

## SOME OPINIONS ON THE OPINION CLAUSE

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*The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.*

U. S. Constitution Article II, Section 2

**T**HIS Essay explores one of the least discussed but most intriguing clauses of the United States Constitution. When closely parsed, the words of the Article II Opinion Clause yield rich insights into the scope, limits, and nature of the American Presidency, with implications both timely and timeless.

In a nutshell, the Opinion Clause was designed to clarify the role of a new and distinctly American idea of a *President*, who would be measurably less than an English-style King, but measurably more than an English-style Prime Minister. Unlike a King, the American President could not compel judicial and legislative leaders to serve as his Privy Council; and unlike a Prime Minister, a President would not merely stand as first among equals in an Executive Cabinet. With the Opinion Clause, the Framers rejected a committee-style Executive Branch in favor of a unitary and accountable President, standing under law, yet over Cabinet officers.<sup>1</sup>

### I. THE CLAUSE (AND THE CONSTITUTION) AS A WHOLE

Before we closely examine individual words and phrases of the Opinion Clause, and ponder their significance, let us consider the clause as a whole. At first, it may seem downright trivial,

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<sup>1</sup> In Jed Rubenfeld's terminology, I claim that Privy Councils and committee-style Cabinets form the "paradigm case" of the "particular evils . . . felt to be intolerable"—the "core evils that demanded a constitutional transformation"—in the drafting of Article II. Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 *Yale L.J.* 1119, 1169-73 (1995). But cf. *id.* at 1173 (distinguishing between rights and powers for constitutional interpretation on Rubenfeld's "model of writing"). On my account, Article II, best read, both empowers and limits.

indeed redundant. Alexander Hamilton appears to have thought so in *The Federalist Papers*, where he devoted exactly one sentence of explicit analysis to the clause: "This I consider as a mere redundancy in the plan, as the right for which it provides would result of itself from the office."<sup>2</sup>

Some modern critics—including Michael Froomkin, Larry Lessig, and Cass Sunstein—have pounced on this logic.<sup>3</sup> According to the critics, if a given reading of the Constitution as a whole, and of Article II's other clauses, ends up rendering the Opinion Clause (or, presumably, any other clause) redundant, that redundancy is itself a very strong reason for rejecting the given reading; each clause *must* add something new.

But it is the critics, and not Hamiltonians, who err in their interpretive premises. Even a casual look at the Constitution reveals clauses that are in some sense redundant or superfluous.<sup>4</sup> In two separate *Federalist Papers*, Publius reminds his readers that the Article I, Section 8 Necessary and Proper Clause does not add any real power to the federal government above and beyond the powers explicit or implicit in the earlier Section 8 menu; rather the clause was added merely "for greater caution"<sup>5</sup> to *explicitly* affirm what otherwise would have been the best reading "by unavoidable *implication*."<sup>6</sup> Though often misread, Chief Justice Marshall's opinion in *McCulloch v. Maryland*<sup>7</sup> echoes this interpretive logic. He does not try to prove that the

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<sup>2</sup> The *Federalist* No. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961). As we shall see, in an earlier Paper, Hamilton had already expounded on the unwisdom of a committee-style Executive Council, whose rejection lay at the heart of the Opinion Clause. See *infra* Part V.

<sup>3</sup> See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1, 8 n.21, 13, 32-38, 48, 72, 119 (1994); Morton Rosenberg, *Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 *Geo. Wash. L. Rev.* 627, 689 (1989); A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 *Yale L.J.* 787, 800-801 & n.72 (1987) [hereinafter Froomkin Note]. For a similar view, see *Youngstown Co. v. Sawyer*, 343 U.S. 579, 640-41 & n.9 (1952) (Jackson, J., concurring).

<sup>4</sup> For a similar analysis, see Steven G. Calabresi & Saikrishna Bangalore Prakash, *The President's Power to Execute the Laws*, 104 *Yale L.J.* 541, 577, 585 (1994) [hereinafter Calabresi & Prakash].

<sup>5</sup> The *Federalist* No. 33, at 203 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>6</sup> *Id.* No. 44, at 285 (James Madison) (emphasis added).

<sup>7</sup> 17 U.S. (4 Wheat.) 316 (1819).

clause actually expands Congress's powers, but only that it does not shrink them.<sup>8</sup> For Marshall, even if the clause neither enlarges nor restricts—and thus is in some sense redundant—it nonetheless serves a sensible purpose, by “remov[ing] all doubts” about what would otherwise be left to implication.<sup>9</sup>

So too, a goodly portion of our Bill of Rights is redundant—and was so understood by its drafters, who explicitly described their Bill as a set of “*declaratory*” and “*restrictive*” provisions.<sup>10</sup> Even without the words of the First Amendment, most leading Federalists conceded that Congress lacked Article I enumerated power to censor opposition speech<sup>11</sup> or regulate religion in the states.<sup>12</sup> And beyond the logic of federalism, the unamended Constitution's overall logic of republican

<sup>8</sup> *Id.* at 413, 419-20. See also Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* 14 (1969) (discussing this aspect of Marshall's opinion).

<sup>9</sup> *McCulloch*, 17 U.S. at 420-21.

<sup>10</sup> 2 *Documentary History of the Constitution of the United States of America* 321 (1894) (emphasis added). See also Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *Yale L.J.* 1131, 1154 & n.109 (1991) (arguing that many Bill of Rights provisions were declaratory measures inserted to confirm preexisting constitutional understandings).

<sup>11</sup> See, e.g., 2 *The Records of the Federal Convention of 1787*, at 617-18 (Max Farrand ed., rev. ed. 1966) [hereinafter *Farrand*] (Roger Sherman at Philadelphia convention); 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 449, 468 (Jonathan Elliot ed., 2d ed. 1968) [hereinafter *Elliot's Debates*] (James Wilson at Pennsylvania ratifying convention); 3 *id.* at 203, 469 (Edmund Randolph at Virginia ratifying convention); 4 *id.* at 208-09 (Richard Dobbs Spaight at North Carolina ratifying convention); *id.* at 259-60 (Charles Pinckney at South Carolina ratifying convention); *id.* at 315 (Charles Cotesworth Pinckney at South Carolina ratifying convention); *The Federalist* No. 84, at 513-14 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *A Citizen of New Haven*, II *in* *Essays on the Constitution of the United States* 237, 239 (Paul Leicester Ford ed., New York, Burt Franklin 1892) [hereinafter *Essays*] (Roger Sherman); *The Landholder*, VI *in* *id.* at 161, 164 (Oliver Ellsworth); *Remarks on the New Plan of Government*, *in* *id.* at 395, 398 (Hugh Williamson); *Observations on George Mason's Objections to the Federal Constitution*, *in* *Pamphlets on the Constitution of the United States* 333, 360-61 (Paul Leicester Ford ed., New York, Burt Franklin 1888) (James Iredell); *An Examination Into the Leading Principles of the Federal Constitution* *in* *id.* at 25, 48 (Noah Webster).

<sup>12</sup> See, e.g., 2 *Elliot's Debates*, *supra* note 11, at 455 (James Wilson at Pennsylvania ratifying convention); 3 *id.* at 93, 204, 330, 469 (James Madison and Edmund Randolph at Virginia ratifying convention); 4 *id.* at 194-95, 208 (James Iredell and Richard Dobbs Spaight at North Carolina ratifying convention); *The Landholder*, VI *in* *Essays*, *supra* note 11, at 164; 2 *The Bill of Rights: A Documentary History* 1088 (Bernard Schwartz ed., 1971) [hereinafter *Schwartz*] (Roger Sherman at First Congress, August 15, 1789).

government and popular sovereignty sharply limited the authority of the People's agents in Congress to regulate the People's speech.<sup>13</sup> As Madison put the point in 1794: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people."<sup>14</sup> If we take seriously the letter and spirit of the Fifth Amendment Due Process Clause, many of the remaining clauses of the Fifth and Sixth Amendments are in some sense redundant. After all, these clauses—implicating grand juries, double jeopardy, confrontation, compulsory process, counsel, and so on—simply make explicit fair-trial rules implicit in the general idea of due process.<sup>15</sup> Under the Constitution's logic of popular sovereignty, We the People retain and reserve certain rights even in the absence of the specific reminders of the Ninth and Tenth Amendments. The Tenth Amendment's additional affirmations of proper principles of federalism—of powers retained by states and denied to Congress—are also redundant, as Madison himself was the first to concede in the First Congress: "Perhaps words which may define this more precisely than the whole of the instrument now does, may be considered as superfluous. I admit they may be deemed unnecessary."<sup>16</sup>

But if all this is so, what are we to make of the oft-repeated maxim against redundancy? Just this: It is one permissible maxim of commonsensical interpretation, to be applied sensitively and contextually to aid sound construction, not some rigid and technical rule that must be followed even where it defeats common sense and interpretive aesthetics.<sup>17</sup> Certain

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<sup>13</sup> See Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 101-24 (1960); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *Yale L.J.* 1193, 1266-67 (1992). See also Black, *supra* note 8, at 35-50 (focusing on the structural need to protect speech from state as well as federal censorship).

<sup>14</sup> 4 *Annals of Cong.* 934 (1794) [hereinafter *Annals*].

<sup>15</sup> See generally Akhil Reed Amar, *Sixth Amendment First Principles*, 84 *Geo. L.J.* 641 (1996).

<sup>16</sup> 2 Schwartz, *supra* note 12, at 1033 (June 8, 1789).

<sup>17</sup> For a sensible application of the anti-redundancy maxim, consider the question whether the general language of Article I, Section 9 applies equally to states and the federal government. If so, then the Section 9 command that "No Bill of Attainder or ex post facto Law shall be passed," limits states as well as Congress—but then what

clauses in a well-drafted Constitution may indeed be redundant in the sense that they are the textual embodiments of the best reading of the document's overall structure and meaning. Why put redundant texts into a well-drafted Constitution? In part to *clarify* and *exemplify* the best reading of structure, which might otherwise be ambiguous. This *clarifying* and *exemplifying* role is especially vital in Article II, which opens with a sweeping and somewhat ambiguous clause vesting "The executive Power" in the President,<sup>18</sup> and yet nowhere exhaustively defines the contours of "executive Power."<sup>19</sup> (Article I, by contrast, vests Congress only with legislative powers "herein granted" and painstakingly enumerated in Article I, Section 8.<sup>20</sup> Similarly, Article III vests "the judicial Power" in federal courts, and then proceeds to define with precision the nine categories of "Cases"

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are we to make of the parallel language in Section 10: "No state shall . . . pass any Bill of Attainder, [or] ex post facto Law . . ." If Section 9 applies to states, the repetition in Section 10 would be horribly and unstylishly redundant—eligible for inclusion in the department of redundancy department. To save the Constitution from *this* kind of inference of poor drafting, we properly construe Section 9 as applying only to the federal government. This construction explains why the Section 9 bans are separated from those of Section 10, which deals only with bans on states. (Here sound textual analysis converges with a structural analysis based on the section-by-section organization of the overall document. For similar interpretive approaches, see *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 248 (1833); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 419-20 (1819)).

<sup>18</sup> U.S. Const. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

<sup>19</sup> For much more analysis of the Vesting Clause, and the ways in which later clauses clarify and exemplify the otherwise ambiguous contours of the power granted by the Vesting Clause itself, see Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 Nw. U. L. Rev. 1377 (1994) [hereinafter Calabresi]; Calabresi & Prakash, *supra* note 4, at 570-81; Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1153, 1175-81, 1194-98 (1992) [hereinafter Calabresi & Rhodes]. See also Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 Harv. L. Rev. 701, 702, 707, 713-15 (1995) (deducing Presidential immunities from the broad and somewhat ill-defined text of the Article II Vesting Clause, as illuminated by other clauses in the Constitution). Contrary to the suggestions of Professors Lessig and Sunstein, both Hamilton and Madison relied prominently on the Article II Vesting Clause as a major font of executive power. Compare Lessig & Sunstein, *supra* note 3, at 28, 49, with Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 Yale L.J. 991, 995-96, 1001 (1993) [hereinafter Prakash Note].

<sup>20</sup> U.S. Const. art. I, § 1, cl. 1.

and "Controversies" to which that very same "judicial Power" "shall extend.")<sup>21</sup>

The opening clauses of Article II, Section 2 do indeed *exemplify* and *clarify* the President's role and powers. If a clause should be read by the company it keeps, the Opinion Clause merits careful attention: it is one of only three opening clauses of this Section, which contains the Constitution's first elaboration of executive power.<sup>22</sup> In this weighty opening wedge, the Opinion Clause is tightly flanked by two of the most important clauses in Article II, the Commander-in-Chief and Pardon Clauses:

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; 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 he shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.<sup>23</sup>

Together, these three introductory clauses place the President at the apex of three awesome pyramids of power—as Chief Military and Naval Commander, as Chief Administrator of the Executive Bureaucracy, and as Chief Prosecutor, Executioner and Dispenser of Mercy.

This opening triad, on its face, speaks to the President alone—defining his basic status—preceding enumerations of shared powers with Congress (treaties and appointments) in the remaining paragraphs of Section 2. A handful of more limited

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<sup>21</sup> *Id.* at art. III, §§ 1, 2. For more discussion of the various vesting clauses, see Calabresi, *supra* note 19; Calabresi & Prakash, *supra* note 4, at 570-76; Calabresi & Rhodes, *supra* note 19, at 1175-81, 1194-99; Prakash Note, *supra* note 19, at 995-96. For more discussion of the Article III Vesting Clause and its tight linkage with the Extension Clause, see generally Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. Rev. 205, 231-33, 238-39 & n.118 (1985); Akhil Reed Amar, Reports of My Death Are Greatly Exaggerated: A Reply, 138 U. Pa. L. Rev. 1651, 1652 n.9 (1990).

<sup>22</sup> Article I, of course, earlier vests the President with the weighty power of a (defeasible) veto; but this is of course a kind of *legislative* power—hence its placement in Article I—rather than "executive Power" as such. U.S. Const. art. I, § 7.

<sup>23</sup> *Id.* at art. II, § 2.

rights and duties of the President are then set out more specifically in a catchall paragraph in Section 3<sup>24</sup> (treated in a single cursory paragraph in *The Federalist* No. 77).<sup>25</sup>

Even as the sole apex of awesome powers in this opening triad, however, the President appears as a limited figure—as a Generalissimo, CEO, and Executioner *under law*. He commands the militia only when called into actual service—otherwise they belong to the states (a federalism limit),<sup>26</sup> and they may be called up only pursuant to a Congressional law (a separation of powers limit).<sup>27</sup> As Chief Prosecutor, the President oversees only prosecutions for offenses “against the United States” (a federalism limit), but not federal impeachment prosecutions, which are instead vested in the House of Representatives (a separation of powers limit).<sup>28</sup> So too, the Opinion Clause features federalism limits—the President cannot demand reports from state governors—and separation of powers limits, as we shall see.

Let us look carefully at what kind of Presidency the Opinion Clause, by its scope and its limits, seems to exemplify. To squeeze as much juice as possible out of one small clause, we shall in turn (but not in order) isolate various words and phrases,<sup>29</sup> and ponder both their explicit positive affirmations and their possible negative implications.<sup>30</sup>

<sup>24</sup> This catchall paragraph includes clauses concerning Presidential state of the union messages, Presidential recommendations to the Congress, Presidential power to convene and adjourn Congress, the Presidential role in receiving ambassadors, the President’s right/duty to take care that the laws be faithfully executed, and Presidential power to commission officers. *Id.* at art. II, § 3.

<sup>25</sup> See *The Federalist* No. 77, at 463 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>26</sup> See Amar, *supra* note 10, at 1168-73; Akhil Reed Amar, Of Sovereignty and Federalism, 96 *Yale L.J.* 1425, 1495-1500 (1987).

<sup>27</sup> U.S. Const. art. I, § 8, cls. 1, 15 (“The Congress shall have Power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”).

<sup>28</sup> *Id.* at § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”).

<sup>29</sup> For a similar organizational strategy, see Akhil Reed Amar & Renée B. Lettow, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 *Mich. L. Rev.* 857 (1995).

<sup>30</sup> As shall become clear, I embrace some negative implications, but not others. Like the anti-redundancy maxim, the *expressio unius* maxim of inference by negative implication must be applied sensitively and contextually; sometimes a negative

II. "RELATING TO THE DUTIES OF THEIR . . . OFFICES": THE ANTI-ROYALTY PRINCIPLE

Though awesome in his powers, the President is not a King.<sup>31</sup> The Constitution requires a separation between the President as a private person and the President as a public officeholder. In England, the Monarchy was not characterized by such a strong separation. Sir William Blackstone, as Solicitor to the Queen, could be ordered to attend to the Queen's private business—her lands, financial dealings and so forth.<sup>32</sup> So too, as Blackstone himself noted, the English King could demand advice from his Privy Counsellors on virtually any matter he pleased: the Counsellor's "duty" was to "advise for the king's honour" and to serve "his sovereign lord."<sup>33</sup> But an American President should not use executive departments to oversee his private business affairs; Bill Clinton may not require Janet Reno to prepare his tax returns. This basic structural postulate—that the "executive Power" vested in Article II is not *regal* power—is neatly exemplified by the closing words of the Opinion Clause, implicitly (by *expressio unius*)<sup>34</sup> limiting the President to seeking advice from Cabinet officers in their public capacity, relating to the public *duties* of their *offices*.<sup>35</sup>

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implication makes the most sense of a clause, sometimes not. See Amar & Katyal, *supra* note 19, at 702-08 & n.6. For an earlier and classic exposition making the same point, with lovely examples, see The Federalist No. 83, at 495-97 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>31</sup> This is, of course, a major theme of Hamilton's Federalist Papers on the Presidency, especially in The Federalist Nos. 67 and 69. See also Calabresi, *supra* note 19, at 1392-93 (distinguishing between "executive" power of American President and "regal" power of English King); Calabresi & Prakash, *supra* note 4, at 577-78 (similar); Calabresi & Rhodes, *supra* note 19, at 1196-97 & nn.217-19 (similar).

<sup>32</sup> See 1 William Blackstone, Commentaries on the Laws of England 212-13 (Stanley N. Katz ed., University of Chicago Press 1979) (1765) [hereinafter Blackstone] (discussing the Queen's ability to purchase and convey lands, and grant copyholds and leases without the intervention of the King).

<sup>33</sup> *Id.* at 223.

<sup>34</sup> See *supra* note 30.

<sup>35</sup> Calabresi & Prakash, *supra* note 4, at 585, 634. Congress may of course provide for personal staff for the President—to cook his meals, and so on. It can also provide for "personal counsel" at public expense. Accordingly, the White House counsel may well advise the President on his taxes. But of course the White House counsel is not a "principal officer" within the meaning of the Opinion Clause. See *infra* Part VI. The Attorney General is such a principal officer—that is why, for example, she is subject to Senate confirmation but the White House counsel is not. Query whether



But the very need to separate the President's private business from his public business may call for two sets of advisors—one on the public payroll, one not—who may need to meet together precisely in order to draw a sensible line between their proper roles, and address both gray areas of ambiguous authority and areas of overlapping responsibility. There is nothing inherently sinister about such meetings—on the contrary they are indispensable to a proper Presidency. For example, it may be wholly proper for the President's private tax lawyer to brief his public press secretary about the President's tax returns, in light of questions that the press and the public may legitimately ask the press secretary about those returns.<sup>36</sup> Conversely, the President may at times want his private lawyers to be briefed about the public policies of his administration. For example, he may want his private tax advisor not to take aggressive positions on open tax questions—positions that, though perfectly defensible in court (and perhaps even winners), may contradict the formal position his I.R.S. Commissioner has taken, or will soon take, in litigation reflecting the public policies of his administration.

The Opinion Clause—though often overlooked—may thus help us to understand better the constitutional principles underlying the famous November 5, 1993 Whitewater meeting of the President's public and private lawyers.

### III. "EXECUTIVE DEPARTMENTS": THE COORDINACY PRINCIPLE

Structurally, the President may not treat the Constitution's other two co-equal branches as his inferiors.<sup>37</sup> Textually, in the Opinion Clause he has no explicit right to demand reports from coordinate branches akin to his right to demand reports from

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salaries paid to personal staff should be seen as a Presidential "Compensation" or "Emolument" that, under Article II, § 1, cl. 7, may not be increased or decreased within a Presidential term.

<sup>36</sup> See Memorandum, Submission of the White House to the Special Senate Committee Regarding Whitewater and Related Matters 4-11 (December 12, 1995) (on file with the Virginia Law Review Association).

<sup>37</sup> See *The Federalist* No. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961) ("The several departments being perfectly coordinate by the terms of their common commission, neither of them, it is evident, can pretend to . . . [a] superior right").

“executive Departments.” (Of course, coordinate branches may nonetheless be free to *offer* their opinions to him—that is a different question.)

Here too, the Opinion Clause sharply distinguishes the American Presidency from the English Monarchy. In England, the judicial power had sprouted as an offshoot of executive power, doing justice in the name of the King (as in the “Court of *King’s Bench*” and so on).<sup>38</sup> Judges customarily sat on the King’s Privy Council, and thus were obliged to offer any advice the King might seek. One proposed version of Article II in the Philadelphia convention had likewise vested the President with a right to demand “advice” from a “Privy-Council” that included “the Chief-Justice of the Supreme-Court,”<sup>39</sup> but this proposal ultimately gave way to an Opinion Clause explicitly limited to heads of “executive Departments.”<sup>40</sup> Though the details of this shift remain sketchy, the convention had earlier and repeatedly rejected schemes to blend judges and the President together in a “Council of Revision” that would collectively wield the veto power.<sup>41</sup> Unsurprisingly, Chief Justice John Jay and his brethren explicitly invoked the negative implications<sup>42</sup> of the Opinion Clause when, in 1793, they politely but firmly declined to offer legal advice to President George Washington as a kind of informal Kitchen Cabinet. In the words of the Justices: “[T]he three departments of the government . . . [are] in certain respects checks upon each other, and . . . the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments.”<sup>43</sup> Thus, under

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<sup>38</sup> 1 Blackstone, *supra* note 32, at 222; Observations on George Mason’s Objections to the Federal Constitution, *supra* note 11, at 345-46; Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 159 (1969).

<sup>39</sup> 2 Farrand, *supra* note 11, at 367. For earlier formulations of this proposal, see *id.* at 328-29, 342-44.

<sup>40</sup> See *id.* at 495, 541-43.

<sup>41</sup> See 1 *id.* at 97-104, 138-40; 2 *id.* at 73-80. The reasons underlying this rejection strongly support the vision of a unitary and thus visibly accountable President. See *infra* Part V.

<sup>42</sup> See *supra* note 30. See also Calabresi & Prakash, *supra* note 4, at 628-29 (discussing negative implications of the word “executive” in the Opinion Clause); Calabresi & Rhodes, *supra* note 19, at 1184-85 & n.160 (similar).

<sup>43</sup> Correspondence of the Justices (1793) *reprinted in* Paul M. Bator et al., *Hart &*

this clause, coordinate branches of government stand in sharp contrast to executive departments that *are* inferior to the President, and do answer and report to him.

Coordinacy, of course, works both ways, structurally speaking. Just as the President may not command other branches, he in turn is not generally subject to their command. In other words, he may not be treated like a legislative staff member or a law clerk. Congress *by law* may impose certain reporting requirements, but such laws obviously require Presidential presentment. Bona fide impeachment investigations may generate broad subpoena power in the House, and (later—*after* the House formally impeaches) in the Senate. But neither a single Senator or Representative, nor a single House, nor the entire Congress acting by joint resolution (without presentment) has a right to demand a Presidential report on any matter whatsoever. Similarly, judges may invite the Solicitor General to give them the benefit of the administration's views, but judges generally may not conscript the Executive Branch to offer legal advice on any issue before the court, unless the United States is a party to the case at hand.<sup>44</sup>

The notion that Congress lacks power to demand reports at will from the President derives some support from the structural principle of coordinacy, but also from the pointed *absence* of any Opinion Clause of Article I vesting Congress with the right to require the opinion of the President on any subject relating to his duties. At least on occasion, Congress seems to have accepted limits imposed by the coordinacy principle. As the House Judiciary Committee put the point in 1879:

The Executive is as independent of either house of Congress as either house of Congress is independent of him, and they cannot call for the records of his actions, or the action of his

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Wechsler's *The Federal Courts and the Federal System* 66-67 (3rd ed. 1988).

<sup>44</sup> Compare the anti-conscription principle in the federalism context laid down by *New York v. United States*, 505 U.S. 144 (1992). On the analogy between federalism and separation of powers, see *The Federalist* No. 51, at 321-23 (James Madison) (Clinton Rossiter ed. 1961).

officers against his consent, any more than he can call for any of the journals or records of the House or Senate.<sup>45</sup>

Perhaps the best textual illustration of coordinacy in the reporting and opining contexts comes from the State of the Union Clause, which exemplifies a meeting of equals, somewhere between a Presidential right and a Presidential duty: "He shall from time to time give to the Congress Information of the State of the Union."<sup>46</sup> The Veto Clause has a similar ring of coordinacy rather than hierarchy in the giving and receiving of opinions: a President should return a vetoed bill "*with his Objections* to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider" the bill.<sup>47</sup>

#### IV. "THE PRESIDENT . . . MAY REQUIRE": THE CHIEF ADMINISTRATOR PRINCIPLE<sup>48</sup>

In sharp contrast to the State of the Union Clause, the Opinion Clause does not exemplify a meeting of equals. Executive departments are part of, well . . . the Executive, whose power is vested, under the emphatic opening words of Article II, in *the President*. Executive departments are accountable to the Chief Executive. The President does not—and cannot—execute all laws himself with his own hands, but he is both empowered and obliged to "*take Care* that the Laws *be* faithfully executed" by his underlings.<sup>49</sup> As George Washington himself explained: "The

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<sup>45</sup> H.R. Rep. 141, 45th Cong., 3d Sess. (1879), *quoted in* Presidential Immunity From Civil Liability, The N.Y. Litigator, Nov. 1995, at 31.

<sup>46</sup> U.S. Const. art. II, § 3, cl. 1. For more analysis, see Calabresi & Rhodes, *supra* note 19, at 1207 n.262.

<sup>47</sup> U.S. Const. art. I, § 7, cl. 2 (emphasis added). See also *id.* at art. II, § 2, cl. 2 (providing for Senate advice and consent in treaty making and appointments).

<sup>48</sup> See generally Prakash Note, *supra* note 19 (discussing the President's tremendous control and discretion as chief administrator).

<sup>49</sup> U.S. Const. art. II, § 3 (emphasis added). See 2 Farrand, *supra* note 11, at 53-54 (Gouverneur Morris at Philadelphia convention) ("There must be certain great officers of State; a minister of finance, of war, of foreign affairs &c. These he presumes will exercise their functions in subordination to the Executive, . . . Without these ministers the Executive can do nothing of consequence."); 1 Annals, *supra* note 14, at 481 (remarks of James Madison, June 16, 1789) ("if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws.").

impossibility that one man should be able to perform all the great business of the State, I take to have been the reason for instituting the great Departments, and appointing officers therein, to *assist* the *supreme* Magistrate in discharging the duties of *his* trust.”<sup>50</sup> Without the Opinion Clause—and the deep structural principle it exemplifies—a (bad but plausible) argument could have been made that Congress could pass laws preventing Cabinet officers from reporting specially to the President. It might have been argued that the Article II Vesting Clause, standing alone, was too vague and open-ended to defeat this law; and the Take Care Clause by itself could have been claimed to “beg the question”—the hypothetical No Report Rule would of course itself purport to be a law that the President must faithfully execute. Even if Cabinet officials, appointed by the President, were removable at will (and there was some ambiguity about this at the Founding<sup>51</sup>) a President might be left in the dark about what was going on in his own administration, under his own watch.<sup>52</sup>

Alternatively, consider the implications of the Opinion Clause if (as some at Founding may have thought) Cabinet officials were to be removable only for cause—such as defiance of lawful Presidential orders. Without the Opinion Clause, even if no Congressional “Don’t Ask, Don’t Tell” law were on the books, a Cabinet officer’s refusal to brief the President might not have been *obviously* unlawful (and thus grounds for dismissal).<sup>53</sup>

Two other readings of the “President may require” language are formally possible in light of the *expressio unius maxium* of

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<sup>50</sup> 30 Writings of George Washington 334 (John C. Fitzpatrick ed., 1939) (emphasis added); see also 1 Annals, supra note 14, at 492 (remarks of Fisher Ames, June 16, 1789) (Constitution vests “all executive power in the hands of the President, and could he personally execute all the laws, there would be no occasion for establishing auxiliaries; but the circumscribed powers of . . . one man, demand the aid of others.”); id. at 637 (remarks of Theodore Sedgwick, June 29, 1789) (executive officers are the “eyes and arms of the principal Magistrate, the instruments of execution”).

<sup>51</sup> See, e.g., James Madison, Letter to Edmund Pendleton, in 12 The Papers of James Madison 251-53 (Charles F. Hobson & Robert A. Rutland eds., 1979) (June 21, 1789 Letter); The Federalist No. 77, at 459-62 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Lessig & Sunstein, supra note 3, at 25-26 & nn.114-15.

<sup>52</sup> See Calabresi & Rhodes, supra note 19, at 1207-08; Prakash Note, supra note 19, at 1005.

<sup>53</sup> See J. Gregory Sidak, The Recommendation Clause, 77 Geo. L.J. 2079, 2134-35 (1989).

construction.<sup>54</sup> A superstrong *expressio unius* reading might read the clause to imply that only the President—and not Congress—may demand information from Cabinet officers.<sup>55</sup> Of course the clause does not say this explicitly. This superstrong reading would run counter to longstanding practice, and to the explicit role of Congress in considering impeachment of Cabinet officers under Article I, Sections 2 and 3, and Article II, Section 4.<sup>56</sup> A slightly softer, though still strong, *expressio unius* reading would likewise deny the general duty of a Cabinet officer to appear before general Congressional oversight hearings (though she would be free to appear if she and the President so desired).<sup>57</sup> But, this reading would concede, Congress could demand information from Cabinet officers if it explicitly and in good faith invokes its impeachment powers. (Note that, here too, the Senate would have no role to play until *after* the House formally impeaches.) Congress could also perhaps impose reporting requirements on a Cabinet officer by law—as did the First Congress, it seems<sup>58</sup>—but of course this law would require presentment to, and risk veto by, the President. Obviously, this strong reading is also in some tension with longstanding practice; but it illustrates how the clause could be read, in a strongly unitary-executive way, to limit Parliamentary-style government via abusive oversight hearings conducted by Congressional barons who are improperly trying to act as Cabinet officers (or as President) micro-managing executive department policy.<sup>59</sup>

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<sup>54</sup> See *supra* note 30.

<sup>55</sup> See Calabresi & Rhodes, *supra* note 19, at 1207; Sidak, *supra* note 53, at 2086.

<sup>56</sup> U.S. Const. art I, § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”); *id.* at § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments.”); *id.* at art. II, § 4 (“all civil Officers of the United States, shall be removed from Office on Impeachment . . .”).

<sup>57</sup> The 1879 House Judiciary Committee language, quoted *supra* text accompanying note 45, seems to lean in this direction in the phrase “or the action of his officers against his consent.”

<sup>58</sup> See Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 66 (Richard Peters ed., Little, Brown 1845). Overlooking the fact of Presidential presentment, Professors Lessig and Sunstein mistakenly read this Act as reflecting the Framers’ belief that “the legislative branch possessed an inherent authority to demand reports.” Lessig & Sunstein, *supra* note 3, at 33.

<sup>59</sup> See Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 48 Ark. L. Rev. 23 (1995).

Though we should not necessarily embrace this strong *expressio unius* reading, it does confirm the view that the Opinion Clause in general supports, rather than undermines, the idea of a unitary executive.

In the end, the Opinion Clause clearly exemplifies the President's supervisory power over the executive departments. But along with this Presidential power—indeed, precisely because of it—comes Presidential responsibility and accountability for these departments. Precisely because of his power to supervise, the buck stops with him. Indeed, as we shall now see, the Opinion Clause subtly highlights and sharpens the exact form of executive accountability contemplated by the Constitution.

#### V. "RESPECTIVE": THE PERSONAL ACCOUNTABILITY PRINCIPLE

Strictly speaking the Constitution does not contemplate a "Cabinet"—a *group* of department heads meeting as such—but instead calls for a series of different departments. The Opinion Clause does not envision the President asking the Secretary of the Treasury for general advice about the death penalty; or asking the Attorney General for general advice about interest rates. Rather the clause envisions the President asking each officer for advice about her *respective* assignment.<sup>60</sup> Of course some issues cut across various departments—and so more than one Cabinet member might be asked to weigh in—but the image is not one of the Cabinet as a fungible group formulating executive policy. Instead, the clause conjures up a hub-and-spoke model, with the President at the hub, each Cabinet officer as a spoke, and no rim connecting the spokes independent of the hub.

This model sharply contrasts with the British-style Privy Council model, a model featured in several early state constitutions<sup>61</sup> and in early proposed drafts of the Federal Constitution in Philadelphia. The Council model was ultimately

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<sup>60</sup> See Calabresi & Prakash, *supra* note 4, at 634; Calabresi & Rhodes, *supra* note 19, at 1196 n.216.

<sup>61</sup> See Calabresi & Prakash, *supra* note 4, at 610 n.278.

rejected in favor of the Opinion Clause model, precisely because the latter better promoted individual accountability at two levels.

First, at the Cabinet level, the Opinion Clause focused responsibility for triumphs and failures on individual department heads responsible for their *respective* departments. Even the chief proponents of Privy Council models at the Philadelphia convention sought to tailor the Council to promote individual accountability for each Council member's particular area of competence. Thus, Gouverneur Morris and Charles Pinckney recommended a clause providing that

[t]he President may from time to time submit any matter to the discussion of the Council of State, and he may require the written opinions of any one or more of the members: But . . . every officer abovementioned shall be *responsible* for *his opinion* on the affairs relating to *his particular Department*.<sup>62</sup>

Second, the Opinion Clause, as finally drafted, sharpened *Presidential* accountability by emphasizing the *hub*. The President could not easily diffuse his own responsibility by hiding behind a group—the Cabinet. Hear the words of future-Justice James Iredell in the North Carolina ratifying convention:

[The Opinion Clause] is, in some degree, *substituted* for a council. . . . [but] does not diminish the *responsibility* of the *President himself*.

. . . .  
It has been the opinion of many gentlemen, that the President should have a council. . . .

. . . .  
. . . [H]ad he a council by whose advice he was bound to act, his responsibility, in all such cases, must be destroyed. . . . [I]t would be natural for him to say, "You know my council are men of integrity and ability: I could not act against their

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<sup>62</sup> 2 Farrand, *supra* note 11, at 343-44 (emphasis added). Earlier, Morris had emphasized that principal officers, though "exercis[ing] their functions in subordination to the Executive, . . . will be amenable by impeachment to the public Justice." *Id.* at 54. Impeachment of "wicked" advisors of the King had been an important part of the English Constitution, see 1 Blackstone, *supra* note 32, at 237, 244; 4 Elliot's Debates, *supra* note 11, at 109 (James Iredell at North Carolina ratifying convention).

In a similar vein, Pinckney, during the ratification period, stressed the President's power to "inspect" the respective executive departments in ways that would "check" the principal officers, and if necessary provide the means for "punishing" their "malpractices," 3 Farrand, *supra* note 11, at 111.



opinions, though I confess my own was contrary to theirs." This, sir, would be pernicious. . . . It would be difficult often to know whether the President or counsellors were most to blame. . . . [But under the Opinion Clause,] the President will *personally* have the credit of good, or the censure of bad measures; since, though he may ask advice, he is to use *his own judgment* in following or rejecting it.<sup>63</sup>

Iredell had sounded the same themes in an earlier published pamphlet, where he criticized formal Councils for "screen[ing]" the chief executive, and stressed that under the Opinion Clause, "the President must be *personally responsible* for everything."<sup>64</sup> The pointed italics were Iredell's.

Though Hamilton slighted the Opinion Clause itself in *The Federalist Papers*, earlier in his discussion of the Presidency he strongly echoed Iredell and emphatically rejected execution by Cabinet/Committee in favor of a unitary—and thus accountable—President. In No. 70, entitled "[The Constitution of the President] in Relation to the Unity of the Executive, with an Examination of the Project of an Executive Council,"<sup>65</sup> he wrote:

[O]ne of the weightiest objections to a plurality in the executive, . . . is that it tends to conceal faults and destroy responsibility. . . . It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall. . . .

"I was overruled by my council. The council were so divided in their *opinions* that it was impossible to obtain any better resolution on the point." These and similar pretexts are constantly at hand, whether true or false.<sup>66</sup>

Though Hamilton did not highlight the word "opinions," we should focus on the word here to see the obvious relevance of this passage to the Opinion Clause. And so when Hamilton later dismissed the clause as a "mere redundancy" in No. 74, his

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<sup>63</sup> 4 Elliot's Debates, supra note 11, at 108-10 (emphasis added).

<sup>64</sup> Observations on George Mason's Objections to the Federal Constitution, supra note 11, at 348.

<sup>65</sup> The Federalist Papers at xxix (Clinton Rossiter ed., 1961).

<sup>66</sup> The Federalist No. 70, at 427-28 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added) (quotation marks in original).

quick dismissal occurred because, in effect, he had *already* expounded on the spirit of the clause—at length, though not by name—in No. 70.

Consider also Hamilton's language in two later Federalist Papers: "[T]he sense of responsibility is always strongest in proportion as it is undivided,"<sup>67</sup> and "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation."<sup>68</sup>

Oliver Ellsworth, who had participated vigorously in Philadelphia and would soon play leading roles in both Congress and the Supreme Court, similarly touched on the Opinion Clause in the course of an influential essay mocking government by Cabinet and praising a unitary executive:

The states who have had such councils have found them useless, and complain of them as a dead weight. In others, as in England, the supreme executive advises when and with whom he pleases; if any information is wanted, the heads of the departments who are always at hand can best give it, and from the manner of their appointment will be trustworthy. Secrecy, vigor, dispatch and responsibility, require that the supreme executive should be one person, and unfettered otherwise than by the laws he is to execute.<sup>69</sup>

These views, expressed by Federalist leaders publicly during the ratification process, closely track the views expressed earlier by leading Federalists in the Philadelphia convention, which met behind closed doors. Early on, when the convention made its momentous decision to vest the executive power in a single person, James Wilson argued forcefully in favor of a single magistrate, as "giving most energy dispatch and responsibility to the office."<sup>70</sup> When asked by Hugh Williamson "whether he means to annex a Council" to the President, Wilson replied that he wanted "no Council, which oftener serves to cover, than prevent malpractices."<sup>71</sup> James Madison shared Wilson's vision of a unitary executive, and he too expressed concern that a

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<sup>67</sup> Id. No. 74, at 447 (Alexander Hamilton).

<sup>68</sup> Id. No. 76, at 455 (Alexander Hamilton).

<sup>69</sup> The Landholder, VI *in* Essays, *supra* note 11, at 163.

<sup>70</sup> 1 Farrand, *supra* note 11, at 65.

<sup>71</sup> Id. at 97.

Council might blur Presidential responsibility: “[A]n Executive formed of one Man would answer the purpose when aided by a Council, who should have the right to advise and record their proceedings, but not to control his authority.”<sup>72</sup> “[A] single Executive [must be free] to depart from their Opinion at his peril.”<sup>73</sup>

When Wilson and Madison argued for a Council of Revision in which the President and judges would collectively wield the veto, other leading Federalists resisted because they believed that this, too, might muddy the personal responsibility of a unitary President. In Rufus King’s words: “If the Unity of the Executive was preferred for the sake of responsibility, the policy of it is as applicable to the revisionary as to the Executive power.”<sup>74</sup> John Dickinson agreed: “[R]esponsibility is more [important], which can only be preserved . . . by leaving [the Executive] singly to discharge its functions.”<sup>75</sup> Likewise, Nathaniel Gorham argued that “it would be best to let the Executive alone be responsible, and at most to authorize him to call on Judges for their opinions.”<sup>76</sup> Wilson and Madison each countered unsuccessfully that unity was required for true *executive* power, but the veto, as a species of *legislative* power, was different.<sup>77</sup>

A few weeks later, Oliver Ellsworth argued that the President should be provided with “a Council . . . who should advise but not conclude the President.”<sup>78</sup> In response, Charles Pinckney emphasized the importance of personal Presidential responsibility: “[T]he President shd. be authorized to call for advice or not *as he might chuse*. Give him an able Council and it will thwart him; a weak one and he will shelter himself under their sanction.”<sup>79</sup> Pinckney, along with Gouverneur Morris, then put forth an elaborate “Council of State” proposal under which the President “shall in all cases exercise *his own judgment*, and

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<sup>72</sup> Id. at 74.

<sup>73</sup> Id. at 70.

<sup>74</sup> Id. at 139.

<sup>75</sup> Id. at 140.

<sup>76</sup> 2 id. at 73.

<sup>77</sup> See 1 id. at 140 (Wilson); 2 id. at 77 (Madison).

<sup>78</sup> 2 id. at 328-29.

<sup>79</sup> Id. at 329 (emphasis added).

either Conform to such opinions or not as *he* may think proper.”<sup>80</sup> This proposal went to a drafting committee that distilled the idea as follows: The President “shall have a Privy-Council . . . whose duty it shall be to advise him in matters respecting the execution of his Office, which he shall think proper to lay before them: But their advice shall not conclude him, nor affect *his responsibility* for the measures which *he* shall adopt.”<sup>81</sup> The convention never adopted this proposal. Instead the members sent it back to yet another committee for reconsideration.<sup>82</sup> That committee—on which Morris sat—substituted the Opinion Clause for the Council proposal<sup>83</sup> precisely because it was felt that, by its very nature as a collective body, a Council might end up blurring the personal responsibility of a unitary President. As Morris explained to his fellow delegates, “The question of a Council was considered in the Committee, where it was judged that the Presidt. by persuading his Council—to concur in his wrong measures, would acquire their [i.e., the Council’s] protection for them [i.e., the measures].”<sup>84</sup>

This legislative history shows that the Opinion Clause sharply rejected English- and state-style Privy Councils precisely to strengthen the idea of a *unitary* executive with *personal* responsibility. Interpretations—like Michael Froomkin’s, Larry Lessig’s and Cass Sunstein’s—that read the clause to oppose a unitary executive turn all this history upside down.<sup>85</sup>

## VI. “THE PRINCIPAL OFFICER”: THE EXECUTIVE PYRAMID (INNER CIRCLE) PRINCIPLE

Why does the Opinion Clause speak only of principal officers? One strong *expressio unius* reading<sup>86</sup> would be that the President has no right to require reports from sub-Cabinet “inferior”

<sup>80</sup> *Id.* at 343-44 (emphasis added).

<sup>81</sup> *Id.* at 367 (emphasis added).

<sup>82</sup> *Id.* at 481.

<sup>83</sup> *Id.* at 495.

<sup>84</sup> *Id.* at 542.

<sup>85</sup> For other correctives, see Calabresi & Prakash, *supra* note 4, at 628-31; David I. Lewittes, *Constitutional Separation of War Powers: Protecting Public and Private Liberty*, 57 *Brook. L. Rev.* 1083, 1124-30 (1992); Prakash Note, *supra* note 19, at 1005-07.

<sup>86</sup> See *supra* note 30.

officers in the Executive Branch. Of course, the Opinion Clause does not quite say that. Ordinarily, by the logic of transitivity, if the President can command principal officers, and principal officers can command inferiors, then Presidential power over inferiors should follow a fortiori. There is an obvious analogy here to the military chain of command under the logic of the Commander-in-Chief Clause—an analogy strengthened by the fact that this chain-of-command clause immediately precedes the Opinion Clause.

A better reading of the “principal Officer” language is that it exemplifies the Founders’ expectation that the President will ordinarily directly pick, act through, and monitor only a handful of personal lieutenants—his inner circle.<sup>87</sup> As Hamilton observed in *The Federalist* No. 72, department heads “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, at least from his nomination, and ought to be subject to his superintendence.”<sup>88</sup> Although the apex of an awesome pyramid *ultimately* rests on a broad and vast base, it sits *immediately* atop a small top ring. While the President is *ultimately* responsible for all that happens in his administration under his watch, the Opinion Clause reminds us that we should not necessarily tax the President with *personal* responsibility for all misdeeds by minor officials, because the President ordinarily does not directly select and oversee them. Though ultimately inferior to the President, they report directly to principal officers (or the principals’ underlings).

This reading of the Opinion Clause also casts light on the Appointment Clause—the other main clause dealing directly

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<sup>87</sup> See *supra* notes 49-50 and accompanying text.

<sup>88</sup> *The Federalist* No. 72, at 436 (Alexander Hamilton) (Clinton Rossiter ed., 1961). See also 2 Farrand, *supra* note 11, at 342 (Morris and Pinckney proposal that department heads should “assist the President in conducting the Public affairs”) (emphasis added). Precisely because of the close relationship between a President and his chief lieutenants in the Cabinet, these officers—and not, say, the Speaker of the House—should stand first (after the Vice President) in the line of Presidential succession. See Akhil Reed Amar & Vikram David Amar, Is the Presidential Succession Law Constitutional?, 48 *Stan. L. Rev.* 113 (1995); see also Steven G. Calabresi, The Political Question of Presidential Succession, 48 *Stan. L. Rev.* 155 (1995) (agreeing that Congress should adopt a Cabinet succession plan, but noting that any Congressional succession statute would be unreviewable as a political question).

with Cabinet officers (here, relabeled heads of departments).<sup>89</sup> For inferior officers, Congress can vest appointment in the President himself or in a principal officer/department head. If the appointment is vested in the President, there is more obvious direct Presidential control—and *personal* responsibility. If, instead, the appointment is vested in a principal officer, *that* officer bears more personal responsibility.<sup>90</sup> In either case, the inferior officer reports to, and must be countermandable by, the appointing officer himself. An “inferior” officer thus embodies a *relational* concept. An “inferior” officer is not merely *less than* another (as two is less than three and a GS-13 Deputy Assistant Attorney General is less than a GS-16 Secretary of State), but also *inferior to* another (as an Assistant Attorney General is inferior to the General whom the Assistant assists). This reading of “inferior” comports with its usage in the inferior courts clause of Article I, Section 8—lower federal courts are “inferior *to*” the Supreme Court.<sup>91</sup> Indeed, this reading explains why these courts may generally be reviewed and reversed by the

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<sup>89</sup> U.S. Const. art II, § 2, cl. 2 (“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.”). Note that in their 1793 correspondence, Chief Justice Jay and his brethren used the phrase “heads of departments” rather than “principal Officer[s]” in paraphrasing the Opinion Clause. See *supra* text accompanying note 43. And so did Oliver Ellsworth in an influential ratification pamphlet. See *supra* text accompanying note 69. Professors Lessig and Sunstein suggest that “Heads of [non-executive] Departments” may exist who are not the same as “principal Officer[s]” of “executive Departments”. See Lessig & Sunstein, *supra* note 3, at 35-38. There is strong reason to doubt their provocative suggestion, see Calabresi & Prakash, *supra* note 4, at 626-34 & n.393, 647-54.

<sup>90</sup> Thus, it is *not* the case that, if department heads really are Presidential assistants and deputies, there is no difference between Presidential and department head appointment. *Contra* Froomkin Note, *supra* note 3, at 799 (unitary-executive reading renders department head appointment, in contradistinction to Presidential appointment, “meaningless”); Lessig & Sunstein, *supra* note 3, at 35 (similar). The difference is one of personal responsibility for the appointment. This might seem a trivial difference to us, but it would not have been to some founders, see *infra* notes 94, 99. (And of course, we should remember that the Department Head Appointment Clause was a last-minute, housekeeping item, see Calabresi & Rhodes, *supra* note 19, at 1168) (citing *Morrison v. Olson*, 487 U.S. 654, 720 (1988) (Scalia, J., dissenting)).

<sup>91</sup> U.S. Const. art. I, § 8, cl. 9 (emphasis added). See also *id.* at art. III, § 1 (vesting judicial power in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

Supreme Court and why they must generally follow that high court's precedents.<sup>92</sup>

Justice Scalia's forceful dissent in *Morrison v. Olson*<sup>93</sup> strongly hints at, without quite driving home, this reading of the Appointment Clause. On this reading, a court can appoint only officers inferior to it—such as magistrates or law clerks—whose every decision may be monitored and countermanded by the appointing authority. A fortiori, interbranch appointments are ruled out by the relational word “inferior”: a special prosecutor claiming to be an inferior prosecutor must be appointed by a superior prosecutor—the Attorney General, and not a court—who has the power to oversee and monitor the inferior's prosecutorial performance, and who thus can be held personally accountable for the inferior's performance.<sup>94</sup>

The particular delicacy that attends some special prosecutors—such as those appointed to investigate the President himself or his inner circle—night warrant, however, a narrow law that sought to regulate or ban direct, private, ex parte communications between the “inferior” special prosecutor and the President himself, in light of possible conflict-of-interest/self-dealing concerns. Although Congress may not

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<sup>92</sup> See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 *Stan. L. Rev.* 817, 828-37 (1994). The argument Caminker sets forth here usefully corrects the analysis in Amar, *supra* note 21, at 258 n.170, subject to the following refinement: If an inferior court has good reason to believe that its “superior,” the Supreme Court, would *itself* overrule an old Supreme Court case, but cannot do so because it now lacks appellate jurisdiction, a faithful “inferior” court could—must?—disregard the old precedent on behalf of its superior.

<sup>93</sup> *Morrison*, 487 U.S. at 715-23 (Scalia, J., dissenting). Justice Scalia's view echoes that of Judge Skelly Wright, who offered a “natural[]” and “common-sense reading” of the Appointment Clause that “courts of law and the other listed offices were meant to appoint only those officers ‘inferior’ to them. . . . [This] reading harmonizes with the most apparent purpose of Article II: to let Congress clothe Secretaries and courts with the necessary authority for filling vacancies in *their own staffs*.” *Hobson v. Hansen*, 265 F. Supp. 902, 921 (D.D.C. 1967) (Wright, J., dissenting) (emphasis added). See also *Ex parte Hennen*, 38 U. S. (13 Pet.) 230, 257-58 (1839) (similar).

<sup>94</sup> On the importance of personal accountability in the appointments context, see *The Federalist* No. 76, at 455-56 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (quoted *supra* text accompanying note 68); *id.* No. 77, at 461 (Alexander Hamilton) (“The blame of a bad nomination would fall upon the President singly and absolutely”). My understanding of this issue has profited from the insights developed in Stephen P. Vaughn's outstanding unpublished manuscript, “Bringing Responsibility to the Appointments Clause” (on file with the Virginia Law Review Association).

generally interfere with the President's ability to communicate with low-level executive officers, arguably it can do so in some rare instances—deriving modest support, perhaps, from the negative implications<sup>95</sup> of the words “principal Officer.”

#### VII. “IN WRITING”: THE PROBITY AND PUBLICITY PRINCIPLES

What if the President simply tried to squeeze confidential investigation information out of the “inferior” prosecutor's constitutionally proper supervisor, the Attorney General? Consider the intriguing implications of the Opinion Clause's cryptic aside, “in writing.” A strong expressio unius reading<sup>96</sup> might suggest that the President generally has no right to demand oral information from his Cabinet Secretaries and that Congress could lawfully ban all such *ex parte* exchanges. Of course, the clause does not quite say this. Ordinarily, it would be silly—and violative of the spirit of a smoothly functioning executive pyramid—to bar such exchanges.

According to the Supreme Court in the Nixon tapes case:

[There is a] valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human 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.

... [T]he public interest [requires] candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.<sup>97</sup>

A more narrow reading might suggest that, in some unusual circumstances, a Cabinet officer might be right in demanding the formality of a written exchange and in resisting an *ex parte* oral

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<sup>95</sup> See *supra* note 30.

<sup>96</sup> See *supra* note 30.

<sup>97</sup> *United States v. Nixon*, 418 U.S. 683, 705, 708 (1974).



briefing. Although a President can fire an Attorney General for any reason or no reason, Janet Reno would not be betraying her oath or defying the Constitution if she declined to brief Clinton *privately* on the Whitewater investigation. She must be prepared to brief him *in writing* if asked—this is what the clause requires—but then there will be a permanent record of the briefing, lest anyone later wonder whether inappropriate information was given by the General,<sup>98</sup> or an inappropriate request was made by the President.<sup>99</sup>

Indeed, taking the argument one step further, perhaps Congress *could* lawfully require that certain Cabinet-Presidential communications about matters involving Presidential conflicts of interest occur *only* in writing. Thus, although Congress cannot forbid *all* oral exchanges, perhaps it could ban *some*. This idea is hinted at in the cryptic aside “in writing”<sup>100</sup>—for the framing generation no doubt felt that men (and today women) would be more likely to do dishonorable things in private than in public with written records. As James Iredell explained in the North Carolina ratifying convention: “[T]he necessity of their opinions being in writing, will render them more cautious in giving them, and make them responsible should they give advice manifestly improper. . . . [The opinion process] is plain and open.”<sup>101</sup> This oral ode to writing echoed what Iredell had already said—in writing!—in a widely respected pamphlet: “[A written opinion] must for ever afterwards speak for itself, and commit the

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<sup>98</sup> Note the military, chain-of-command metaphor here. See *supra* Part VI.

<sup>99</sup> Even if this written report could not be demanded at will by a single House of Congress, see *supra* text accompanying notes 54-59, it might be subject to subpoena in a bona fide impeachment investigation of either the President or the department head. And of course, a President might, as a political matter, be forced to “voluntarily” share the document with Congress as the price for getting Congress to do something else the President wants done. Finally, the document might be available to historians years later—and both President and Cabinet heads, as lovers of “fame,” could be expected to care about their enduring reputations and the judgment of history, see Douglass Adair, *Fame and the Founding Fathers, in Fame and the Founding Fathers* 3 (Trevor Colbourn ed., 1974); *The Federalist* No. 72, at 437 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“love of fame [is] the ruling passion of the noblest minds”); *infra* text accompanying notes 101-102.

<sup>100</sup> In Philadelphia, the idea of *written* opinions was hinted at early on, when James Madison proposed that an Executive Council be given the right to “advise *and record* their proceedings.” 1 Farrand, *supra* note 11, at 74 (emphasis added).

<sup>101</sup> 4 Elliot’s Debates, *supra* note 11, at 108-10.

character of the writer, in lasting colors, either of fame or infamy, or neutral insignificance, to future ages, as well as the present."<sup>102</sup>

Other provisions of the Constitution push in the same direction. When the President vetoes a bill, he must under Article I, Section 7 openly state his objections,<sup>103</sup> which are then entered on the presumptively public journal of the originating House.<sup>104</sup> And on the override vote, "the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively."<sup>105</sup> On other votes, Article I, Section 5 likewise gives a mere one-fifth of a House the right to demand a written record of the yeas and nays.<sup>106</sup>

### VIII. "THE OPINION . . . UPON ANY SUBJECT": THE EXECUTIVE DISCRETION PRINCIPLE

Though he wields awesome powers, the President may not simply do as he pleases. He must act under law.<sup>107</sup> He must enforce the Constitution, even where he disagrees with it. So too, when Congress passes constitutionally proper laws, the President must execute them, even where he disagrees with those laws. Yet virtually no law specifies everything: almost all laws create zones of discretion, zones in which faithful execution requires good faith judgment and choice.<sup>108</sup> Moreover, even when the *law* is clear, the *facts* in any given situation may be less so; reasonable persons may disagree about what the facts are and what the facts mean. Here too, faithful execution will often require the Executive to exercise good faith judgment and choice. Furthermore, beyond *legal* and *factual* judgment lies *policy* judgment: Article II explicitly invites the President to

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<sup>102</sup> Observations on George Mason's Objections to the Federal Constitution, *supra* note 11, at 348.

<sup>103</sup> U.S. Const. art. I, § 7, cl. 2; *supra* text accompanying note 47.

<sup>104</sup> See U.S. Const. art. I, § 5, cl. 3.

<sup>105</sup> *Id.* at art. I, § 7, cl. 2.

<sup>106</sup> *Id.* at art. I, § 5, cl. 3; see also *id.* at art. III, § 3 (calling for treason confessions "in open Court"); *id.* at amend. VI (affirming right of "public trial" in all criminal cases).

<sup>107</sup> See Calabresi & Prakash, *supra* note 4, at 569 n.108.

<sup>108</sup> See 2 Farrand, *supra* note 11, at 34 (remarks of James Madison at Philadelphia convention) ("in the administration of the [Executive department] much greater latitude is left to opinion and discretion than in the administration of the [Judiciary]").

assemble information he deems appropriate to communicate to Congress in "State of the Union" messages and to give Congress policy recommendations that "*he shall judge necessary and expedient.*"<sup>109</sup> Similarly, Article I gives the President a huge role, via the veto, in fashioning new policy.<sup>110</sup>

In performing all of these tasks, and in exercising all of these kinds of discretion, the President necessarily relies on others—most critically, his inner circle of principal officers—to lend him their eyes and ears and hearts and minds. The Opinion Clause phrase "Opinion . . . upon any Subject" captures the breadth of Executive Branch discretion and judgment. The President is responsible for following and often construing (in the first instance) the law, for finding (at least in the first instance) the facts, for exercising limited discretion in executing existing laws, and for articulating wide-ranging policy judgment in proposing new laws. On all of these subjects he may demand the opinion of the relevant Cabinet head(s). If he is dissatisfied with them on any of these grounds—their legal judgment, their factual astuteness, their discretionary judgment, their policy

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<sup>109</sup> U.S. Const. art. II, § 3 (emphasis added). For a study of the Recommendation Clause, see generally Sidak, *supra* note 53 (offering a historical and economic rationale for the clause and arguing that "muzzling laws" are an unconstitutional violation of the President's powers and duties).

<sup>110</sup> The Framers understood that, in weighing and wielding his veto pen, the President would often seek the "information and opinions" of the executive underlings, see 2 Farrand, *supra* note 11, at 80 (remarks of John Rutledge at Philadelphia convention); see also 2 Elliot's Debates, *supra* note 11, at 448 (similar remarks of James Wilson at Pennsylvania ratifying convention). One of the first and most memorable uses of the Opinion Clause occurred when President Washington asked for opinions from Cabinet officers Hamilton, Jefferson and Randolph, as he pondered a possible veto of the Bank Bill. See Michael B. Rappaport, *The President's Veto and the Constitution*, 87 Nw. U. L. Rev. 735, 782-83 & nn.189-90 (1993). In his classic decision in *McCulloch*, Chief Justice Marshall not only relied on Hamilton's written opinion throughout the case, but also opened with a pointed reference to Washington's decision to solicit the views of his "executive cabinet" before making up his own "pure and intelligent" "mind[.]" *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402 (1819). Note that, contrary to Lessig and Sunstein's provocative claims, Hamilton clearly understood in this incident that he was an executive officer subject to President Washington's order under the Opinion Clause, see Calabresi & Prakash, *supra* note 4, at 651. This was also Washington's understanding, see *id.*, and Marshall's too. (Note Marshall's explicit reference to Washington's "executive cabinet." *McCulloch*, 17 U. S. (4 Wheat.) at 402.) The First Congress shared this view; nine days after creating the Treasury Department Congress passed a "Salary Act" describing the Treasury Secretary as an "Executive Officer," see *id.* at 647-48.

wisdom—he may dismiss them.<sup>111</sup> Precisely because of this broad power to oversee and, where necessary, thwart his Cabinet, the President is visibly accountable to the American People for all these aspects of his administration.

Perhaps no one put it better than the great Federalist leader James Wilson, one of the earliest champions at Philadelphia of a unitary executive. In the Pennsylvania ratifying convention debates he declared: “The next good quality . . . is, that the *executive authority is one*. . . . The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President. . . .”<sup>112</sup> Three years later, in his celebrated Lectures on Law, Wilson returned to this basic theme. Though he did not refer to the Opinion Clause by name, he clearly expounded its spirit by explaining at length how the American Chief Executive differed from his English antecedent:

In one important particular—the unity of the executive power—the constitution of the United States stands on an equal footing with that of Great Britain. In one respect, the provision is much more efficacious.

The British throne is surrounded by counsellors. With regard to their authority, a profound and mysterious silence is observed. One effect, we know, they produce; and we conceive it to be a very pernicious one. Between power and responsibility, they interpose an impenetrable barrier. Who possesses the executive power? The king. When its baneful emanations fly over the land; who are responsible for the mischief? His ministers. Amidst their multitude, and the secrecy, with which business, especially that of a perilous kind, is transacted, it will be often difficult to select the culprits; still more so, to punish them. The criminality will be diffused and blended with so much variety and intricacy, that it will be almost impossible to ascertain to how many it extends, and what particular share should be assigned to each.

. . . .

In the United States, our first executive magistrate is not obnubilated behind the mysterious obscurity of counsellors.

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<sup>111</sup> See 1 Annals, supra note 14, at 480 (remarks of James Madison, June 16, 1789) (“the first Magistrate should be responsible for the executive department; so far therefore as we do not make the officers who are to aid him in the duties of that department responsible to him, he is not responsible to his country.”).

<sup>112</sup> 2 Elliot’s Debates, supra note 11, at 480.

Power is communicated to him with liberality, though with ascertained limitations. To him the provident or improvident use of it is to be ascribed. For the first, he will have and deserve undivided applause. For the last, he will be subjected to censure; if necessary, to punishment. He is the dignified, but accountable magistrate of a free and great people.<sup>113</sup>

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<sup>113</sup> 1 *The Works of James Wilson* 318-19 (Robert G. McCloskey ed., 1967).

