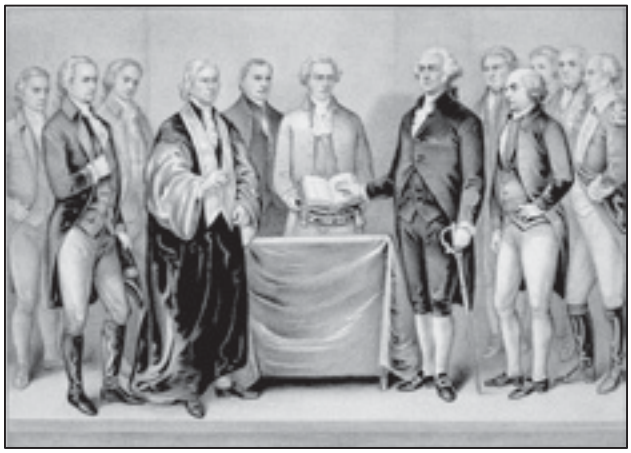
CHAPTER 8

FOLLOWING WASHINGTON'S LEAD:

America's "Georgian" Constitution



THE INAUGURATION OF WASHINGTON (APRIL 30, 1789, AS DEPICTED IN 1876).

As America's first "first man," Washington set precedents from his earliest moments on the job. At his 1789 inauguration he wore civilian garb and swore his oath of office on the Bible. Nothing in the written Constitution specified this protocol, yet later presidents have emulated various elements of Washington's inaugural etiquette and have closely followed many other Washingtonian precedents. Several presidents have even made a point of swearing their oaths on the same Bible that Washington used on April 30, 1789. Note also the foreground presence of two of the four men whom Washington would later bring into his first cabinet—future treasury secretary Alexander Hamilton at the far left and future war secretary Henry Knox at the far right.

Launching America's constitution meant more than simply discussing and approving the text of the Philadelphia plan in the several state conventions. True, Article VII of the plan proclaimed that ratification by these conventions would be "sufficient for the Establishment of this Constitution." Formally, once the state conventions said yes, the deal was done, and it remained merely for all to obey the legally binding words that the American people had approved. But in reality, the Founding process extended past the ratification period. Some patches of constitutional text raised nearly as many questions as they answered. Before these parts of the document could be obeyed, they would need to be clarified and concretized.[1]

We should therefore view the Founding as a two-part drama. First, in 1787–1788, the American people assembled in special conventions to enact—to *activate*—the Philadelphia plan. Next, newly authorized government agents appeared on the scene to reenact—to *act out*—the approved legal text, much as a theatrical troupe might act out a playwright's written script. In this post-1788 process, America's leading man, George Washington, who had waited quietly in the wings during the ratification period, now strode to center stage. During the Constitution's debut, Washington and other actors manifested the meaning of the terse text, deepening the two-dimensional print into a three-dimensional performance that set the standard for later government actors. In short, after the Founders in ratifying conventions took a mere proposal and made it law, the Founders in government took law and made it fact.[2]

Over the ensuing centuries, the constitutional understandings that crystallized during the Washington administration have enjoyed special authority on a wide range of issues, especially those concerning presidential power and presidential etiquette. Much as modern Christians ask themselves, "What would Jesus do?," presidents over the centuries have quite properly asked themselves, "What would President Washington do?" and, even more pointedly, "What did President Washington do?" In the American constitutional tradition, what Washington did—the particular way in

which he handled treaties, conducted foreign affairs, dealt with the Senate, controlled his cabinet, and so on—has often mattered much more than what the written Constitution says, at least in situations where the text is arguably ambiguous and Washington's actions fall within the range of plausible textual meaning.

"Go. Washington—Presidt"

OF ALL THE TEXTUAL UNCERTAINTIES confronting America's first president, none loomed larger than the indeterminacy shrouding his own role in the new constitutional order. The Constitution's text made some things clear. America's chief executive would serve a four-year renewable term; would wield a federal veto pen (subject to override) and a federal pardon pen (except in impeachment cases); would personally oversee high executive officers whom he would handpick (with senatorial support); would make treaties (again, with senatorial involvement); could win reelection independently of Congress; and could be ousted from office only if a House majority and a Senate supermajority found him guilty of gross misconduct. In all these respects, America's president would tower far above a typical state governor circa 1787, yet remain far below England's King George III.

But the text failed to specify exactly how far above and below these distant models Washington should position himself on a variety of executive-power issues as to which the constitutional text was silent or opaque. Most important of all, uncertainty existed early on about whether a president properly had any general executive powers or privileges beyond what was specifically listed in the constitutional text.

The Executive Article (Article II) opened with the following words: "The executive Power shall be vested in a President of the United States of America." This sentence appeared to confer upon the president a general residuum of "executive Power" above and beyond various specific presidential powers and duties itemized a few paragraphs later. Yet ordinary Americans during the ratification period could be forgiven for missing this point. The Legislative Article (Article I) confined Congress to an enumerated list of specified powers, and the Judicial Article (Article III) likewise limited the jurisdiction of federal courts to a textually enumerated

list. Although the Executive Article used subtly different language that seemed to say that its list of specific presidential powers was exemplary rather than exhaustive, it took an eagle eye to spot the textual difference,* and few Americans during the ratification period paid attention to the powerful possibilities coiled within the Executive Article's opening clause. Eager to persuade anxious Anti-Federalists that the Constitution did not squint toward monarchy, leading Federalists, from Hamilton/Publius on down, directed the public's gaze to the limited nature of the specifically enumerated presidential responsibilities.[3]

Faithful constitutionalists seeking to honor the text as originally understood are thus yanked hard in opposite directions. On the one hand, most ratifiers may not have realized that the president would enjoy a residual "executive Power." On the other hand, the people had said yes to a text that seemed to say just that—and surely the public did understand that the Constitution would conjure up a far more muscular executive than anything they had experienced since 1776.

The seeming tension between the text and the public understanding in 1787–1788 invites a closer look at both in the hope of finding some means of reconciliation. Why didn't the text delimit the scope of presidential power more clearly and precisely? And why didn't ratifying conventions pay closer heed to every detail of Article II?

At least three things blunted the edges of the Executive Article and blurred the ratification conversation. First, no ancient or modern model closely prefigured the federal chief executive that the Founders fashioned. British monarchs had ruled by dint of noble birth and claims of divine right; most colonial governors had answered to kings; most post-Independence state governors seemed far too weak; and the presiding officer of the Confederation Congress was likewise a mere shadow of the new presider

* For readers who pride themselves on their eagle eyes: Article I opened with words vesting Congress only with legislative powers specified or implied elsewhere in the document—"herein granted." Article III opened with words vesting federal courts with "the judicial Power of the United States"; and later language in Article III proceeded to itemize all the types of "cases" and "controversies" over which that very same "judicial Power" could properly "extend." Article II, by contrast, opened with words vesting a general "executive Power," and no later Article II clause textually purported to enumerate all the components of this general executive power.

Americans were inventing. Though Americans could agree that their new president needed a very different blend of powers and limits from any previous executive, there remained considerable uncertainty about exactly what mix would be best.[4]

Second, the very nature of presidential power made it hard in 1787—and continues to make it hard today—to fully specify its precise boundaries in all contingencies. In a nutshell, Congress passes laws, authorizes expenditures, organizes itself, polices its own membership, and oversees the other branches via investigations and impeachments, while federal judges decide cases under law and monitor subordinates within the judicial branch. By contrast, presidents perform a far wider range of multifarious tasks. They promulgate interstitial rules, much like legislators. They find facts, construe laws, and apply laws to facts in the first instance, much like judges. But they also do much, much more. For example, they officially propose new legislation and define national reform agendas; they participate in the passage of federal statutes; they pick federal judges; they directly communicate and coordinate action with state governments; they stand atop a vast bureaucratic pyramid, filling and sometimes thinning the ranks of federal executive officialdom; they collect revenues and disburse funds; they manage federal properties; they file and defend lawsuits on behalf of the nation; they prevent, investigate, and prosecute civil and criminal misconduct; they ponder mercy for miscreants; they command armed forces in both war and peace; they respond to large-scale disasters and crises; they direct diplomacy and international espionage; and they personify America on the international stage. Even today, sophisticated commentators often define "executive Power" not affirmatively but residually. On this view, executive power encompasses all proper governmental authority that is neither legislative nor judicial in nature. Whereas legislatures and judiciaries almost always act via standard operating procedures, presidents recurrently need to improvise to handle fast-breaking situations that threaten to upend the entire system (such as the Civil War) or that present unique opportunities to promote the national welfare (such as the Louisiana Purchase). The essence of the presidential office defies easy textual specification, even after two centuries of presidential experience.

Third, even if precise textualization of every aspect of presidential power

had been theoretically possible in 1787–1788, Americans were not designing the office in the abstract. Rather, they were tailoring it for its intended first occupant—George Washington. Without Washington at the helm as America's first president, it was widely believed that even a perfectly designed constitutional ship of state might founder at the launch. Conversely, with Washington in charge at the outset, even an imperfect text might work—so long as the text fit the first "first man" suitably well. An overtextualized Executive Article might not match Washington's precise proportions. Thus Americans undertextualized the presidency, trusting Washington to make sensible adjustments after wearing his custom-made constitutional uniform and testing it against the elements. The textual openness of Article II—the "give" in the garment of executive power—was not a design flaw, but a desired feature.

It is true that nothing in the official constitutional text required that George Washington be America's first president. But without the near-universal understanding that Washington would guide the new ship at the start, the Executive Article would have been drafted in a dramatically different fashion, and perhaps nothing closely resembling the Philadelphia plan would have ever won the express approval of the American people. Washington's indispensability was recognized by both the supporters and the critics of the Philadelphia plan in every state. Fittingly, the attestation section of the ceremonial parchment began with the suggestive signature of the Philadelphia Convention's presiding officer, as follows: "Go. Washington—Presidt." In many a printed version of the proposed Constitution circulating in 1787–1788, this accompanying signature was reformatted to read, "GEORGE WASHINGTON, *President*."[5]

It is also true that nothing in the official constitutional text explicitly delegated authority to George Washington to fill in the blanks of Article II and thereby sharpen the role of all future presidents. But neither did the terse text explicitly prohibit the inference that the framers and ratifiers were deputizing Washington to clarify the Executive Article, subject to the broad advice and consent of the other branches and the American people. Though the Constitution's text does not compel this delegation-to-Washington interpretation, the text permits and even invites this reading for the simple reason that this reading makes sense. It explains the other-

wise puzzling and even dangerous looseness of the Executive Article, and it turns what might otherwise seem an abject failure of draftsmanship and deliberation into something safe and clever.[6]

SEVERAL BASIC FEATURES of America's enduring presidential system have been established less by the Constitution's text than by the gloss on the text provided by President Washington's actions—actions that he initially undertook with scrupulous constitutional consciousness and that ultimately won acceptance from the other branches and the American people.

First, America's presidents today enjoy unilateral power to officially recognize and derecognize foreign governments. In 1979, for example, without any specific preauthorization from Congress as a whole or from the Senate, President Jimmy Carter established normal diplomatic relations with the (Communist) People's Republic of China, formally recognizing that regime as the official sovereign power in China. In the process, Carter cut formal diplomatic ties with the (anti-Communist) Taiwanese government, which had previously been recognized by the U.S. government as the lawful Chinese regime and, indeed, an official American treaty partner.

The text of the Executive Article's list of specific presidential responsibilities can plausibly be stretched to cover the president's powers of recognition and derecognition. In particular, the list declares that the president "shall receive Ambassadors and other public Ministers."

But this patch of text can also be plausibly read far more modestly, as simply providing that foreign diplomats from regimes already recognized by the president and Congress (or alternatively, by the president and the Senate) should as a matter of official protocol and ceremony present their credentials to the president when they arrive on American soil. In *The Federalist* No. 69, Hamilton/Publius described the reception clause as a mere matter of etiquette and convenience, more about "dignity" than "authority"—a rule of minuscule consequence whose main effect would be to avoid the need to summon the legislature or some subpart thereof into special session whenever one diplomat replaced another from a previously recognized foreign regime.

Other language in the Executive Article can be read to suggest a rather

modest vision of presidential power in foreign affairs. Before dispatching an official ambassador to some foreign land, the president must ordinarily win the approval of the Senate: "He [the president] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors." If the president must typically induce the Senate when sending official American diplomats abroad, why may the president ignore the Senate when receiving official foreign diplomats at home? Additionally, the Executive Article provides that no treaty may take effect without a two-thirds Senate vote. If the Senate plays such a prominent role in the making of treaties, why can the Senate be shoved offstage in the breaking of treaties? Also, the written Constitution broadly empowers Congress as a whole to regulate "Commerce"—that is, affairs, transactions, and general intercourse—with "foreign Nations." Why may the president act without congressional preapproval in conducting foreign affairs via diplomatic recognition or derecognition?

A structural argument on behalf of presidential power would emphasize that world events can move at lightning speed and that only the president might be in session when a critical decision must be made. (Unlike members of Congress, the president is always "in session.") Thus, a president who needs to send an ambassador on an emergency mission need not wait for the Senate to convene, thanks to another provision of the Executive Article that explicitly authorizes unilateral "Recess" appointments for temporary periods. Textually, the power to recognize new foreign regimes and to break relations with defunct treaty partners can also be defended as part of the residual "executive Power" vested solely in the president.

Beyond these plausible structural and textual arguments, however, is the strongest legal argument of all: a powerful precedent set by a powerful president. When French revolutionaries seized power and guillotined King Louis XVI on President Washington's watch, a momentous decision had to be made. America could opt to stand by the French monarchy, which had bankrolled the American Revolution and had signed treaties of amity and alliance with the United States in 1778. Alternatively, America could choose to recognize the French revolutionaries as the rightful government of France entitled to all the treaty rights of the prior regime. Or perhaps America could decide to stand aloof from all French factions in the bloody

maelstrom and declare that the old treaties were now entirely void. Under this view, the French revolutionary upstarts had no automatic entitlement to treaty concessions that America had granted only to its original treaty partner, Louis, and his designated successors (starting with his young son, the dauphin Louis XVII). The competing considerations—loyalty to a friendly monarchy, solidarity with fellow revolutionary democrats, and anxiety about being sucked into an increasingly violent vortex—tugged in different directions. A wrong choice could have dreadful consequences. Were the United States to back the losing contestants in the unfolding and unpredictable tumult, the ultimate winners might well seek vengeance against the perfidious Americans.

The crucial point is that after consulting his cabinet, George Washington made the fateful decision himself—in effect, transferring official American recognition from the fallen French monarchy to the reigning French revolutionaries. Far more than any word or phrase in the written text ratified in 1787–1788, this post-1789 precedent established the basic ground rules for all subsequent presidents—for example, Jimmy Carter in 1979—trying to decide whether and how America should cut diplomatic links with displaced sovereigns and/or create diplomatic ties to new regimes.

President Carter's formal recognition of the People's Republic of China came after President Nixon's famous visit to mainland China in 1972, which in turn built on diplomatic foundations laid in 1971, when Nixon secretly sent his envoy Henry Kissinger to Beijing to parley with the Chinese Communists. In this diplomatic episode, we see a second basic feature of modern presidential power traceable back to the Washington administration, namely, the president's unilateral power to communicate, even secretly, with foreign regimes and to negotiate treaties without the Senate's foreknowledge.

Here, too, we can invoke various plausible textual and structural arguments to support presidential power, and here, too, there are plausible textual counterarguments. The matter has been settled beyond all doubt, less by the naked constitutional text than by the actual practice of presidents of all parties, with the repeated backing of Senates and Congresses when presidents have sought formal legal support for previously secret diplomatic initiatives.

Perhaps the most momentous episode occurred when President Jefferson quickly negotiated for the purchase of the Louisiana Territory as soon as this vast tract of land was unexpectedly plopped onto the bargaining table at Paris in the spring of 1803. Had Jefferson delayed negotiations in order to get detailed advice or preapproval from the Senate or House—neither of which was then in session—he would have run the risk that the mercurial Napoleon might change his mind and whisk the land off the table. Instead, Jefferson (via his handpicked diplomats, James Monroe and Robert Livingston) seized the day and closed the deal. When Congress convened in the fall, Jefferson won the support of both two-thirds of the Senate (which formally approved the treaty he had negotiated on his own initiative) and a majority of the House (which later voted, along with the Senate, to provide the legal structure for the new lands and to foot the bill).[7]

This near-doubling of the new nation's landmass, one of the most spectacular diplomatic triumphs in modern world history, followed an established constitutional script. But the script was established less by the debatable text of the written Constitution than by the definitive gloss on that text that Washington had added in the early 1790s, via diplomatic initiatives culminating in the famous Jay Treaty. The process that led to this treaty began when Washington secretly sent an unofficial emissary (Gouverneur Morris) to Britain. Later, the president decided to follow up with a formal diplomatic overture. Although the Senate confirmed Washington's choice of Envoy John Jay, senators did not preapprove the specifics of Jay's official diplomatic mission. Instead, Jay followed Washington's negotiating instructions. Only months after Jay and his English counterparts reached a tentative deal (in November 1794) was the treaty brought before American lawmakers. Eventually, both the Senate and the Congress as a whole endorsed Washington's diplomatic entrepreneurialism—the Senate by approving the Jay Treaty by the requisite two-thirds in June 1795, and the Congress by enacting the necessary implementing legislation and appropriations the following year.[8]

A third and related piece of executive power also settled squarely into place as a result of Washington's conduct in the Jay Treaty. After winning Senate approval for the treaty, Washington reserved the final legal move for

himself. In the end, he alone decided whether to officially ratify the treaty in the name of the nation. Only after he decided to proceed in the wake of the Senate's yes vote did the treaty become legally binding. (Washington also needed to secure British agreement to a modification that the Senate had insisted upon as a condition of giving its advice and consent.) Although the Constitution's text could be parsed different ways on the nice questions of treaty-making raised by the power-sharing between president and Senate, what is constitutionally decisive today is not the pure text, but the institutional gloss that Washington applied to it—a gloss that was accepted then and has been accepted ever since by his countrymen.[9]

A similar story can be told about Washington's famous Neutrality Proclamation of 1793. When word reached America that France and England were officially at war, the Second Congress had just adjourned, and the Third Congress was not due to meet for several months. Washington quickly reviewed the treaties already on the books, consulted his cabinet, and then publicly announced his policy: America would steer a middle course between the belligerents and would not ally with either side. As Washington saw it, neither justice nor the strict language of existing treaties obliged America to join France's international crusade, and America's strategic interests counseled noninterference.

Washington's proclamation carried legal weight. It was not purely an exercise of free expression akin to an Inaugural Address, a State of the Union Message, or a newspaper op-ed. Rather, Washington spoke in the name of the nation, officially proclaiming that no American citizen aiding any belligerent could properly claim to be acting with the approval of the United States. On the contrary, Washington sternly warned that Americans who ran contraband war supplies or otherwise gave military help to any of the warring parties risked being criminally prosecuted or sued civilly for violating international law and breaching the peace. Although Washington did not speak particularly about Congress's constitutional role, nothing that he said denied congressional power to adopt a different policy by later statute if Congress so chose.

Here, then, was another major precedent. Much as the executive power encompassed authority to formally recognize or derecognize foreign regimes, to unilaterally and even secretly negotiate with these regimes, and

to formally ratify treaties with them, so, too, the executive power encompassed authority to construe existing treaties (and international law more generally) in the first instance and to declare formal American neutrality between warring nations. In all these respects, America's presidents would officially propound America's foreign policy and act as the constitutionally authorized organ of communication between America and the world.

ONE ASPECT OF THE NEUTRALITY PROCLAMATION, however, has failed the test of time. Washington suggested that American citizens violating his neutrality policy would be immediately subject to federal prosecution. But the Supreme Court later made clear in a celebrated 1812 case, *United States v. Hudson & Goodwin*, that American presidents (and American judges, for that matter) lack authority to create federal criminal law unilaterally. This ruling accurately reflected the Constitution's grand architecture, which guarantees that ordinarily no person can be convicted of a federal crime unless Congress first defines the crime (and determines the accompanying punishment) with suitable specificity and prospectivity.[10]

Textually, the Legislative Article explicitly authorizes Congress—not the president and not the judiciary—to "define and punish…Offenses against the Law of Nations." In fact, Congress did just that in its Neutrality Act of 1794, which provided the proper legal authorization for the prosecution policy that Washington had prematurely announced in his 1793 proclamation. Thus, the justices got it just right in 1812 when they insisted that "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."[11]

In this landmark Marshall Court ruling, we see the proper limits of America's unwritten Constitution. Where the text and structure of the written document are clear, the written Constitution trumps the unwritten Constitution—even where George Washington is concerned.

"the Heads of Departments"

IN ALL THE WASHINGTON ADMINISTRATION EPISODES just canvassed, the president relied heavily on the advice of an inner circle of top

executive-branch officials. This heavy reliance bids us take a hard look at the president's "cabinet"—a word that nowhere appears in the text of the written Constitution as ratified in 1787–1788, but an entity that has played an important role in America's actual institutional system from 1789 to the present.

Cabinet members are the president's subordinates, and have been so ever since the days of Washington. America's first president leaned on his cabinet precisely because he had reason to trust these confidants. He himself had handpicked this team, per the Constitution's explicit appointments rules. These powerful lieutenants answered directly to him under the Article II opinions clause, which encouraged presidents to require reports from the "principal Officer"—elsewhere described as the "Head[]"—of each executive department. Crucially, these men served at Washington's pleasure; he had the unilateral power to dismiss them at any time for any reason, and he was willing to wield this power. In 1795, within days of receiving intelligence raising grave doubts about the ethical and political fitness of his second secretary of state, Edmund Randolph (whom he had appointed to replace Jefferson), Washington unceremoniously muscled Randolph out of office, who resigned to avoid being fired.[12]

But where did the Constitution give presidents this unilateral, plenary, and instantaneous authority to fire the heads of executive departments? Article II explicitly made the Senate a partner in the hiring of department heads. Arguably, the document implicitly gave the Senate a symmetrical role in the firing of these department heads—a reading that would generally require the president to win senatorial consent before firing any cabinet member. (This was the interpretation offered by Hamilton/Publius in *The Federalist* No. 77.)

However, as soon as Washington took the helm, his supporters in and out of the First Congress (including Hamilton, who on second thought abandoned his earlier interpretation) insisted that the Constitution gave the president a right to fire any executive head in whom the chief executive had lost confidence. After extensive deliberation, the First Congress adopted a series of laws acknowledging this presidential authority in the course of establishing the State Department (originally named the Department of Foreign Affairs), the Department of War, and the Treasury Department.

These landmark statutes specified what should happen whenever the principal officer "shall be removed from office by the President"—phraseology artfully designed not to confer removal power upon the president by legislative grace, but rather to concede and confirm the chief executive's *constitutionally derived* authority to dismiss executive department heads at will. More than anything in the terse text or the popular understandings that had emerged in the ratification process, it was this set of landmark statutes—today often referred to as the "Decision of 1789"—that established the basic rules of executive-branch firing that govern twenty-first-century practice.[13]

Granted, a hardcore textualist can insist—as did many of Washington's supporters in the First Congress, from Madison on down—that the president's plenary authority to dismiss executive-branch underlings was simply one aspect of the president's "executive Power" vested by Article II's opening sentence. But if this sentence alone gave a president power to fire cabinet heads at will, logic would suggest that the opening sentence likewise gave a president power to fire at will all other high-level executive-branch appointees—that is, all top appointed federal officers except judges and other judicial-branch officials. This broader power, however, has not been recognized in American practice over the centuries. In a wide range of high-profile and well-settled areas, statutes have long limited and continue to limit the president's ability to remove nonjudicial officers.

For example, when Barack Obama succeeded George W. Bush in 2009, everyone understood that Bush's treasury secretary, Henry Paulson, would need to leave immediately if the new president wanted to hand the top Treasury spot to someone else. (Obama in fact let Paulson go.) Yet virtually no one thought that Obama could likewise immediately dismiss all of the governors of the Federal Reserve Board, simply because he may have preferred new persons of his own choosing. On the contrary, the statute authorizing the Federal Reserve Board—a statute whose basic framework has been in place for three-quarters of a century—pointedly limits the ability of a new president to sweep the board clean on day one. Thus the Federal Reserve Board and the Treasury are governed by different firing rules. The simple text of the Article II "executive Power" clause cannot easily explain this interesting difference in actual institutional practice.[14]

The best explanation is that in 1789, Congress squarely acknowledged presidential authority to remove certain kinds of executive appointees at will, but made no similar ruling regarding other appointees. This Decision of 1789 has, in effect, glossed the language of Article II as a whole, establishing that *individual department heads*, such as Treasury Secretaries Alexander Hamilton and Henry Paulson, must be subject to unilateral removal whenever the president loses confidence in them for any honest personal or political reason. But this Decision did not cement in place identical removal rules for all other executive appointees. Later Congresses were thus free to enact somewhat different mechanisms of accountability for these other appointees—even important executive-branch appointees such as governors of the Federal Reserve.

There are at least two ways to conceptualize the status of the Federal Reserve in light of the Decision of 1789. On one view, the governors of the Federal Reserve Board are simply not department "Heads," strictly speaking. Unlike the statutory structure establishing regular cabinet departments topped by a one-man decisional "Head" or "principal Officer," the statute creating the Federal Reserve vests legal authority in a multimember body. Thus, the Federal Reserve and certain other nonjudicial agencies whose top governing boards are not removable at will by the president may be seen as "headless" in a certain sense. The point is not that these "headless" agencies live in some mysterious fourth branch of government beyond all presidential supervision and control. Even vis-à-vis these agencies, the president remains the ultimate apex of the executive branch, retaining broad powers of appointment and additional powers of oversight and for-cause removal (as distinct from at-will removal). Rather, these agencies may be viewed as "headless" in a much narrower and more technical sense: Legal power in these agencies generally resides not in a one-man head, but instead in a multimember board or commission.

Tellingly, the written Constitution allows Congress to empower department "Heads"—but no other executive official, except the president himself—to unilaterally appoint lower-level ("inferior") executive officers. Any executive officer who could be entrusted with the honorific authority to name other executive officers had to be removable at will by the president at any time for any honest reason. Or so the First Congress could be

understood as having decided after careful deliberation, and so the text of Article II as a whole could today plausibly be read, thanks to the intertwining of America's written and unwritten Constitution.[15]

An alternative interpretation of Article II as glossed by the Decision of 1789 explains the basic constitutional difference between the Federal Reserve and the Treasury in a slightly different way. Perhaps we should think of the Federal Reserve not as a "headless" department but rather as a "hydra-headed" department—that is, a department headed not by one brain but several coordinate brains. On this view, multibrain hydras qualify as "department heads," and the hydra/commission can therefore be vested with power to pick inferior officers, but the removal rules for hydra-headed departments need not be absolutely identical to the removal rules applicable to one-headed departments.[16]

From this perspective, the Decision of 1789 established that in all one-headed departments, the department head must be removable at will by the president, but this Decision simply did not reach and therefore did not resolve the different set of issues posed by hydra-headed departments. As to these departments, post-1789 presidents and Congresses have in effect decided that the president needs only the power to remove hydra heads *for cause*, rather than *at will*. In sharp contrast to a typical one-man department head who enjoys broad operational freedom within the department, each member of a hydra-headed commission is routinely subject to close monitoring by each other member for possible misconduct. Any commissioner who has concerns about a peer is well positioned to confer with other commissioners and to report these concerns to the president. As a result, the president does not need peremptory power to remove at will in order to assure commission members' due subordination and energetic performance. Removability for cause, supplemented by the additional horizontal monitoring provided by a multimember commission structure, may well suffice, if Congress and the president prefer this alternative accountability structure and embed this alternative structure into a department's enabling statute.[17]

But even if the Decision of 1789 does not require at-will removability for hydra-headed department heads, that Decision did firmly establish that neither Congress as a whole, nor the Senate, nor any subset of these bodies

can participate in any specific removal decision (outside the context of impeachment or legislation subject to presidential presentment). Whatever removal power of executive officers exists—whether the removability is at will or for cause—is ultimately executive power, not legislative or senatorial power, and thus resides solely within the executive branch. That much was settled for good in 1789, even if other elements of the 1789 settlement may plausibly be read in different ways—much as constitutional texts themselves clearly settle some core issues while leaving peripheral issues unsettled and subject to differing plausible interpretations.

Thus, the opening "executive Power" language of Article II was not only clarified and qualified by the textual list of specified presidential powers that appeared later in Article II, but was additionally glossed by the basic settlement achieved between the First Congress and President Washington. Congressman Madison predicted as much to his colleagues in the First Congress even as they were deliberating: "The decision that is at this time made, will become the permanent exposition of the constitution."*[18]

CLOSELY READ, THE ARTICLE II CLAUSE sketching the role of cabinet officers gestured toward a more compartmentalized executive inner circle than what ultimately emerged in practice. Textually, the Constitution provided that "[t]he 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." The word "respective" called to mind an image of a hub-and-spoke organizational chart, with each principal officer/department head reporting directly to the president on all matters concerning his particular executive department, but keeping mum on issues confronting other department heads.

Washington, however, routinely consulted multiple executive heads on a given issue—often in a single conference. Most of Washington's early successors followed this conference practice. Thus a new entity—the "cabi-

* Mid-nineteenth-century congressmen occasionally strayed from the Decision of 1789, especially when confronting ornery presidents from Tennessee named Andrew J____son. But these lapses did little to impair the legal force of the Decision of 1789, which for most of American history has enjoyed and today continues to enjoy a status akin to that of a clear constitutional text. For details, see n. 18.

net," comprising various department heads meeting together—became a notable part of actual institutional practice for much of American history (although today, meetings of the entire cabinet are less common and more ceremonial than in decades past).

Several factors explain the three-dimensional materialization of an institution that is virtually invisible in the Founders' two-dimensional blueprint. First, the real-world policy issues facing Washington often spilled across the formal boundaries separating the various executive departments. For example, the question of whether to have a federal bank surely implicated the Treasury Department, but the question also had foreign-policy aspects (should aliens be allowed to buy shares in the bank?) and raised nice issues of constitutional interpretation (did the federal government have authority to create such an institution?). When obliged to decide whether to sign or veto a bank bill that Congress passed in 1791, Washington ultimately received written opinions from Treasury Secretary Hamilton, Secretary of State Jefferson, and Attorney General Randolph. Many later issues concerning France and England likewise related to multiple departments and thus invited collective conferencing.

Second, the attorney general in some ways operated as an official liaison tying together the formal department heads and also reporting directly to the president. Strictly speaking, the attorney general himself was not a department head because he had no bureaucratic organization beneath him. (Only after the Civil War did Congress create an official executive-branch Department of Justice and thereby elevate the AG to the status of a formal department head.) Nevertheless, the 1789 statute creating the position of attorney general explicitly provided that this officer was duty-bound to provide legal opinions when so requested by the president or by the official department heads. Whether intentionally or not, this statute induced collective executive-branch deliberation, with the attorney general functioning as an interconnecting legal bridge who linked together all top executive officials by answering directly to each department head and also to the president.[19]

Third, the idea of a collective executive council drew strength from traditional practice. English monarchs had long been accustomed to receiving advice from a collective Privy Council, whose precise shape and functions

had varied over time and were continuing to evolve in the Founding era. Executive councils had also featured prominently in the colonies before 1776 and in the independent states thereafter.[20]

Finally, Washington, by temperament and philosophy, was a consensus-seeker. War councils had served him well when he was a battlefield general, and in his vision of public service, patriotic officials of all stripes should ideally converge on nonpartisan solutions when presented with the same facts. Thus, he sought advice from his department heads even on topics beyond the strict boundaries of their respective departmental assignments, and later presidents followed suit.[21]

Although this collective model moved beyond the simple hub-and-spoke image suggested by the spare text of the opinion clause, Washington's practice and that of his successors did not transgress the strict letter of the written Constitution. Necessarily, the opinions clause gave the president some discretion to decide for himself which "Subject[s]" were so closely "relat[ed] to" a given department head's official portfolio as to warrant a formal opinion from that officer. And nothing in this clause or in any other clause barred presidents from seeking advice from various persons outside the official circle of department heads, if presidents deemed these other advisers wise and trustworthy. If a president could request informal advice from non-department-heads—and which president has not done this routinely?—it is hard to see why the president couldn't likewise ask a department head for informal advice on topics beyond that adviser's official bailiwick.[22]

Textual fine points aside, Washington's practice honored the animating spirit of the opinions clause, whose thrust was to concentrate accountability for presidential action on the president himself. No matter how Congress might choose to contour various executive departments and offices beneath the president, the president needed to serve as the legal hub of the executive inner circle and the apex of the executive pyramid. Even if a president chose to consult his department heads en masse, their collective judgment would not thereby trump his own. In sharp contrast to many state governors who constitutionally had to win the votes of council majorities for various proposed gubernatorial initiatives, the president would be his own man. Although the clause invited him to solicit the opinions of

his department heads, it pointedly did not oblige him to do so. (Hence the phrase "the President…may require" rather than "the President…shall require.") Ultimately, the president would oversee lieutenants who answered to him—not vice versa.[23]

This was the big idea behind the opinions clause, which underscored that a president could never claim that his hands were tied because he had been outvoted or overridden by his advisers in a secret conference. In *The Federalist* No. 70, Hamilton/Publius explained that "one 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 a series of pernicious measures[,] ought really to fall." According to Publius, a chief executive in a badly designed council system could always claim, truthfully or not—for the public could never be sure who had done what behind closed doors—that "I was overruled by my council" or that "The council were so divided in their opinions that it was impossible to obtain any better resolution on the point."

Though Publius in this passage did not explicitly quote the opinions clause, his telling use of the word "opinions" drove home the central purpose of this clause: to prevent presidents from evading blame by hiding behind the opinions of advisers meeting in private. As future justice James Iredell stressed with italics in his own ratification-era publication, the opinions clause would fix public attention where it belonged. "The President must be *personally responsible* for everything." In more modern parlance, the buck stops with him.[24]

Nothing in Washington's generous consultative practice violated this core principle, even as it did drift toward a collective model of advice-seeking. Everyone from Washington on down understood that even if he chose to poll various department heads or to confer with them en masse on important issues, and even if he often chose to follow their collective wisdom, he nevertheless remained personally responsible for the final decision. Legally and politically, the buck did indeed stop with him.[25]

"Advice"

TO SOME EXTENT, the cabinet's rise came at the Senate's expense.

Before the American Revolution, the upper legislative chamber in most colonies had officially doubled as the governor's executive council. After 1776, many states had either continued this double-duty system or had created new executive councils composed of select members of the upper house.[26]

As Americans pondered the proposed Constitution in 1787–1788, it seemed natural enough to many ratifiers that U.S. senators would likely play a broadly similar role vis-à-vis the president. After all, the Constitution twice spoke of the Senate as a body that would give the chief executive its "Advice and Consent"—first in the context of making treaties, and second in the context of appointing federal officers. Beyond the consultative ring of this phrase, the brute fact that presidents would ultimately need to secure senatorial approval for various executive initiatives made it plausible to predict that presidents would confer with senators early and often. Also, senators would sit as judges and jurors in any presidential impeachment trial that might occur. A cautious president would thus have yet another reason to invite senators into his confidence at the earliest opportunity: If senators were to informally approve various presidential initiatives as they were occurring, it would be harder for these counselors to later convict the chief executive of misconduct.

George Washington had little to fear from an impeachment court. Nevertheless, his natural inclination toward consultation and consensus-building prompted him to seek the Senate's advice in consiliary fashion early in his administration. In a tragicomic episode whose clumsy choreography ultimately exposed the structural inaptness of the Senate as an ideal executive council, both president and Senate tried to lead the dance, and despite honorable intentions all around, each stepped on the other's toes.

The dance began on a Saturday in August 1789 when Washington went in person to the Senate chamber. He sought the Senate's quick approval of instructions that had been drafted for a team of American negotiators preparing to parley with southern Indian tribes. Many senators, reasonably enough, wanted a little time to ponder the policy issues being presented to

them. Some members felt intimidated by Washington's very presence and were bent on setting a proper precedent of senatorial autonomy. Recording his anxieties in his private journal, Pennsylvania Senator William Maclay worried that if senators said yes to the president too quickly, "we should have these advices and consents ravished, in a degree, from us.…I saw no chance of a fair investigation of subjects while the President of the United States sat there…to support his opinions and overawe the timid and neutral part of the Senate."[27]

As it became clear from the meandering drift of the proceedings that the upper house would postpone the matter until Monday, a visibly impatient Washington voiced his frustration: "*This defeats every purpose of my coming here*!" Regaining his composure, Washington withdrew from the room and politely returned the next Monday, at which time he secured the approval he sought, but only after being obliged to endure hours of tedious talk. According to one account—perhaps too juicy to be true—as Washington left the chamber on Monday he was heard to say that "he would be damned if he ever went there again."[28]

In fact, Washington never again darkened the Senate's door to seek advice or consent in person. Nor did he always solicit the Senate's written advice before making momentous decisions, even decisions (for example, in treaty negotiations) that he knew would later require him to win formal senatorial approval.

The mismatch that first became apparent in August 1789 went far beyond the delicate issues of host-guest etiquette raised by the physical separation of powers between the president's regular place of business and the Senate's. Nor was the mismatch simply a function of the special admiration and fear that Washington inspired by his mere presence in a room. Had these been the only impediments to a close consultative partnership between president and Senate, a frequent practice of written advice-seeking and advice-giving between Washington and the upper chamber should have emerged. It did not. Instead, Washington increasingly turned to his department heads as his sounding board, and Washington's successors have all followed suit. For more than two centuries, America's actual institutional constitution has featured the cabinet and not the Senate as the president's de facto council. (Note that in August 1789, the advice-

hungry Washington did not have the option of seeking counsel from his handpicked department heads, for the simple reason that these heads had yet to be nominated, confirmed, commissioned, and sworn in—a process that would begin a few weeks later.)

With the benefit of hindsight and structural analysis—and with special attention to the ramifications of the Decision of 1789—we can see several reasons for this shift from Senate to cabinet as the president's preferred advisory body. For starters, the Senate was too crowded to facilitate a genuinely intimate conversation. Most colonies had featured councils of twelve members, and virtually all revolutionary state councils were in the same range or smaller. By contrast, when Washington took office he faced a twenty-two-seat Senate, and by the time he left office the upper chamber had swelled to thirty-two seats, with many more future members imaginable on the western horizon in the years to come. After experimenting with different ways of handling the Senate, Washington eventually settled into a practice in which informal exchanges with a handful of trusted senators occasionally substituted for formal consultations with the entire upper chamber.[29]

Whereas senators answered to state legislatures, department heads answered to presidents. This difference had huge implications. Consider, for example, the need for strict confidentiality. An effective presidential advisory body dealing with sensitive issues of diplomacy, appointment policy, and the like will often have to keep a secret. Every member of the advisory body must cooperate: A single leak can sometimes sink a project. Not only was the Senate awkwardly large even in 1789, but each senator ultimately answered to a constituency wholly independent of the president. A leak from a political skeptic of the president might actually enhance the leaker's standing with state legislators back home, even as it compromised the national interest as understood by the president. If a department head spilled a secret, the president could deal with him severely. Thanks to the Decision of 1789, the leaker could be sacked and shamed immediately, and President Washington only had to consult his own conscience. He had no comparable control over a loose-lipped senator.

In early 1792, Secretary of State Jefferson recorded in his diary that "[t]he President had no confidence in the secresy [*sic*] of the Senate." The fol-

lowing February, when Washington asked his cabinet whether he should give senators details of his negotiating strategy vis-à-vis northern Indians, his confidants—composed entirely of Senate confirmees—unanimously advised against an early Senate briefing. According to Jefferson, "We all thought if the Senate should be consulted & consequently apprized of our line, it would become known to Hammond [a British diplomat with ties to the Indians], & we should lose all chance of saving anything more at the treaty than our Ultimatum." After Virginia's senator, Stevens Thomson Mason, violated Senate rules by handing the official text of the Jay Treaty to the press in 1795—and was not even censured by the upper chamber—Washington's early doubts hardened.[30]

Consider also the need for speed. A council works best when its members are physically proximate enough to confer in person or quickly exchange written messages. But senators hoping to be reelected—or merely hoping to explain and defend their political conduct to those who had elected them—needed to spend time in their home states. It would be a genuine political hardship for senators to be required to sit permanently in the national capital as an on-call executive council. By contrast, department heads would naturally need to remain in place to discharge their ordinary executive functions.

Here, too, the Decision of 1789 influenced the incentives. Had Congress in 1789 decided, with Washington's assent, that department heads could be fired only if both the president and the Senate agreed that removal was warranted, each head would have had reason to curry favor with leading senators—perhaps senators from the head's home state, or senators with a special policy interest in his particular department. Department heads in such an alternative universe might even have been tempted to routinely leave the national seat in order to lobby the home legislatures of their senatorial patrons. But in the actual universe created by the Decision of 1789, department heads seeking to keep their jobs have as a rule needed to please the president and only the president—not some prominent senator or some influential state legislature.[31]

Precisely because presidents over the centuries have understood all this, these chief executives have been more willing to confide in department heads than they might otherwise have been. The Decision of 1789 encour-

aged the emergence of a substitute body of counselors—secretaries rather than senators—who would be well positioned to evaluate presidential behavior on an ongoing basis and to sound a public alarm, via mass resignations or some other appropriate act, if a president ever revealed himself to be unfit. Thus, even as the Decision of 1789 strongly reaffirmed the unilateral powers of a unitary executive, Congress also subtly cabined those powers with…a cabinet.[32]

Thanks to the Decision of 1789, fledgling federal institutions sensibly specialized. Senators were freer to periodically return home to reconnect with their constituents, secure in the knowledge that distinguished—senatorially approved!—figures would remain in the capital city to monitor and advise the president during the senatorial recess. Department heads concentrated on administering the government without the temptation to routinely abandon their posts in order to bolster their job security. And each president, beginning with Washington, has been free to confide in a council of genuinely trustworthy advisers while properly remaining personally responsible for various decisions vested by the Constitution and statutes in him and him alone.[33]

THE CONSTITUTION'S GENERALLY TERSE TEXT turns especially terse in Article II. The laconic language governing the presidency can plausibly be read in various ways. But in actual presidential practice over the centuries on a wide range of issues, the written words of Article II have been read in one quite particular way—a way that is consistent with, but by no means compelled by, the plain meaning of the words alone, a way powerfully influenced by the first president's first precedents. To understand the full meaning of Article II over the course of American history, we must read its words through a special set of lenses—the spectacles of George Washington.