There are compelling arguments on both sides of those longstanding debates. But if their proponents are correct that constitutional text, constitutional structure, founding era history, and more than two centuries of historical practice support an inherent executive power over selecting subordinates and protecting privileged communications, then similar text, structure, history, and practice provide strong evidence of an inherent judicial power over selecting subordinates and protecting privileged communications.

Such inherent judicial power would function as an internal grant of power to federal judges and as an external limit on the power of Congress to intrude into judges' office management. It would help ensure that the judiciary remains the co-equal branch of government that the framers imagined and the Constitution's tripartite structure requires. It would likely preclude recently proposed congressional interference with the selection of judges' law clerks, the disclosure of retired judges' work product papers, and the televising of oral arguments. And it would protect the judiciary from threats to its independence.

The Roman poet Juvenal once posed a question that has been asked for millennia since: *Quis custodiet ipsos custodes*—Who will guard the guardians? But the more precise question, when it comes to guarding the judges who are among the guardians of our constitutional rights, is *what* will guard the guardians—*what* protects the judiciary? Since our founding, the answer to that question has been the principle of separated powers—the principle that just as there are some things no Congress and no President can do to the people, there are also some things no Congress and no President can do to another branch of the government.

in ways that arguably interfere from constitutionally protected independence of courts martial, see Andy Wright & Megan Graham, *McCain's Hearing Threat and the Bergdahl Court-Martial*, JUST SECURITY (Nov. 6, 2015), <https://www.justsecurity.org/27437/mccains-hearing-threat-bergdahl-court-martial/> (“[I]t may raise nontraditional separation of powers concerns to use congressional oversight to shape the outcome in a pending trial — regardless of whether that adjudication is housed in the executive or judicial branch. To be sure, Congress can affect pending matters by altering substantive law or passing jurisdiction-stripping legislation. But vindictive, threatening oversight designed to influence a trial would be, at best, political overreaching with possibly significant consequences. At worst, it could be constitutionally improper.”).

For more than two centuries, that principle has endured, and with it, the advantages to a republic of an independent judiciary. In recent years, that independence is being tested. But it will remain protected—the guardians will remain guarded—so long as we sustain our respect for the separation of powers and our inquiries into its nature, qualities, and constitutional contours.