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]