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.

(The reason why this flatfooted reading makes no sense is that it would disqualify Smith between T1 and T2, but in this very same time period it would not disqualify ex-senator Smythe, who served alongside Smith in Smith's first term, and who then left the Senate at T1. What sense does it make to treat Smith worse than Smythe? Indeed, Smythe may have voted for the $4,000 increase, whereas Smith may have voted against it. And before T2, nothing in Smith's second term has happened in Congress that seems relevant to the emoluments clause.)

Now consider the emolument clause's final phrase: "during such time." During what time? Under a literal reading, "such time" obviously refers to earlier language, namely, "during the Time for which [Smith] was elected." In Smith's case, this first "during" phrase clearly covers the precise six-year period between T1 and T7. But upon reflection, it cannot be right that the final "during" phrase means the same thing as the opening "during" phrase. Suppose Congress had never raised the AG's salary at Time T2 in Smith's second term. If so, there would have been no problem whatsoever with his appointment at T6—and no need for any sort of Saxbe fix at Time T4. But what if Congress *later* increases the AG's salary on Jones's watch—that is, sometime after T6 but before T7? Surely this increase does not somehow retroactively oust Smith from office. Even though the first "during" phrase covers the entire period from T1 to T7, the second phrase only covers the period until Smith's appointment—T1 to T6. The closing phrase "during such time" cannot sensibly be read to mean the same thing as the opening phrase "during the Time for which [Smith] was elected," even though this might at first seem to be the literal meaning.

Just as other phrases in the emoluments clause—the opening "during" phrase and the closing "during" phrase—must be read with reference to their purpose and spirit, so, too, must the word "encreased" be construed functionally. The Saxbe fix is thus a highly plausible gloss on a genuinely ambiguous text—a classic illustration of how America's written and unwritten Constitutions generally cohere.

CONSIDER, FINALLY, THE ROLE OF various *independent agencies* that have been created over the past century, such as the Federal Trade Commission, the National Labor Relations Board, the Federal Reserve Board, and the Consumer Products Safety Commission. All told, several dozen

such agencies currently exist, making up a substantial portion of the federal government's regulatory apparatus. Many casual observers and even some scholars who should know better have suggested that the very existence of these agencies proves that real institutional practice in America broke free from the written Constitution long ago, and remains as free as ever today. A close look at both the text and the practice suggests otherwise.

The very label "independent agency" can be read in different ways, and some readings lead only to confusion. "Independent" agencies are of course not independent of the Constitution itself. Nor are they independent of the document's tripartite scheme. Constitutionally speaking, they are executive-branch agencies of a certain sort.

True, some of these agencies perform multiple functions—promulgating rules of conduct (as does a legislature), enforcing civil laws and prosecuting violations of criminal statutes (in classic executive fashion), and also performing adjudicatory tasks between government and individuals and sometimes even between private parties (much like a court). But this fact does not suffice to relegate these agencies to some counter-constitutional "fourth branch" outside the written Constitution's three-branch structure. Rather, this mixture of functions places "independent agencies" squarely within the second branch—the executive branch, a branch that has always performed a wide range of tasks. Interstitial rule-making within the bounds of a vague or ambiguous statute is a common executive function, as is applying law in the first instance to specific facts involving specific persons.

The label of independence may also mislead some into thinking that actual agencies either freely float between the Congress and the president or can be statutorily sited anywhere along the continuum between legislature and executive. In fact, these agencies conform to a strict pattern.

Note first how agency officials are *appointed*. The top members of so-called independent agencies are never directly named by Congress or by any subpart thereof. Rather, these officials are invariably appointed by the president, with Senate confirmation, in precisely the manner prescribed by Article II for all high-level executive-department officers. The point is not that Congress has never attempted to overleap these constitutional walls. It has indeed tried—and dramatically failed. For example, in 1974 Congress enacted an intricate federal campaign-finance law and created

a Federal Election Commission, which was vested with the classic executive functions of enforcing the statute and filling in statutory gaps via the promulgation of legally binding rules and regulations. These are precisely the sort of tasks that may be given to executive officers under Article II, yet under the terms of the statute, none of the six voting members of the commission were to be appointed in the constitutionally correct way. Rather, the statute said that two members were to be formally named by a *Senate leader*, two others by *the speaker of the House*, and the final two by the president—with all six members to be confirmed by *both* houses of Congress. When the statute reached the Court, the justices disagreed about several knotty campaign-finance issues raised by the law, but were united in striking down these outlandish appointments rules, which were quickly corrected by new legislation.[56]

Note next how independent-agency officials may be *removed*. Nothing in the written Constitution allows both houses of Congress, acting together without the president, or either house acting alone, or any subset of either house, to remove any executive officer—except, of course, via the impeachment process. Ordinarily, Congress must act by law—via bicameralism and presentment. In perfect harmony with this basic structure, independent-agency officers have never been removable by the legislature alone or by any subpart. Nor has the Senate succeeded in reserving to itself a role alongside the president in making removal decisions. Though the written Constitution might arguably be read to require the Senate to say yes to every ordinary removal, just as the Senate must say yes to every ordinary appointment, this reading was repudiated by the Decision of 1789. Whatever power exists to remove executive officers—including officers of independent agencies—is solely executive power. Nearly all of actual American practice from Washington's era to our own has honored this vision.[57]

In sum, so-called independent agencies are in reality executive agencies. These entities wield executive power. Their high-ranking officials are all appointed by the chief executive in much the same way that various cabinet heads are appointed—a process that ordinarily involves the Senate as well. The top officials of these agencies are removable by the president acting without any legislative involvement, in much the same way that various cabinet heads are removable.[58]

One key difference, however, is that cabinet heads are removable *at will*, whereas independent-agency officials are removable only *for cause*, and are in this sense more independent of the president. This modest form of independence is easy to justify precisely because it does not contravene the written Constitution, which, as we have seen, says nothing explicit about removal (outside of impeachment). Nor does this modest form of independence contravene the Decision of 1789, which only addressed departments akin to the State Department, the War Department, and the Treasury Department—departments with single-heads.[59]

True, we could read the Constitution to imply that all top executive officials must be removable at will. We could further read the document to imply that wherever a statute creates any executive-branch discretion or decisional authority, the president may always substitute his own personal discretion or decision for that of any high-level executive official—even when the statute explicitly vests the discretion or decisional authority in the official and not the president. But this is not a required reading of the text, which qualifies its grant of "executive Power" to the president in a variety of ways. A later clause in the Executive Article says that the president "shall take care that the laws be faithfully executed." This clause does not say that the president shall *personally* execute all the laws. It says that he shall oversee others and take care that the laws "*be* faithfully executed"—by others, who may indeed be vested by necessary and proper congressional statutes with certain discretion or decisional authority in domains where these independent officials possess distinctive expertise or impartiality.[60]

Or so the terse text may plausibly be read. And so government has operated for decades and perhaps centuries. And so the boundaries of presidential power have come to be accepted by a long line of presidents of both parties and all political stripes. And so the text and the practice have actually come to cohere and mutually reinforce.[61]*

Although a president may not dismiss an independent officer at will, he may dismiss any "independent" official who is not faithfully executing the law—anyone who is corrupt, careless, lazy, or lawless, for example.

* Even if the line between cabinet departments and independent agencies was not clearly established in constitutional text prior to 1967, the Twenty-fifth Amendment, which was adopted in that year, constitutionalized this line and thus implicitly endorsed the propriety of independent agencies. For details, see n. 61.

A president may also dismiss an independent official who is insubordinate to the proper role of the president as the superintendent-in-chief of the entire administration and the wielder of a broad set of powers that the Constitution itself vests in the president personally. For example, if a president orders an "independent" prosecutor not to pursue a certain target of investigation, and the prosecutor defies this order, the president could ordinarily nullify the prosecutor's actions by pardoning the target. Given this greater power of pardon, it would seem sensible that a president also has a lesser power of mere non-prosecution. And if, in fact, the president does rightly enjoy a power of non-prosecution—a power vested in him and him alone by the Executive Article itself in a specific clause beyond its opening "executive Power" grant—then any "independent" prosecutor who thumbed his nose at a presidential order to cease prosecution would have overstepped his subordinate authority and committed a removal-worthy act of insubordination. (If the official cannot in good conscience carry out the president's orders, the path of honor is generally not defiance but resignation.)[62]

The casual labels distinguishing cabinet officers from "independent" agency officials should thus not obscure the fact that both sets of officials fall wholly within the executive branch, albeit with varying rules of composition, authority, and removal.

Viewed through the prism of practice, the Constitution allows independent agencies to be created when three factors converge: first, when an executive entity is best headed up by a committee rather than by a single officer; second, when it makes sense to create continuity-enhancing fixed-tenure offices embodying technical expertise or nonpartisanship in a specific policy domain; and third, when an executive agency does not routinely interfere with specific constitutional grants of personal presidential authority, such as the powers to command the military, to personally monitor all cabinet heads, to pardon criminals, to parley with foreign leaders, to make appointments, to define an overall national agenda, and, more generally, to superintend the entire executive branch.[63]

Although the powers vested in independent agencies and the limited removability of these agency officials do constrain presidents, virtually all modern presidents have accepted these constraints. By contrast, many

ecutive departments" for special responsibilities. Unless statutes specify otherwise, these officers initially decide whether a president is so disabled as to warrant his displacement by the vice president. Although section 4 does not speak directly to the issue of whether a president may unilaterally oust all high-level executive-branch officials, it does address a similar—indeed, a symmetric—question: whether high-level executive-branch officials may ever oust the president. And the officials who are specified by section 4 to make this ouster decision are "principal officers of the executive departments"—cabinet heads, and not board members or commissioners of independent agencies. According to the key congressional report, "[o]nly officials of Cabinet rank should participate in the decision as to whether presidential inability exists.…The intent…is that the Presidential appointees who direct the 10 executive departments named in 5 U.S.C. 1[now codified as sect. 101], or any executive department established in the future, generally considered to comprise the President's Cabinet, would participate…in determining inability." H.R. Rep. No. 203, 89-1, 3 (1965).

In essence, this amendment blesses the distinction between cabinet departments and independent agencies—and does so in a way fitting Chapter 8's functional account. Because presidents are responsible for monitoring cabinet officers—monitoring that includes the power of at-will removal—these cabinet officers are symmetrically best positioned to monitor the president for signs of disability. Independent-agency officials are not in the same position to personally monitor the president, and this is precisely because they are not, as a rule, personally monitored by the president. The commissioners of independent agencies monitor and are monitored by each other, rather than monitoring and being monitored by the president in cabinet-style fashion.

62 Cf. Washington, *Writings*, 32:386 (March 13, 1793, letter to William Rawle, a U.S. district attorney, "instruct[ing]" Rawle to cease prosecution of a specified case and "enter a Nolle prose qui on the indictment aforesaid"). See Leonard D. White, *The Federalists: A Study in Administrative History* (1961), 31 n. 15, 408 & n. 10.

63 The specific provisions vesting the president personally with these respective powers are the commander-in-chief clause, the opinions clause, the pardon clause, the ambassador-receiving clause, the appointments clause, the state-of-the-union and recommendation clauses, and the take-care clause. Under this framework, it makes perfect sense that in 1789, the War Department and the State/Foreign Affairs Department were structured as cabinet-style departments directly answerable to the president, and that they have remained so structured ever since. It also makes perfect sense that the attorney general answered directly to the president in 1789 and has done so ever since.

CHAPTER 10: JOINING THE PARTY

1 For the erroneous claim that the written Constitution omits all mention of and/or is hostile to political parties, see, e.g., Samuel Issacharoff and Richard H. Pildes, "Politics as Markets: Partisan Lockups of the Democratic Process," *Stanford LR* 50 (1998): 643,