THE PRESIDENT'S DUTY TO COMMISSION OFFICERS

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ABSTRACT

The Constitution contains an anti-unitary executive provision in the Commission Clause, which says that the President "shall Commission all the Officers of the United States." The import of the Commission Clause is that the President lacks discretion to refuse to provide a commission to an Officer of the United States who has been properly appointed under statutory law and under the Appointments Clause—including by an official other than the President. Because it would be futile for the Constitution to require the President to commission someone whom the President could remove at will, the Commission Clause demonstrates that the Constitution contemplates cases in which the President will lack removal authority. Indeed, the purpose of the Commission Clause is to secure presidential fidelity to congressional choices about the structure of government. The Article supports this conclusion with analysis of the text of the Commission Clause; its place within the Constitution's structure, in particular its relationship to the Take Care Clause; its drafting history; the functional significance of commissions in the early Republic; and judicial precedent, in particular *Marbury v. Madison*. In fact, in *Marbury*, Chief Justice Marshall suggests outright that, if an officer is properly appointed under statutory law and under the Appointments Clause, then for the President "to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused." In addition to refuting the unitary executive theory, the Commission Clause has implications for understanding presidential duties under the Take Care Clause and congressional prerogatives under the Necessary and Proper Clause. The Commission Clause, as interpreted by *Marbury*, demonstrates that Congress can lawfully enlist the assistance of judicial supervision in enforcing at least some presidential duties. At the same time, the content of the President's obligation to take care that the laws be faithfully executed must be filled in by the content of laws that generate presidential obligations.

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> "The distinction between the appointment and the commission will be rendered more apparent, by adverting to that provision in the second section of the second article of the constitution, which authorizes congress 'to vest, by law, the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments;' thus contemplating cases where the law may direct the President to commission an officer appointed by the courts, or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused."
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> – *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 156 (1803)

INTRODUCTION

The debate over the extent of the President's constitutional power to supervise and remove executive officials—in which proponents of the unitary

executive theory[1] have gained significant ground over the last 15 years, particularly since 2020—has neglected one of the most important sources of law on the question. The Constitution's most direct statement about the validity of the unitary executive theory appears in an almost-forgotten provision, the Commission Clause of Article II, Section 3, which says that the President "shall Commission all the Officers of the United States."[2] The Commission Clause is, in effect, an anti-unitary executive provision. The import of the Commission Clause is that the President lacks discretion to refuse to provide a commission to an Officer of the United States who has been properly appointed under the Appointments Clause—including by an official other than the President. Because it would be futile for the Constitution to require the President to commission someone whom the President could remove at will, the Commission Clause demonstrates that the Constitution contemplates cases in which the President will lack removal authority. The Commission Clause thus refutes the unitary executive theory.

If this claim sounds surprising, the surprise would be understandable. The Commission Clause is rarely discussed,[3] and even when it is mentioned it is often treated as a nullity. Very little legal scholarship addresses the Commission Clause.[4] This is perplexing—in part because the Commission Clause played an important role in the seminal case *Marbury v. Madison*[5] and in part because it is the Constitution's clearest statement on the unitary executive theory. In fact, the Commission Clause has received little sustained judicial interpretation since *Marbury*.[6] And even as a recent academic literature has recovered *Marbury* as a source of authority opposing the unitary

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[1] According to the unitary executive theory, the Constitution furnishes the President with a power—albeit one not conferred specifically by the Constitution's text—to remove any subordinate executive official from office. For further explanation, see *infra* notes 14-16 and accompanying text.

[2] U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States"). Some literature refers to the clause as the Commissions Clause (in the plural). This Article refers to the clause as the Commission Clause, using the word that appears in the Constitution.

[3] The overwhelming majority of articles quoting the Commission Clause do so only incidentally, in the course of discussing other provisions of Article II, Section 3.

[4] Even literature that examined the Commission Clause has been more interested in its bearing on the question of who is an "Officer of the United States" than in the significance of the President's commissioning duty. See *infra* notes 93-94.

[5] 5 U.S. (1 Cranch) 137 (1803). *See infra* Section III.D.1.

[6] *See infra* Section III.D.2.

executive theory,[7] this literature has not attended to the principal constitutional provision at issue in *Marbury*, the Commission Clause.

Yet the provision is no mere record-keeping requirement[8] or empty formality. At the time of the Constitution's framing, commissions were important markers of authority.[9] A commission—a document given by the government to its agents—provided evidence that its bearer possessed the authority to act on behalf of the state. This evidence was important in a context with much more severe technological obstacles to communication, where there would often be reasonable doubts about whether someone claiming to act on behalf of the state actually possessed the necessary authority. Without holding a commission, an official might frequently find it difficult to carry out the duties of their office. The Commission Clause is thus a highly consequential bar to a President's attempt to anoint herself the gatekeeper of access to federal executive power—at least in ways beyond the President's enumerated power of appointment (and whatever implicit power of removal derives from it). Indeed, the drafting history of the Commission Clause confirms that its purpose is to obligate the President to respect congressional choices about the appointments process.[10]

This Article's interpretation of the Commission Clause finds support in no less an authority than Chief Justice John Marshall—indeed, in perhaps the most famous case in U.S. constitutional law, *Marbury v. Madison*.[11] While *Marbury* is famous for originating the Supreme Court's authority of constitutional review, it principally involved the interpretation of the Commission Clause. Yet Marshall's interpretation of the Commission Clause has become badly distorted in the intervening centuries. There has been some slippage in interpretation of the Commission Clause from treating it (rightly) as an imposition of a duty to treating it (wrongly) as a grant of a power. Partly as a result, the conventional wisdom about the Commission Clause has come to neglect its importance, leading it to be treated as constitutional surplusage—even though the creation of surplusage is traditionally anathema to constitutional interpretation.[12]

The best interpretation of the Commission Clause is that it imposes a duty on the President to provide a commission to anyone who is an Officer of the

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[7] *See infra* note 99 and accompanying text.

[8] *See infra* note 80 and accompanying text.

[9] *See infra* Section III.B.

[10] *See infra* Section III.C.1.

[11] Some scholars have questioned the wisdom of Chief Justice Marshall's opinion in *Marbury*. *E.g.* Michael Stokes Paulsen, *Marbury's Wrongness*, 20 CONST. COMMENT. 343 (2003). But this is a minority view.

[12] *See infra* notes 78-79 and accompanying text.

United States—and thus to anyone who is properly appointed to an office under the Appointments Clause, including by officials other than the President. This requirement reflects an underlying purpose, confirmed both by the functional importance of commissions in the Founding era and by the drafting history of the Commission Clause, that the President should not be permitted to countermand congressional choices about the structure of government. If Congress chose to vest the appointment of an officer in an official other than the President or to protect the tenure of an executive officer, then the Constitution enjoins the President to respect that congressional choice. Chief Justice Marshall was thus correct to say in *Marbury* that, if an officer is properly appointed under statutory law and under the Appointments Clause, then for the President "to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused."[13]

Not only does the meaning of the Commission Clause refute the unitary executive theory, its relationship to the Take Care Clause has broader implications for constitutional structure. The Commission Clause is appended to the Take Care Clause. In fact, they are two halves of the same clause. The Commission Clause is perhaps best understood as a paradigmatic example of the duty imposed by the Take Care Clause. The Commission Clause reinforces the understanding of the Take Care Clause as (fiduciary) duty-imposing, and it confirms that whatever prerogatives the President possesses under the Take Care Clause are subordinate to Congress's prerogatives under the Necessary and Proper Clause. The Commission Clause—along with the Take Care Clause whose function it typifies—seeks to ensure presidential obedience to legislative governance choices. Moreover, the Commission Clause, as interpreted by *Marbury*, demonstrates that Congress can lawfully enlist the assistance of judicial supervision in enforcing at least some presidential duties. At the same time, the content of the President's obligation to take care that the laws be faithfully executed must be filled in by the content of laws that generate presidential obligations.

The Article proceeds as follows. Part I explains the stakes of the issue, surveying both the scholarly debate on the unitary executive theory and the real-world implications. Next, the Article's argument about the interpretation of the Commission Clause proceeds in two steps. First, in Part II, it argues that the Commission Clause is properly understood as imposing a duty on the President. Second, in Part III it argues that, understanding the Commission Clause as imposing a duty, the only plausible content of that duty is to provide a commission anyone who is an Officer of the United States—and thus to recognize the authority of anyone who is an Officer of the United States to

[13] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 156 (1803).

act on behalf of the United States government, within the officer's domain of authority. To make this case, the Article relies on text, structure, function, drafting history, and Supreme Court precedent. Finally, in Part IV, the Article draws out the implications of correctly understanding the Commission Clause for the scope of the President's removal power, the constitutionality of executive nonenforcement of the law, and the permissibility of judicial injunctions directed at the President.

I. THE UNITARY EXECUTIVE THEORY

A revisionist literature beginning in the 1980s began to interpret Article II as providing for a "unitary executive."[14] By this term, scholars meant that the President must possess the power to control all the activities of the executive branch, lest the structure of government contradict the Constitution's supposed mandate that the President hold "[t]he executive Power."[15] The unitary executive theory gained a foothold at the Supreme Court in 1988, in Justice Scalia's dissenting opinion in *Morison v. Olson*, in which Scalia urged that the Article II Vesting Clause "does not mean *some of* the executive power, but *all of* the executive power."[16]

Defenders of the traditional view that Congress has broad discretion to design agencies and offices, including by insulating them from presidential removal,[17] responded that Congress possesses clear authority to structure the executive branch under the Necessary and Proper Clause[18] and that the structure of Article II provides ample reason to doubt the unitarian conclusion, not least in the Take Care Clause[19] and the Opinion Clause.[20]

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[14] *See, e.g.*, Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

[15] U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

[16] Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

[17] *See* Humphrey's Executor v. United States, 295 U.S. 602 (upholding congressional power to insulate executive officers from removal).

[18] U.S. CONST. art. I, § 8, cl. 18 (granting Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

[19] U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed").

[20] U.S. CONST. art. II, § 2, cl. 1 ("[H]e 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").

Nevertheless, the insurgents won significant ground in the ensuing decades.[21] In *PCAOB v. Free Enterprise Fund*, the Court invented a new (and curiously precise) rule, that Congress may not confer tenure protection on officials at multiple levels of an executive hierarchy.[22] In *Seila Law v. CFPB* and *Collins v. Yellen*, the Court again invented a new and curiously precise rule, that Congress may not confer protection against presidential removal on a single agency head (but only on a members of a multimember commission).[23] These decisions have considerably eroded Congress's power under *Humphrey's Executor* to exercise discretion in structuring the government.

Proponents of the unitary executive theory are correct about one thing: Article II does a lot to centralize appointment power in the presidency. However, they are wrong about the instrument through which Article II pursues this policy and also about its contours. Unitarians recognize the Constitution's commitment to this policy, and on that basis invent a presidential removal power that is absent from the Constitution's text—but the Appointments Clause is the vehicle the Constitution chooses to vindicate this policy.

A. The Scholarly Debate

Proponents of the unitary executive theory—dubbed unitarians in the literature—interpret the Article II Vesting Clause as conferring a set of substantive powers, notably the power to control subordinate executive officials, including by removing them from office.[24] Anti-unitarians appeal to the Necessary and Proper Clause, the Take Care Clause, and the Opinion Clause. Neither side in the debate has appealed to the Commission Clause. In view of the focus of much of the current debate on Founding-era history,[25]

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[21] *See* Patrick J. Sobkowski, *Consistent with the Letter and Spirit:* Seila Law v. Consumer Financial Protection Bureau *and the Future of Presidential Removal Power*, 47 U. DAYTON L. REV. 163 (2022).

[22] Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477 (2010) (holding that multiple layers of for-cause tenure protection in an agency leadership structure violates separation of powers).

[23] Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (2020) (holding that tenure protection for single agency head of CFPB violates separation of powers); Collins v. Yellen, 141 S. Ct. 1761 (2021) (holding that tenure protection for single agency head of FHFC violates separation of powers).

[24] For one criticism of this premise, see David B. Froomkin, *The Vesting Clauses and the Presidential Veto*, available at https://papers.ssrn.com/abstract=4242238.

[25] *See, e.g.*, Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023); Andrea Katz & Noah Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. F. 404 (2023); Aditya Bamzai

the omission of the Commission Clause is particularly striking.

Early refutations of the unitary executive theory took aim at the premise that it is appropriate to read the Article II Vesting Clause as a grant of unenumerated powers,[26] which they referred to as the "Vesting thesis."[27] The Necessary and Proper Clause confers on Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[28] This language explicitly recognizes Congress's power to structure the government, even in ways that govern how laws are to be "carr[ied] into execution" and in ways that regulate "powers vested . . . in any Department or Officer" of the government.[29] Peter Strauss has drawn attention to the language of the Take Care Clause, which suggests that the President does not have the primary responsibility of law execution but at most a secondary responsibility of supervision.[30] The language of the Take Care Clause recognizes that there will be subdivision of executive power. Finally, scholars including Michael Froomkin, Lawrence Lessig, Cass Sunstein, and Peter Strauss have pointed to the Opinion Clause as conclusive evidence that the Article II Vesting Clause cannot have the broad implications imagined by unitarians.[31] If the President had the inherent

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& Saikrishna Bangalore Prakash, *How to Think about the Removal Power*, 110 VA. L. REV. ONLINE 159 (2024). *Cf*. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996).

[26] A. Michael Froomkin, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787, 794 (1987) ("Distinguishing between presidential and executive functions provides a restrained ground for the Court's separation of powers jurisprudence.").

[27] A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994).

[28] U.S. CONST. art. I, § 8, cl. 18.

[29] *Id*.

[30] Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 980 (1997) ("Finally, rather than directing the President (himself) faithfully to execute the laws, it says that 'he shall take Care that the Laws be faithfully executed'—as if to say, executed by those in whom the Senate, as well as he, has expressed its confidence.").

[31] Froomkin, *Agency Autonomy*, *supra* note 26, at 800 ("A broad reading of the take care clause has the effect of reducing this clause [i.e. the Opinion Clause]—which appears among the grant of major presidential powers in section two—to surplusage. If the President has so much control over the executive that he can fire at will, why put the power to request written opinions in the Constitution?"); Larence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 38 (1994) ("But the [Opinion] clause does suggest a serious puzzle for those who believe that the executive power includes an inherent power to direct or

power to fire any subordinate executive official, then the Opinion Clause would be surplusage. The Constitution would not need to confer a presidential power to require heads of department to provide opinions on matters within their authority if the President could demand opinions on pain of termination.

But the unitarians triumphed in the courts. And as the scholarly zeitgeist tends to follow the courts, there has since been a scholarly retreat. Recent scholarship does not question the Vesting thesis. Nevertheless, recent scholarly literature has adduced reasons for doubting the unitary executive theory on its own terms. Julian Mortenson has challenged unitarians' view of the background understanding of the content of "executive power" at the Founding.[32] Jed Shugerman has challenged unitarians' view of the meaning of "vesting" in historical context.[33] These interventions do not challenge the premise that the Vesting Clauses are legally meaningful, but they challenge unitarians' view of the substantive content of the Article II Vesting Clause. Jane Manners, Lev Menand, and Jed Shugerman have also contributed to a scholarly recovery of *Marbury* as powerful evidence that the unitary executive theory lacked a basis in original understanding.[34]

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supervise all administration."); Peter L. Strauss, *On the Difficulties of Generalization:* PCAOB *in the Footsteps of* Myers, Humphrey's Executor, Morrison, and Freytag, 32 CARDOZO L. REV. 2255 (2011) ("The Constitution contains not a word about the President's power to remove any of these officers, once appointed—merely that if Congress wishes to remove an officer, its route is the formal procedure of impeachment. And perhaps the easiest reading of its text is that it establishes a consultative rather than a commanding relationship with government officers outside the nation's military. It makes the President 'Commander in Chief' of the country's armed forces; as to those at the head of the departments Congress may have created to conduct the affairs of domestic government, however, it says only that he may require their 'opinion in writing' about how they will exercise any duties Congress may have assigned them. And, of course, those assignments of duty are a part of the laws whose faithful execution the President is obliged to assure." (footnotes omitted)). *But see* Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647 (1996).

[32] Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019).

[33] Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479 (2022).

[34] Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 (2021); Jed Handelsman Shugerman, *Presidential Removal: The* Marbury *Problem and the Madison Solutions*, 89 FORDHAM L. REV. 2085 (2021). *See also* Froomkin, *New Vestments*, *supra* note 27, at 1356 ("If Chief Justice Marshall had adhered to the Vesting thesis, *Marbury* would not even be a footnote to history, since the Court would have dismissed the case as moot, stating that whether or not Marbury received

B. The Practical Stakes

The rules used to be much clearer. When Congress had legislated to interdict presidential conduct, presidential authority was "at its lowest ebb."[35] Recent cases adopting at least some version of the unitary executive theory have generated tremendous uncertainty about the scope of presidential power. Thus far, the Court has only recognized an inherent presidential power to remove a single head of an agency or department.[36] But the unitarian logic on which these decisions rest could have broader implications. The unitary executive theory suggests that the President is the Executive Branch. The logical implication of the unitary executive theory is that any government structures that insulate the policy of the executive branch from the President's control unconstitutionally dilute the President's executive power.

The expansion of presidential removal power means that the President has a greater capacity to control the operations of government, but there are still limits. The subdivision of executive power—the existence of departments with their own heads who control their distinct operations, including appointments of inferior officers—limits absolute presidential power. The strong version of the unitary executive theory, however, would suggest that the President must be able veto appointments by heads of department of inferior officers.

Because of the Appointments Clause, the President exercises some power over all executive officers, save for the Vice President.[37] Other than the President and the Vice President, every executive officer is appointed either

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his commission was irrelevant, as the President had the vested right to remove him at once."). *See also* Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129 (2022) (demonstrating that original understanding rejected the unitary executive theory).

[35] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (Jackson, J., concurring) (1952).

[36] *See* Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (2020); Collins v. Yellen, 141 S. Ct. 1761 (2021).

[37] The Vice President is also arguably a special case in being both an executive and a legislative officer. Article II, Section 3 implies that the Vice President is an "Officer" of the Senate in saying that "[t]he Vice President of the United States shall be President of the Senate," U.S. CONST. art. I, § 3, cl. 4, and then that "[t]he Senate shall chuse their *other* Officers," U.S. CONST. art. I, § 3, cl. 5 (emphasis added). The Vice President is clearly not a "Member" of the Senate, however, because the Incompatibility Clause makes clear that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. CONST. art. I, § 6, cl. 2.

by the President (the mode of appointment for all principal officers and for some inferior officers) or by a principal officer appointed by the President (the mode of appointment for many inferior officers).

Another recent doctrinal development that shares similar theoretical underpinnings with the rise of the unitary executive theory is the expansion of the category of Officers of the United States for Appointments Clause purposes. The Appointments Clause (implicitly) distinguishes principal officers and inferior officers.[38] While it is fairly clear who is a principal officer for Appointments Clause purposes, the contours of the category of inferior officers are more ambiguous.[39] In *Freytag v. Commissioner of Internal Revenue*, the Court embarked on its current trend of pushing executive officials into the category of Officers of the United States subject to the Appointments Clause.[40] More recently, in *Lucia v. SEC*, the Court extended the category of Officers of the United States to encompass administrative law judges, requiring them to be appointed by a head of department in order to comply with the Appointments Clause.[41]

The expansion of the category of Officers of the United States expands the breadth of presidential control over the executive branch by pushing more officials within one degree of separation from direct presidential control. The removals revolution has expanded presidential control over heads of

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[38] In fact the term "principal Officer" appears in the Opinion Clause, U.S. CONST. art. II, § 1 ("[The President] may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices"). The Appointments Clause refers to "inferior Officers." U.S. CONST. art. II, § 2. This language has come to be understood as contrasting inferior officers with the aforementioned principal officers, although the text of the Appointments Clause on its own is consistent with understanding any officer other than those enumerated in the Appointments Clause—"Ambassadors, other public Ministers and Consuls, [and] Judges of the supreme Court"—as an "inferior Officer." *Supra*.

[39] *See, e.g.*, Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 454 (2018) ("This evidence indicates that the most likely original public meaning of 'officer' is one whom the government entrusts with ongoing responsibility to perform a statutory duty of any level of importance. . . . Under this definition, many employees of the modern administrative state currently considered to hold nonofficer positions should more properly be classified as 'Officers of the United States' subject to Article II."). *Cf.* David B. Froomkin & Eric Eisner, *Officers*, at 50, available at https://papers.ssrn.com/abstract=5029416 (arguing that the current doctrinal approach to the Appointments Clause errs by authorizing courts, rather than Congress, to determine which executive officials fall in the category of inferior officers).

[40] Freytag v. Commissioner of Internal Revenue, 501 U.S. 868 (1991).

[41] Lucia v. Securities and Exchange Commission, 585 U.S. 237 (2018).

departments, and the trend in Appointments Clause doctrine subjects more officials to control by heads of departments. Against the backdrop of the policy of centralization promoted by recent cases pushing executive officials into the category of Officers of the United States and attenuating tenure protections, recovering the limit on presidential control of the executive branch implied by the President's duty to commission officers could establish an important constraint on presidential power. Constitutional doctrine forcing executive officials into the category of inferior officers makes limits on the President's power to control the appointments of inferior officers all the more meaningful.

C. The Commission Clause

Very little scholarship addresses the Commission Clause. It typically appears in law review articles as an afterthought, mentioned alongside the other provisions of Article II, Section 3, without receiving any discussion. Insofar as scholarship has engaged substantively with the Commission Clause, it has featured more substantially in the debate over the boundaries of the category of "Officers of the United States" than in consideration of the extent of presidential control over the executive branch. In particular, Seth Barrett Tillman has argued that the language of the Commission Clause suggests that the President is not an Officer of the United States.[42] But the implications of the Commission Clause for that debate are tangential to its primary significance, which concerns the internal structure of the executive branch.

Although the Commission Clause might appear prima facie to be favorable to the unitary executive theory—after all, the Commission Clause uses the magic word "all" in providing for the President to commission "all the Officers of the United States"[43]—closer inspection reveals difficulties. Accepting the unitary executive theory requires an interpreter to interpret the Commission Clause as being trivial. Michael McConnell provides an archetypical example of the difficulties that unitarians encounter in trying to make sense of the Commission Clause. Because McConnell has assumed the correctness of the unitary executive theory, he is forced to treat the

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[42] *See, e.g.*, Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1, 16 (2008). *Cf.* Froomkin & Eisner, *supra* note 39, at 15-16 (contesting Tillman's conclusion on the grounds that the President does not need a commission from the President to dispel doubts about the President's authority to act on behalf of the government).

[43] U.S. CONST. art. II, § 3.

Commission Clause as surplusage. McConnell writes,

> The Commissioning Clause is the hardest [of the Article II, Section 3 provisions] to understand. It is cast as a duty. Indeed, in *Marbury v. Madison*, the Supreme Court deemed commissioning a 'ministerial' duty, meaning one that involves no discretion, making it the only nondiscretionary function in Article II. (Other duties, such as the duty to receive ambassadors or to give information on the state of the union, require the exercise of judgment as to when and how they are to be performed.) That alone makes the Clause an anomaly. Why elevate to constitutional status a ministerial duty that could be performed by a mere functionary? Even more perplexing, the Clause seems empty, possibly pointless, with respect to the commissioning of all but a few officers. Article II, Section 2 states that after nomination and Senate confirmation, the next step is for the President to 'appoint' the officer. Despite the verb 'shall,' the appointment authority is understood to be a discretionary act, meaning that the President is free, even after Senate confirmation, to refuse to complete the appointment. Why, then, does a separate provision in a different section of Article II impose a duty on the President to 'Commission' that officer? What does the act of "appointing" consist of, other than commissioning? And for officers subject to presidential removal—which, contrary to current Supreme Court precedent, should include all executive branch officers with significant discretionary power—what does the commission signify, other than a piece of paper to hang on the wall, since the President can fire the officer as soon as the commission has been delivered?[44]

In other words, McConnell recognizes that the Commission Clause imposes a duty upon the President—indeed, a "ministerial" duty that denies the President any discretion—yet is forced to regard the content of that duty as nugatory because of McConnell's unitarian premise that "the President can fire the officer as soon as the commission has been delivered."[45]

It is noteworthy that McConnell has already decided, before encountering the Commission Clause, that the Constitution confers substantial removal power on the President and on this basis encounters the Commission Clause with puzzlement. The Commission Clause appears to constrain the President's discretion over executive appointments, undermining the view that the "executive power" ostensibly conferred by the Article II Vesting Clause encompasses an inherent and indefeasible power to remove

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[44] MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 270-71 (2020).

[45] *Id.* at 271.

subordinate executive officials from office. Embracing the unitary executive theory thus necessitates minimizing the import of the Commission Clause, as McConnell's text illustrates. Yet an important principle of constitutional interpretation, the rule against surplusage, establishes a strong presumption against interpreting a constitutional provision as being of no consequence.[46] A more judicious way of reading Article II would be to read all of its provisions, not least the Commission Clause, and then to consider whether they can be reconciled with an unfettered presidential removal power.

McConnell should be commended, however, for acknowledging his puzzlement. More commonly, unitarians have simply ignored the Commission Clause. (Of course, so too have their opponents.)

II. THE COMMISSION CLAUSE AS A DUTY

The Commission Clause reads: "[The President] shall Commission all the Officers of the United States."[47] This text permits two possible readings.

(1) *The power reading*: Someone is only an Officer of the United States when the President commissions them.
(2) *The duty reading*: If someone is an Officer of the United States, then the President is not allowed to deny them a commission.

In other words, is the President's granting of a commission a condition for someone's becoming an officer, or does being an officer entitle one to a presidential commission? This Part offers four reasons for understanding the Commission Clause as imposing a duty:

1. The Commission Clause uses the language of obligation.
2. The placement of the Commission Clause in Article II, Section 3, alongside other presidential duties, suggests that its purpose is to impose a duty.
3. The connection between the Take Care Clause and the Commission Clause suggests that its purpose is to impose a duty.
4. The statement of law implied by the power reading of the Commission Clause is false.

The power reading of the Commission Clause disserves its text, its placement, and its function.

That the Commission Clause imposes a duty is clear, first and foremost,

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[46] See infra note 78 and accompanying text.

[47] U.S. CONST. art. II, § 3.

from its text. The Commission Clause uses the language of duty—"shall."[48] Typically the word "shall" indicates a mandatory provision: the word "shall" directs an official to perform an action. On the basis of the text, Lessig and Sunstein characterize the Commission Clause as "requiring the President to commission officers."[49] Many constitutional scholars have concurred with this understanding.[50] To be sure, using the word "shall" is not dispositive evidence of a mandatory provision. Sometimes the Constitution uses the word "shall" in conditional constructions, as in Article I, Section 7, Clause

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[48] *See* Bethany R. Pickett, *Will the Real Lawmakers Please Stand Up: Congressional Standing in Instances of Presidential Nonenforcement*, 110 NW. U. L. REV. 439, 445 (2016) ("[T]he Take Care Clause expressly states that the President 'shall'—not may—'take Care that the Laws be faithfully executed,' imposing a duty upon the Executive, which the Supreme Court has affirmed."). *But see* Robert G. Natelson, *The Original Meaning of the Constitution's "Executive Vesting Clause"—Evidence from Eighteenth-Century Drafting Practice*, 31 WHITTIER L. REV. 1, 30 (2009) (asserting, without elaboration, that the Commission Clause is "phrased as [a] grant").

[49] Lessig & Sunstein, *supra* note 31, at 13. *See also id.* at 62 (contrasting "something the President may choose to do" with "something that he 'shall' do").

[50] David Hunter Miller, *Some Legal Aspects of the Visit of President Wilson to Paris*, 36 HARV. L. REV. 51, 57 (1922) (citing the Commission Clause as the sole "possible exception" to the general rule that the President's constitutional powers "require inherently and essentially the exercise of executive discretion"); Jacques B. LeBoeuf, *Limitations on the Use of Appropriations Riders by Congress to Effectuate Substantive Policy Changes*, 19 HASTINGS CONST. L.Q. 457, 463 (1992) (characterizing "the duty to commission federal officers" under the Commission Clause as one of the President's "immutable duties . . . explicitly mandated by the Constitution," in contrast to "prerogatives" and "mutable duties"); Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 762 (1999) (characterizing as one of the President's "affirmative duties" the instruction to "commission all federal officers"); Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 386 n.40 (2005) ("the President is constitutionally obligated to commission all the officers of the United States"); Seth Barrett Tillman, *Originalism and the Scope of the Constitution's Disqualification Clause*, 33 QUINNIPIAC L. REV. 59, 126 n.112 (2014) (interpreting the Commission Clause as "direct[ing] the President" and imposing a "duty"); Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 221 (2015) (interpreting the Commission Clause to mean that "[t]he President has an obligation to commission officers for whatever positions Congress creates"); Ilan Wurman, *The Removal Power: A Critical Guide*, 2020 CATO SUP. CT. REV. 157, 202 (2020) ("[T]he clause respecting commissioning officers . . . serves to clarify a presidential duty where power is otherwise shared with the Senate.").

2.[51] But the Commission Clause does not use the word "shall" in this conditional way. Unlike in Article I, Section 7, Clause 2, the Commission Clause contains no consequence that follows from the existence of a condition.

The structure of Article II also supports the conclusion that the Commission Clause imposes a duty. The Commission Clause appears in Article II, Section 3, which concerns presidential duties (in contrast to Article II, Section 2, which concerns presidential powers).[52] The sole exception to

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[51] U.S. CONST. art. I, § 7, cl. 2 ("If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him . . .").

[52] *See* Bethany R. Pickett, *Will the Real Lawmakers Please Stand Up: Congressional Standing in Instances of Presidential Nonenforcement*, 110 NW. U. L. REV. 439, 444–45 (2016) ("The location of the Take Care Clause in Section 3, instead of Section 2, of Article II of the Constitution is evidence that the clause imposes a duty upon the President and does not simply give the President an additional grant of power. Section 2 states that the President 'shall have Power' and then lists several powers unique to the President. Section 3, however, does not mention the word 'power,' but rather lists several duties. In three of the four Clauses in Section 3, the Framers listed the duties of the President, enumerating that the President 'shall' give to Congress 'Information of the State of the Union,' 'shall receive Ambassadors and other public Ministers,' 'shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.' In only one instance in Section 3 does the text not impose a duty, stating the President's prerogative that in 'extraordinary Occasions' the President 'may' convene both houses of Congress.[19] The Framers thus distinguished between the President's duties and the President's prerogative by using contrasting language like 'shall' and 'may' within the same Section. Nevertheless, the Take Care Clause expressly states that the President 'shall'—not may—'take Care that the Laws be faithfully executed,' imposing a duty upon the Executive, which the Supreme Court has affirmed." (footnotes omitted) (citing *Morrison v. Olson*, *Myers v. United States*, and *Little v. Barreme* for the proposition that the Supreme Court has recognized the Take Care Clause as imposing a duty)); Gary Lawson, *Everything I Need to Know about Presidents I Learned from Dr. Seuss*, 24 HARV. J. L. & PUB. POL'Y 381, 383 (2001) (recognizing that the Commission Clause, in keeping with the other provisions of Article II, Section 3 imposing "responsibilities," assigns the President the "duty to commission officers"); Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 33 (2006) ("Although the word 'shall' can sometimes signify a grant of power, the context of at least the last two of these provisions [of Article II, Section 3] suggests the imposition of duties more naturally than it does the grant of powers. That is clearest in the case of the Take Care Clause. English monarchs had occasionally claimed the power to suspend laws by refusing to enforce them. It thus makes very good sense for a presidential power of law execution granted by the Vesting Clause to be cabined by the Take Care Clause—the President does not have absolute discretion with respect to law execution but

this general rule is the third clause of Article II, Section 3, which also departs from the section's typical practice in using the word "may."[53] Michael McConnell argues that the Convening and Adjourning powers of the third clause were placed in Section 3 rather than Section 2 "because they were intended to serve a housekeeping function rather than to impart significant political power."[54] The third clause also differs from the other clauses of Article II, Section 3 in including conditions.[55] Moreover, the Commission Clause is appended to the Take Care Clause; they are in fact the same clause—or the Commission Clause is a subset of the Take Care Clause. And the Take Care Clause is the most important imposition of a presidential duty—the ur-duty.

The connection of the Commission Clause to the Take Care Clause is

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must exercise that power faithfully. The Take Care Clause thus neatly eliminates any possible presidential claim to a royal power of suspension. The Commissions Clause similarly reads most naturally as a duty—as a certain Secretary of State and would-be Justice of the Peace once taught us." (footnote omitted)); Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 96 (2020) ("Article II, Section 3, then seems to involve the president's duties and relationship to Congress."); Ilan Wurman, *The Removal Power: A Critical Guide*, 2019-2020 CATO SUP. CT. REV. 157, 159 (2019) ("The president then has a series of duties, mostly to Congress").

[53] U.S. CONST. art. II, § 3, cl. 3 ("he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper").

[54] MCCONNELL, *supra* note 44, at 268 ("It appears that these powers were not located among the prerogative powers of Section 2 because they were intended to serve a housekeeping function rather than to impart significant political power. Locating these powers in Section 3 rather than in Section 2 underscores that status.").

[55] Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 221 (2015) ("Fourth, 'on extraordinary Occasions,' the President 'may'—not must—'adjourn' or 'convene' Congress. Indeed, so as not to unduly infringe on the separation of powers, the Framers limited that responsibility to circumstances where the President 'shall think [it] proper,' rather than at his whim." (footnotes omitted)).

highly instructive. Article II, Section 3[56] separates four clauses[57] with semicolons: (1) the President's information and recommendation duties; (2) the President's convening and adjourning powers (conceptually linked to the preceding);[58] (3) the President's duty to receive foreign dignitaries; and (4) the President's Take Care duty, along with the duty to commission Officers of the United States. Whereas Article II, Section 3 generally demarcates distinct duties with semicolons, it joins the Take Care Clause and the Commission Clause with a comma.[59] If a semicolon implies a stronger distinction than a comma, then it is reasonable to regard the Take Care Clause and the Commission Clause as closely connected in function.[60]

The structure of the fourth clause of Article II, Section 3 mirrors that of the first clause: "he shall [A], and [B]." The first clause reads: "He shall from

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[56] U.S. CONST. art. II, § 3 ("He [i.e. the President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.").

[57] *See* Pickett, *supra* note 52, at 444 (observing that Article II, Section 3 contains four Clauses). *But see* MCCONNELL, *supra* note 44, at 263 ("Section 3 has only one clause, but that clause includes five or six separate powers. . . . Most of these are framed as duties."); *id*. at 267 ("Section 3 comprises five unnumbered clauses, separated by commas or semi-colons.").

[58] *See* MCCONNELL, *supra* note 44, at 268 ("The Information and Recommendation Clause and the Convening and Adjournment Clause of Section 3 thus form a single unit.").

[59] *See* David S. Yellin, *The Elements of Constitutional Style: A Comprehensive Analysis of Punctuation in the Constitution*, 79 TENN. L. REV. 687, 726 (2012) (citing the Take Care Clause and Commission Clause together as an example of the constitutional style rule that "[s]entences generally require a comma, or a pause, where there is a connective particle, or a word, introducing a new member, which may be separated from the preceding part").

[60] *See* Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 344 (2002) ("The semicolon is used instead of the period to separate short independent clauses that are closely connected in purpose and meaning . . . in Article II, Section 3. . . . Article II, Section 3 uses the semicolon three times within the same paragraph to append closely connected independent clauses defining the contours of the President's executive power."). *But see id*. at 348 (noting that the divergent uses of the same punctuation in the Constitution "caution us against placing too much reliance on fine points of punctuation in constitutional interpretation").

time to time give to the Congress Information of the State of the Union, and recommend to their consideration such Measures as he shall judge necessary and expedient."[61] The first clause thus imposes two closely connected presidential duties, a duty to provide information to Congress about "the State of the Union" and a duty to recommend "necessary and expedient" measures for congressional consideration. The fourth clause reads: "he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."[62] By analogy to the first clause, the fourth clause might be understood as imposing two conjoined duties: exercising fidelity to congressional choices and commissioning officers of the United States. Perhaps it might be objected that the word "shall" appears twice in the fourth clause (unlike in the first clause), which might suggest two separate clauses. But because of the placement of semicolons, there is still a structural homology between the first and fourth clauses of Article II, Section 3, suggesting a closer connection between the Take Care Clause and the Commission Clause than between either of those clauses and the other presidential duties imposed by Article II, Section 3.

Additionally, there is a strong substantive connection between the two halves of the fourth clause. The connection between the Commission Clause and the Take Care Clause suggests that the purpose of the Commission Clause is to bind the President to law. The Take Care Clause instructs that the President "take Care that the Laws be faithfully executed,"[63] and the Commission Clause provides an illustrative example: by providing commissions to Officers of the United States. McConnell is thus mistaken to say that the duty "to take care that the laws be faithfully executed" and the duty "to commission all the officers of the United States"—which he treats as separate clauses—"deal with unrelated areas."[64] McConnell appreciates the important implications of understanding the Take Care Clause as imposing a duty, but he does not apply the same logic to the Commission Clause, even though he recognizes that it similarly imposes a duty.[65]

The interpretation of the Commission Clause supplied by the power reading is also false, as an independent matter. According to the power reading of the Commission Clause, receiving a presidential commission is a condition for becoming an Officer of the United States, and thus the President has the power to prevent someone from becoming an Officer of the United

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[61] U.S. CONST. art. II, § 3.

[62] *Id*.

[63] *Id.*

[64] MCCONNELL, *supra* note 44, at 269.

[65] *Id*., at 269 (observing, "The Commissioning Clause is the hardest to understand.").

States by denying them a commission. But someone can be an Officer of the United States without receiving a presidential commission. Two clear examples are the President and the Vice President. Both are Officers of the United States, and both are entitled to hold office even in the absence of a presidential commission.[66] If the President neglected or declined to issue a commission to the President or the Vice President, no one would doubt either's entitlement to serve as an Officer of the United States. This evidence is sufficient to prove that one can be an Officer of the United States without the President's grant of a commission. Because the interpretation of the Commission Clause supplied by the power reading is incorrect as a general rule, we cannot infer that other Officers of the United States require a presidential commission as a condition for their holding office. One does not need a commission to be an Officer of the United States; rather, being an Officer of the United States entitles one to a commission.

This conclusion fits with the meaning of commissioning at the time of the adoption of the Commission Clause. To commission an officer meant to give recognition of the officer's status,[67] not to appoint the officer. The Constitution clearly distinguishes the general procedure for appointing officers[68] from the President's conferral of commissions.[69] Judicial doctrine since *Marbury* has recognized this distinction.[70] The commission was only "evidence of an appointment,"[71] rather than constitutive of the appointment.

In fact, Article II, Section 2 does confer a presidential power to commission officers—but a power with a much narrower scope than that of the general duty to commission imposed by Article II, Section 3. Whereas the President's duty to commission officers applies to "all the Officers of the

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[66] *See* Froomkin & Eisner, *supra* note 39. *Cf*. Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 159 n.24 (1995) ("The failure to commission the President and the Vice President would on this reading be deemed an oversight."); *id*. at 161 n.33 ("Presidential practice with respect to issuing commissions is highly unreliable for purposes of determining who qualifies as an 'Officer of the United States.' To paraphrase the Book of Common Prayer, the President has commissioned those whom he ought not to have commissioned and has left uncommissioned those whom he ought to have commissioned."); Steven G. Calabresi, *Does the Incompatibility Clause Apply to the President?*, 157 U. PA. L. REV. PENNUMBRA 141, 145 ("There is simply no need for a signed commission to prove that Presidents and Vice Presidents have been invested with power while there is often such a need as to lesser officials.").

[67] *See infra* text accompanying notes 83-87.

[68] U.S. CONST. art. II, § 2, cl. 2 (Appointments Clause).

[69] U.S. CONST. art. II, § 3 (Commission Clause).

[70] *See infra* Part III.D.

[71] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 157 (1803).

United States,"[72] the Recess Appointments Clause of Article II, Section 2 confers upon the President a "Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[73] This presidential function, explicitly recognized as a "Power," is tightly constrained: the President may only issue a commission under the Recess Appointments Clause to fill a vacancy, and the commission only lasts until the end of the Senate's next session.

The contrast between the language of power in the Recess Appointments Clause and the language of duty in the Commission Clause could not be clearer. The Recess Appointments Clause explicitly confers a "Power," whereas the Commission Clause, as already discussed, uses language typically associated with the imposition of a duty. The Recess Appointments Clause appears among a list of presidential powers in Article II, Section 2, whereas the Commission Clause appears among a list of presidential duties in Article II, Section 3. These differences underscore that the role of the Commission Clause is precisely to distinguish the general presidential obligation to confer commissions upon Officers from the specific presidential power to grant temporary commissions.

Importantly, the Recess Appointment Clause also imposes constraints on the President's power to issue time-limited commissions. Article II thus makes clear that the only way in which an officer may be entitled to receive a presidential commission outside of the ordinary process prescribed by the Appointments Clause is in the case of a recess of the Senate. In this case, and this case alone, the President may complete the process of appointment by granting a commission. And in the case of a recess appointment, the President must comply with the rules prescribed by the Recess Appointments Clause, by issuing a commission with a specified expiration: the temporary commission "shall expire at the End of [the Senate's] next Session."[74] The President lacks discretion to choose the duration of the recess appointment, possessing only the discretion about whether and of whom to make the recess appointment.[75] In contrast to this carefully limited exception, the Constitution's general rule is that commissioning is a presidential duty distinct from and subsequent to an officer's appointment.

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[72] U.S. CONST. art. II, § 3.

[73] U.S. CONST. art. II, § 2.

[74] U.S. CONST. art. II, § 2, cl. 3.

[75] Even this discretion is substantially constrained under NLRB v. Noel Canning, 573 U.S. 513 (2014) (holding that the Senate has the power to decide when it is in recess).

III. THE CONTENT OF THE DUTY TO COMMISSION

The previous Part argued that the Commission Clause is properly understood as imposing a duty on the President. This Part explains the content of that duty. The import of the Commission Clause is that the President lacks discretion to refuse to provide a commission to an Officer of the United States who was properly appointed under the law and under the Appointments Clause. This Part defends and elaborates on that interpretation on the basis of four types of evidence: the formal properties of the Clause, the functional significance of the Clause, the Clause's history, and legal precedent interpreting the Clause.

A. Form

This section provides three reasons from text and structure to interpret the Commission Clause as denying the President the discretion to refuse to confer a commission on any Officer of the United States:

1. Assuming the Commission Clause imposes a duty, the clause's plain meaning is that if someone is an Officer, then the President must commission them.
2. The connection between the Commission Clause and the Take Care Clause reinforces this interpretation.
3. This interpretation of the Commission Clause rescues it from becoming constitutional surplusage.

The Commission Clause reads, "[the President] shall Commission all the Officers of the United States."[76] The previous Part argued that this provision is properly understood as imposing a duty on the President. If the purpose of the Commission Clause is to impose a duty, then the only plausible construction of that duty is as denying the President discretion to deny a commission to someone if that person is an Officer of the United States. If someone is an Officer of the United States, the Commission Clause says, then the President must give that person a commission.

The Commission Clause is appended to the Take Care Clause, which instructs the President to "take Care that the Laws be faithfully executed."[77] The preceding Part argued that the textual and structural connection between the Take Care Clause and the Commission Clause suggests a relationship between the content of the two clauses. In fact, they are two sub-clauses of the same clause—or perhaps the Commission Clause is best understood as a

[76] U.S. CONST. art. II, § 3.

[77] *Id.*

sub-clause of the overarching Take Care Clause. The content of each clause is therefore valuable evidence in ascertaining the meaning of the other.

Indeed, the Commission Clause provides an illustrative—and paradigmatic—example of the content of the President's duty to take care that the laws be faithfully executed. It is paradigmatic because by far the most consequential of the President's powers, at least in the domestic sphere, is the appointment power (along with whatever removal power derives from it). What Article II, Section 2 gives, Article II, Section 3 constricts: although the President possesses much of the appointment power (subject to Senate advice and consent and congressional discretion to lodge the appointment of inferior officers in heads of departments), the President does not possess the authority to dislodge or to undermine Congress's choices about how to exercise its lawful discretion, under the Appointments Clause and the Necessary and Proper Clause, in structuring the government. The Commission Clause dispels any doubt that the President must respect those congressional choices. The Commission Clause thus provides one particularly significant example of the President's general duty of faithful execution.

The rule against surplusage says that one should interpret a legal text so as not to render any provision a nullity.[78] This principle is particularly apposite in constitutional interpretation, as the Constitution is a short, programmatic document—one that does not contain "the prolixity of a legal code."[79] Yet the conventional wisdom about the Commission Clause is that it is effectively a nullity: either trivial, formal, or symbolic.[80] This

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[78] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012) ("If possible, every word and every provision is to be given effect (*verba effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."); WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 112-13 ("Because courts try to give every word and every provision of a statute a legal effect, it is a cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant or meaningless. This anti-redundancy canon is usually called the rule against surplusage." (internal quotations marks omitted)). *See also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.").

[79] McCullough v. Maryland, 17 U.S. 316, 407 (1819). *See also* Zivotofsky v. Kerry (reasoning that the President's power to receive foreign ambassadors, U.S. CONST. art. II, § 3, must have some consequence, by virtue of its inclusion in a scant list of presidential powers).

[80] *See, e.g.*, Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 13-14 (1974) ("I would class as trivial,

conventional wisdom disserves the deserved weight of a document that establishes, with impressively economical text, the powers and duties of a supreme federal government.[81] It also contradicts the accepted principle that a constitutional provision should be interpreted, as much as possible, as having some meaningful purpose.[82] The conventional wisdom thus provides an infelicitous construction of the Commission Clause. And the structural and historical evidence identified by this Article provides strong grounds for overturning the conventional wisdom.

B. Function

The meaning of a "commission" in historical context provides further evidence of the significance of the Commission Clause as a constraint on the President. Saikrishna Prakash understands the primary importance of the commission as evidence of the appointment.[83] Lessig and Sunstein make the same observation.[84] Indeed, the word "commission" as a verb meant "authorize" or "recognize the authority of," just as a "commission" was a document reflecting the bearer's authority to act on behalf of a principal.[85] But this alone does not explain why the Constitution imposes a presidential

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if not altogether insubstantial, . . . his formal duty to commission all the officers of the United States."); Saikrishna Bangalore Prakash, *The Appointment and Removal of William J. Marbury and When an Office Vests*, 89 NOTRE DAME L. REV. 199, 241 (2013) ("The Constitution obliges the President to commission officers. In *Marbury*, Marshall claimed that transmission of the commission to the appointee was not required by the Constitution or by law. If the Commissions Clause never requires delivery of a commission to an appointee, it does no more than establish a record-keeping requirement, one satisfied by a ledger with a list of appointees."); Thomas H. Lee, *University Dons and Warrior Chieftains: Two Concepts of Diversity*, 72 FORDHAM L. REV. 2301, 2330 (2004) ("As a mark of their importance to the nation, all commissioned officers have their commissions signed by the President of the United States." (citing the Commission Clause)).

[81] As Chief Justice Marshall reminded, "we must never forget that it is a *constitution* we are expounding." McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

[82] *See supra* note 78.

[83] Prakash, *supra* note 80, at 248.

[84] Lessig & Sunstein, *supra* note 31, at 57 n.232 ("The commission was just the evidence of the appointment.").

[85] *See, e.g.*, 1 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 (1911) (indicating contemporaneous usage of the term to refer to the authority of delegates to the Constitutional Convention to act on behalf of their states). *See also* Calabresi, *Incompatibility Clause*, *supra* note 66, at 145 ("The verb [*sic.*] commission has long been used to refer to a document that empowers some official to act.").

duty to commission officers. If the issuance of a commission were merely "a record-keeping requirement,"[86] then its inclusion alongside other important presidential duties like the Take Care Clause and the President's obligation to provide information to Congress would be mysterious. Understanding the function of commissions—particularly in historical context—shows the Commission Clause to be far from trivial.

Historically, commissions were important to executive officials because they provided evidence that the official was authorized to speak on behalf of the government. Government officials are employed to perform functions that frequently bring them into conflict with individual members of the polity, functions such as law enforcement, tax collection, and regulatory inspection. In order to be effective in performing these tasks, officials depend on either polity members' voluntary compliance or the backing of state force—and polity members are more likely to comply when they can anticipate a penalty for refusing to do so. Making clear that an official is operating with the backing of state force, then, is likely to make it considerably easier for the official to do their job.

Technological developments since the Founding era have made it relatively easy, today, to determine whether someone claiming to act on behalf of the government possesses the authority to do so. In the Founding era, however, there were no telephones or computers. Consulting Washington, D.C. to ascertain the authority of an official typically would have been prohibitively time-consuming. Commissions solved this problem.[87] Commissions enabled federal officials to secure compliance with their enforcement activity by obviating doubt about their authority to act on behalf of the federal government, with the backing of federal power.

Modern thinking about the Commission Clause (to the extent it takes place at all) has gone astray because it neglects the distinct challenges faced by enforcers of federal law in the early Republic. Whatever the validity of originalism as a proposition about legality, understanding the conditions at the time of the Constitution's enactment can provide a helpful corrective to the blinders that presentism can impose. Frequently it turns out that present

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[86] Prakash, *supra* note 80, at 241.

[87] *See* Seth Barrett Tillman, *The Puzzle of Hamilton's Federalist No. 77*, 33 HARV. J.L. & PUB. POL'Y 149, 160–61 (2010) ("From this standpoint, one can see the key function played by the Commissions Clause under the original Constitution and in the early republic. When one officer *displaced* another, he tendered his commission to the outgoing officer as evidence of the subsequent *appointment*. Tender or notice effectuated the removal, and if any third party were in doubt about who was the proper officer, he need only look to the date on the two competing commissions. As the commissions emanated from equal authorities, the last-in-time controlled." (footnotes omitted)).

understandings were not always regnant—and new understandings may similarly arise to displace them. In the case of the Commission Clause, it has become more difficult to understand its purpose in an environment in which there is less occasion for doubt about officials' authority. Yet it was important at the time of the Constitution's enactment to make provisions for dispelling the very real doubts that were likely to arise in different technological circumstances.

The Commission Clause, therefore, makes clear that the President lacks the authority to deny that duly appointed officials have the authority to act on behalf of the federal government. An Officer of the United States, if validly appointed under statutory law and under the Appointments Clause, is entitled to exercise the authority of the United States, within their assigned domain of competence, and the Commission Clause forbids the President from denying the valid authority of other executive officials. By the same token, the President cannot have an unfettered power to decommission officers, or else that would defeat any import of the duty to commission. The Commission Clause would hardly be a meaningful provision if it required the President to grant a commission that the President could immediately rescind.

Under what circumstances could the President's commissioning duty become relevant? Asking this question is a way of getting at why the Constitution would need to impose the duty. If the President had already appointed an officer, there would be no need to mandate that the President provide the officer a commission; the President would have every incentive to do so. The duty to commission, then, only matters in situations where the President did not appoint the officer who stands to receive the commission. There are at least two such situations: (1) when an inferior officer is properly appointed by a Court of Law or a Head of Department pursuant to the Appointments Clause; (2) when an officer was appointed for a term of years and hence with tenure protection.

First, the Constitution expressly recognizes that some "inferior Officers" will be appointed by executive agents other than the President (i.e. by Heads of Departments), and it requires that the President respect these appointments. The President lacks the discretion to deny a commission to an inferior officer validly appointed by a principal officer.[88] If an inferior officer is properly

[88] *See* McConnell, *supra* note 44, at 272 ("To be sure, under the final Constitution, some appointments are made by entities other than the President. Congress names its own officers, such as the sergeant of arms, and Article II, Section 2 allows Congress to empower heads of departments and the courts of law to appoint inferior officers. The President should not be able to countermand such appointments by refusing them a commission."). *But see id*. ("This explanation, however, is more theoretical than real. In practice, Presidents have never commissioned officers outside of the executive branch whose appointments are

appointed under the law and under the Appointments Clause, then the President has a duty to commission them. Chief Justice Marshall recognized this purpose of the Commission Clause in *Marbury v. Madison*.[89]

Second, the Constitution might recognize that some officers will remain in office beyond the term of the President who appointed them, and it reinforces Congress's prerogative to grant such officers tenure protection by requiring a succeeding President to respect their appointment. If the officer was properly appointed under the law and under the Appointments Clause, then the President has a duty to recognize their authority.[90] Personnel in independent agencies are also commissioned by the President. (Indeed, perhaps serendipitously, many independent agencies are called "commissions.") Under the Commission Clause, the President must respect the status of officers in independent agencies as officers of the United States, even if they were appointed by a previous President.

C. History

The drafting history of the Commission Clause provides further evidence that its function is to impose a duty of fidelity on the President, as does some early legislative practice. Historical neglect of the duty imposed by the Commission Clause does not change its legal import.

1. Drafting History

The drafting history of the Commission Clause confirms that its purpose is to constrain the President's discretion with respect to executive appointments. The original draft of the Constitution conferred on Congress most of the appointment power, such that the purpose of the Commission Clause was to obligate the President to be faithful to the congressional choice. The draft of the Constitution reported by the Committee on Detail to the Convention on August 6, 1787 read, "The Senate of the United States shall have power . . . to appoint Ambassadors, and Judges of the Supreme Court. . . . [The President] shall commission all the officers of the United States; and shall appoint officers in all cases not otherwise provided for by

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made by others. That leaves appointments by heads of departments. It is highly unlikely—though not impossible—that a President would wish to deny a commission to the appointee of his own appointee. But in the unlikely event of such an occurrence, one might think the President should get his way.").

[89] *See infra* Part II.D.1.

[90] Chief Justice Marshall also recognized this implicitly in *Marbury*. *See infra* Part II.D.1.

this Constitution."[91] In this scheme, the obligation of the President to "commission all the officers of the United States" underscored the President's duty of fidelity to the appointments made by Congress. The President's duty to commission officers prohibited the President from denying or countermanding congressional appointments.[92]

This function of the Commission Clause still makes sense in a context in which appointments are made not by Congress directly but by agents of Congress at the direction of Congress. The version of the Constitution that the Convention ultimately adopted included a different version of the Appointments Clause, one lodging principal appointment authority of executive officers in the President (albeit subject to Senate advice and consent). Nevertheless, the adopted version of the Appointments Clause preserves congressional power to lodge appointment authority of inferior officers in heads of departments. The function of the Commission Clause remains the same as in the original draft, even though the appointment power is now divided between the President and department heads rather than lodged in Congress directly.

2. Historical Practice

The duty imposed by the Commission Clause has not always been scrupulously observed.[93] Seth Barrett Tillman has observed that Presidents have never commissioned themselves or the Vice President.[94] Steven Calabresi notes other possible instance in which officers of the United States

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[91] JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 385 (Ohio Univ. Press ed., 1966)).

[92] *See* MCCONNELL, *supra* note 44, at 271 ("This explains why commissioning was distinct from appointing and why commissioning had to be a duty: the President should not be permitted to use his Commissioning Power as a back-door means of thwarting the appointment powers of the Senate or the Congress.").

[93] *See* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 9.7(d) (5th ed. 2017) ("Section 3 says that the President *shall* commission, but in practice the President is considered to have discretion over the power to commission and not to be obligated by the Constitution." (citing EDWARD S. CORWIN, THE PRESIDENT 78 (Rev. 4th ed. 1957)).

[94] *See* Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL'Y 1, 16 (2009) ("Simply put, that is not the practice and never has been the practice."). Tillman believes the reason for this practice is that the President and Vice President are not Officers of the United States, but the evidence cuts against that conclusion. *See* Froomkin & Eisner, *supra* note 39.

have not received presidential commissions.[95] If the President has not always commissioned every officer of the United States, this hardly changes the import of the Commission Clause. Presidents may simply have failed to perform a constitutional duty.[96] Alternatively, one might think that a President has not failed to fulfill their constitutional duty by not providing a paper commission to an officer in a situation where there would be no doubt about that officer's authority. The point of having a commission, after all, is to dispel doubt about the authority of the officer to act on behalf of the government. No one would doubt the authority of a duly elected President to act on behalf of the government.

The First Congress, moreover, seems to have considered it to be within its authority to require the President to commission officers who had been duly appointed. A 1789 statute provided: "The President shall nominate, and by and with the advice and consent of the Senate, shall appoint all officers which by the said ordinance were to have been appointed by the United States in Congress assembled, and all officers so appointed shall be commissioned by him; and in all cases where the United States in Congress assembled, might, by the said ordinance, revoke any commission or remove from any office, the President is hereby declared to have the same powers of revocation and removal."[97] Congress clearly understood commissioning to be a distinct matter from appointment and from removal. The language of the statute made mandatory the granting of the commission, but it conferred discretionary powers of appointment and of removal.

D. Precedent

The Commission Clause lay at the center of *Marbury v. Madison*, yet it has received little discussion in subsequent cases from the Supreme Court. It has been mentioned with slightly more frequency in recent years by some justices, writing in their individual capacity, who often evince fundamental misunderstanding of the Clause.[98] It is therefore worth dwelling at some length on what *Marbury* said about the President's duty to commission officers.

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[95] Calabresi, *Political Question*, *supra* note 66, at 161 n. 33 ("Inferior federal executive and judicial officers should probably be considered 'Officers of the United States' for purposes of this analysis, even though in many instances they do not receive presidential commissions.").

[96] *See id*. at 159 n.24.

[97] An Act to provide for the Government of the Territory Northwest of the river Ohio, chapter 8, 1 Stat. 50, 53 (August 7, 1789).

[98] *See infra* notes 148-152 and accompanying text.

1. *Marbury v. Madison*

There has been a scholarly recovery of *Marbury* in recent literature challenging the originalist credentials of the *Myers* rule that a President by default possesses an unfettered power to remove executive officials.[99] These authors correctly note that *Marbury* makes no sense if the President possesses an unfettered power of removal. *Marbury* concerned a President's refusal to tender a commission to a duly appointed officer of the United States, and the Court determined that the President had a duty to tender the commission. Marbury did not have a statutory tenure protection but rather was appointed to an office for a term of years. Under *Myers*, Marbury would have been removable at will, since Congress would have had to specify a tenure protection in order to override the default rule that officers serve at the discretion of the President. Yet *Marbury* regarded the statutory specification of a term of years as sufficient grounds to obviate any presidential removal power. Manners, Menand, and Shugerman, therefore, regard *Marbury* as powerful evidence of the poor originalist credentials of the *Myers* rule. Despite returning to *Marbury*, however, the revivalists do not address the Commission Clause. Yet the Commission Clause was the reason Marbury had a case.

The *Marbury v. Madison* litigation arose because the newly-inaugurated President Thomas Jefferson, via Secretary of State James Madison, refused to tender a commission to John Marbury, who had been appointed a justice of the peace in Washington, D.C. Marbury had been appointed by outgoing President John Adams, and Marbury's appointment had been confirmed by the Senate, but outgoing Secretary of State John Marshall had not managed to deliver Marbury's commission before Jefferson's inauguration. Marbury sued, arguing that he had a right to the delivery of his commission. He located this entitlement in the Commission Clause.

Resolution of the first question presented in *Marbury*—"Has the

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[99] Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 (2021); Jed Handelsman Shugerman, *Presidential Removal: The* Marbury *Problem and the Madison Solutions*, 89 FORDHAM L. REV. 2085 (2021). *See also* Froomkin, *New Vestments*, *supra* note 27, at 1356 ("If Chief Justice Marshall had adhered to the Vesting thesis, *Marbury* would not even be a footnote to history, since the Court would have dismissed the case as moot, stating that whether or not Marbury received his commission was irrelevant, as the President had the vested right to remove him at once.").

applicant a right to the commission he demands?"[100]—thus turned on the interpretation of the Commission Clause. Chief Justice Marshall, writing for the Court, definitively endorsed the duty interpretation of the Commission Clause: if Marbury had been properly appointed, then the Commission Clause entitled him to a commission from the President. The reasoning required to reach this conclusion centered on the distinction between appointment and commissioning. At the core of Marshall's analysis lay "the constitutional distinction between the appointment to an office and the commission of an officer, who has been appointed."[101] Marshall made clear that the presidential conferral of a commission did not constitute the act of appointment but merely provided evidence of the appointment. Marshall concluded that Marbury had been properly appointed, the delivery of his commission not being constitutive of the appointment, and thus recognized the President's obligation under the Commission Clause to grant Marbury his commission.[102]

Marshall's analysis in reaching this conclusion is instructive. Marshall began by observing that if an official was properly appointed to an office for a term of years, then the President was not entitled to remove the official from office.[103] Thus, the central question to be considered was whether Marbury was properly appointed.

Marshall then turned to the question of whether an officer could be properly appointed before the receipt of a commission—in other words whether commissioning was a requisite for appointment. He began this

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[100] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 154 (1803).

[101] *Marbury*, 5 U.S. at 156.

[102] *Marbury*, 5 U.S. at 162 ("To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.").

[103] *Marbury*, at 155 ("In order to determine whether he is entitled to this commission, it becomes necessary to enquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property."). *See also id*. at 151 ("The justices of the peace in the district of Columbia are judicial officers, and hold their office for five years. . . . They hold their offices independent of the will of the President. The appointment of such an officer is complete when the President has nominated him to the senate, and the senate have advised and consented, and the President has signed the commission and delivered it to the secretary to be sealed. The President has then done with it; it becomes irrevocable. An appointment of a judge once completed, is made forever. He holds under the constitution. The requisites to be performed by the secretary are ministerial, ascertained by law, and he has no discretion, but must perform them; there is no dispensing power. In contemplation of law they are as if done.").

analysis with the text of the Commission Clause.[104] Marshall interpreted the text of the Commission Clause in the same manner as this Article has interpreted it, as imposing a "duty"—"enjoined by the constitution"—on the President "[t]o grant a commission to a person appointed."[105] In other words, Marshall concluded on the basis of the text of the Commission Clause that if an appointment had been legally completed, then the President would have a constitutional duty to tender the commission to the officer who had been appointed.

Marshall then bolstered this analysis by considering the purpose of the Commission Clause. He interpreted the function of the Commission Clause as reflecting the multiple possible avenues for appointment among which Congress could select under the Appointments Clause.[106] Marshall suggested that the reason for the inclusion of the Commission Clause in the Constitution is to dispel any doubt about whether the President must respect an appointment by an official other than the President. The Commission Clause instructs the President, when an officer is properly appointed under the Appointments Clause by an official other than the President, to commission the appointed officer. "In such a case," Marshall concluded, "to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused."[107] According to Lessig and Sunstein, summarizing *Marbury*, "Marshall says these are distinct powers, because the 'Heads of Departments' clause makes it possible that someone could be appointed whom the President would not want appointed. Nonetheless, the Commission Clause requires him to commission this unwanted officer."[108]

Marshall rejected the idea that arguments from practice could supersede

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[104] *Marbury*, 5 U.S. at 155 ("The third section [of Article II of the Constitution] declares, that 'he shall commission all the officers of the United States.'").

[105] *Marbury*, 5 U.S. at 156 ("To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the constitution. 'He shall,' says that instrument, 'commission all the officers of the United States.'").

[106] *Marbury*, 5 U.S. at 156 ("The distinction between the appointment and the commission will be rendered more apparent, by adverting to that provision in the second section of the second article of the constitution, which authorizes congress "to vest, by law, the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments;" thus contemplating cases where the law may direct the President to commission an officer appointed by the courts, or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused.").

[107] *Id.*

[108] Lessig & Sunstein, *supra* note 31, at 37 n.170.

the Constitution's clear textual instruction.[109] Even if the commissioning duty had not always been followed, Marshall observed, it remained obligatory. Moreover, Marshall regarded the Commission Clause as a basis for congressional authority to require presidential compliance with statutory mandates about appointments.[110] In other words, Marshall recognized that the Commission Clause posed an obstacle to a President's attempt to claim constitutional authority to defy a statutory scheme that attenuated the President's appointment power, at least in ways consistent with the requirements of the Appointments Clause.

Next Marshall considered whether the delivery of a commission could be a requisite for the completion of an appointment, the central question on which the determination of the substantive issue in the case depended. If Marbury's appointment was properly completed even in the absence of his receipt of a commission, then the delivery of his commission would be obligatory under the Commission Clause. While Marshall recognized that, when an official is to be appointed by the President with the advice and consent of the Senate, a presidential act is required to complete the appointment, [111] he distinguished the completion of the appointment from the conferral of the commission. On the specific facts of *Marbury*, however, Marshall recognized the difficulty of extricating the commission from the appointment:

> This is an appointment made by the President, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case therefore the commission and the appointment seem inseparable; it being almost impossible to shew an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment; though conclusive evidence of it.[112]

Yet Marshall insisted that the act of appointment and the act of commissioning are, in principle, distinct. In *Marbury*, the signing of Marbury's commission was the only evidence of the completion of his appointment. Nevertheless, Marshall reminded, "It follows too, from the

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[109] *Marbury*, 5 U.S. at 156 ("Although that clause of the constitution which requires the President to commission all the officers of the United States, may never have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases.").

[110] *See id.*

[111] *Id*. at 157 ("Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised.").

[112] *Id*., at 157.

existence of this distinction [between appointment and commissioning], that, if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the President, would either give him a right to his commission, or enable him to perform the duties without it."[113]

As a legal matter, "this power has been exercised when the last act, required from the person possessing the power, has been performed."[114] On the facts of *Marbury*, Marshall observed, "This last act is the signature of the commission."[115] Marshall made clear that the President's signing of an officer's commission was conclusive evidence of the President's appointment of the officer. But just because the President's power of appointment conclusively has been exercised at the point at which the President signs a commission does not mean that the power of appointment has not been exercised before the President signs the commission. Marshall repeated that "the commission . . . is conclusive evidence that the appointment is made."[116] Marshall affirmed again and again, throughout *Marbury*, that the commission provides evidence of the appointment rather than constituting the appointment. He was at pains to reject "the supposition that the commission is not merely *evidence* of an appointment, but is itself the actual appointment."[117]

To be sure, *Marbury* at times proceeds on the assumption—*arguendo*—that the President's signing of a commission is a step in the appointments process, along with the President's nomination, the Senate's advice and consent, and the President's appointment.[118] Marshall's opinion proceeded this way to make even clearer that a commission, once signed by the President, must be delivered to an appointee. But Marshall left no ambiguity about whether the issuance of a commission was a requisite for the completion of an appointment. Although the issuance of a commission was "conclusive evidence" of the appointment, an appointment could be completed through other means. On the facts of *Marbury*, the conclusive evidence was the signing of the commission. But some other "public act"

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[113] *Marbury*, 5 U.S. at 156.

[114] *Id*. at 157.

[115] *Id*.

[116] *Id.*, at 158.

[117] *Id*., at 159.

[118] *E.g. id.* at 157 ("Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still it would be made when the last act to be done by the President was performed, or, at furthest, when the commission was complete.").

could just as well serve as sufficient evidence of the appointment.[119] In other words, Marshall concluded that commissioning was not necessary to complete an appointment.

Finally, Marshall underscored the important relationship between the Commission Clause and the scope of the presidential removal power. Marshall made clear that a President may revoke the commission of an officer who is subject to presidential removal.[120] In this case, an officer who had been properly removed by the President would no longer be entitled to a commission, because it would be improper to represent to the world that the officer was entitled to act on behalf of the United States. Yet, in the same breath, Marshall made clear that a President may not revoke the commission of an officer who is not subject to presidential removal.[121] Sai Prakash suggests that Jefferson believed that he had the power to remove Marbury.[122] The Court disagreed.

It happened in *Marbury* that the President had signed Marbury's commission. Thus, the Court only had to reach a decision about the obligation of the Executive to transmit to a properly-appointed officer an already-signed commission. The Court did not confront the question of the entitlement of a properly-appointed officer to a commission that the President had not yet signed. But the same result would follow from the Commission Clause, under *Marbury*'s reasoning, if the President had not yet signed a commission. If the commissioning of an officer is constitutionally distinct from the appointment of an officer and an officer is entitled to a commission under the Commission Clause "when the constitutional power of appointment has been

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[119] *Marbury*, 5 U.S. at 156: "It follows too, from the existence of this distinction, that, if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the President, would either give him a right to his commission, or enable him to perform the duties without it."

[120] *Id.*, at 162 ("Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office.").

[121] *Marbury*, 5 U.S. at 162 ("But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed. . . . Mr. Marbury, then, since his commission was signed by the President, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of this country.").

[122] Saikrishna Bangalore Prakash, *The Appointment and Removal of William J. Marbury and When an Office Vests*, 89 NOTRE DAME L. REV. 199 (2013).

exercised,"[123] then a President is obliged to tender a commission to an officer who has been properly appointed, even if the commissioning process has not yet begun.

Marbury's interpretation of the Commission Clause is binding precedent, not merely in dicta, because the Court's interpretation of the Commission Clause was necessary to reach the Court's disposition of the case. The Court only reached the question of the constitutionality of the Judiciary Act of 1789, on which the resolution of the case ultimately turned, because it had interpreted the Commission Clause in such a way that it required the delivery of Marbury's commission. Although the modern approach would probably be to confront the question of subject matter jurisdiction first, the *Marbury* Court reasoned—reasonably—that there would be no need to take the awesome step of invalidating a federal statute if Marbury lacked a valid claim on the merits. Under *Marbury*'s approach, there would be no need to inquire into the judicial power to grant a remedy if there were no right at issue.

If cases after *Marbury* understood the commission to be part of the appointment, then they misunderstood *Marbury*. Cases occasionally speak as if the President's signing of a commission is a requisite for an appointment[124]—likely misled by *Marbury*'s imprecise language in places suggesting that the President's signing of a commission is a step in the appointments process.[125] At the same time, courts have followed *Marbury*'s holding that an appointee is entitled to a commission once the steps of the appointments process have been completed.[126] Michael Stokes Paulsen suggests that Marbury did not need to sue for his commission if he was

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[123] *Marbury*, 5 U.S. at 157.

[124] *E.g.* United States v. Le Baron, 60 U.S. 73, 78 (1856) ("When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete.").

[125] *Marbury*, 5 U.S. at 151 ("The appointment of such an officer is complete when the President has nominated him to the senate, and the senate have advised and consented, and the President has signed the commission and delivered it to the secretary to be sealed. The President has then done with it; it becomes irrevocable.").

[126] *See Le Baron*, 60 U.S. at 79 ("It is of no importance that the person commissioned must give a bond and take an oath, before he possesses the office under the commission; nor that it is the duty of the Postmaster General to transmit the commission to the officer when he shall have done so. These are acts of third persons. The President has previously acted to the full extent which he is required or enabled by the Constitution and laws to act in appointing and commissioning the officer; and to the benefit of that complete action the officer is entitled, when he fulfils the conditions on his part, imposed by law.").

already properly appointed.[127] But even if someone was already an officer of the United States as a legal matter, possessing a commission was still important to demonstrate one's status to the world. Despite the rightfulness of Marbury's legal claim, he had suffered a genuine injury as a result of Jefferson's refusal to provide him his commission.

2. Subsequent Cases

Very few opinions of the Supreme Court since *Marbury* have interpreted the Commission Clause. One case mentioning the Commission Clause was *Myers v. United States*, and as to the Commission Clause the Court reaffirmed *Marbury*'s understanding—despite departing from *Marbury* substantially in other respects. Even as *Myers* impugned *Marbury*'s precedential value in other respects,[128] it accepted *Marbury*'s understanding of the Commission Clause. The *Myers* Court mentioned the Commission Clause, but only as incidental to the Take Care Clause. Justice Brandeis noted in dissent, "The provision that the President 'shall Commission all the Officers of the United States' clearly bears no such implication [of a presidential removal power]."[129] Brandeis, along with Holmes and McReynolds, regarded the Take Care Clause as the issue of contention.

The *Myers* Court recognized that *Marbury* had held "that the commission was only evidence of the appointment."[130] Consequently, a proper appointment entitled the appointee to conferral of a commission.[131] According to the majority, "It would seem that this conclusion applied, under the reasoning of the opinion, whether the officer was removable by the President or not, if in fact the President had not removed him."[132] *Myers* also

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[127] Michael Stokes Paulsen, *Marbury's Wrongness*, 20 CONST. COMMENT. 343, 345 (2003) ("If an appointment is complete upon signing by the President (for the life of me I cannot figure out what possible constitutional significance affixing the seal of the United States might have), then delivery is utterly immaterial. If that is the case, then Marbury had no real beef with Madison in the first place. He was legally appointed the nanosecond that President Adams signed the commission. He did not need to sue for delivery of the commission. All he needed to do was ride to the tailor, order a nice robe made, and walk into the courthouse and start deciding cases.").

[128] *Myers*, 272 U.S. at 140 ("The court had therefore nothing before it calling for a judgment upon the merits of the question of issuing the mandamus.").

[129] Myers v. United States, 272 U.S. 52, 246 (1926) (Brandeis, J., dissenting).

[130] Myers v. United States, 272 U.S. 52, 140 (1926).

[131] *See id.* (observing that "the occupant was thereafter entitled to the evidence of his appointment in the form of the commission").

[132] *Myers*, 272 U.S. at 141.

observed, "But the [*Marbury*] opinion assumed that in the case of a removable office the writ would fail on the presumption that there was in such a case discretion of the appointing power to withhold the commission."[133] This too was consistent with *Marbury*.[134] *Myers* says that where the President has removal power, removal does not contradict the President's duties under Article II, Section 3. It does not say that the Commission Clause expands the President's removal power—and in fact, as this Article explains, the Commission Clause has the opposite implication.

Another Supreme Court opinion, which did more to cast doubt on *Marbury*'s reasoning about the Commission Clause, albeit in passing, was *Cunningham, v. Neagle*, which seemingly treated the Commission Clause as conferring upon the President an affirmative power to commission officers.[135] *Neagle* mentions the Commission Clause only in the most cursory way and provides no analysis. This *Neagle* dicta is inconsistent with the reasoning of *Marbury*[136] and with the most plausible reading of the Commission Clause.[137] In essence, *Neagle* gets the relationship between the Commission Clause and the Take Care Clause backward: rather than providing the means of carrying out the duty, the Commission Clause is illustrative—indeed emblematic—of the duty. In any case, *Neagle* provides no reasoning to support its interpretation, which after all only appears glancingly.

Finally, *Orloff v. Willoughby* discusses the President's authority to grant commissions to military officers, holding that it would be improper for a court to enjoin the President to grant a commission to an army officer.[138] Notably, *Orloff* treats the President's power to commission army officers as a matter of statute. The Court interprets two statutes and concludes that

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[133] *Myers*, 272 U.S. at 141.

[134] *See supra* note 120 and accompanying text.

[135] Cunningham v. Neagle, 135 U.S. 1, 63 (1890) ("The constitution, § 3, art. 2, declares that the president 'shall take care that the laws be faithfully executed;' and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the senate, to appoint the most important of them, and to fill vacancies."). For a similar suggestion in the scholarly literature, see Robert J. Delahunty & John C. Yoo, *Dream on: The Obama Administration's Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 800 (2013) ("Furthermore, the next clause charges him to 'Commission all the Officers of the United States,' underscoring that he will be provided with subordinates who will assist him in the tasks of executing the laws, and for whose performance he will be accountable." (footnote omitted)).

[136] *See supra* Part III.D.1.

[137] *See supra* Part II.

[138] Orloff v. Willougby, 345 U.S. 83 (1953).

neither provides an entitlement to a commission.[139] This approach preserves congressional power to impose various constraints on presidential discretion.[140] At the same time, the constitutional rule for military officers may be different than for civil officers, because the Commander in Chief Clause may confer additional presidential authority over military officers, beyond the authority conferred over civil officers by the Appointments Clause.[141] Nevertheless, the Court notes that Congress retains the authority under the Appointments Clause to condition a President's appointment of military officers on Senate advice and consent.[142]

The real question the Court confronted in *Orloff* was whether Orloff was entitled to an *appointment*. Thus, the Court concluded, "Whether Orloff deserves appointment is not for judges to say and it would be idle, or worse, to remand this case to the lower courts on any question concerning his claim to a commission."[143] To speak of whether Orloff was entitled to a commission in this context is a misnomer. *Orloff* cited *Mouat* for the proposition that "except one hold his appointment by virtue of a commission from the President, he is not an Officer of the Army."[144] But *Mouat* likewise concerned the requirements for the appointment of officers under the Appointments Clause and under statutory law.[145]

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[139] *Orloff*, 345 U.S. at 88-89 (1953) ("Thus, neither in the language of the Universal Military Training and Service Act nor of the Army Reorganization Act referred to above is there any implication that all personnel inducted under the Doctor's Draft Act and assigned to the Medical Corps be either commissioned or discharged.").

[140] *See Orloff*, 345 U.S. at 97 (Frankfurter, J., dissenting) ("Of course the commissioning of officers in the Army lies entirely within the President's discretion and is not subject to judicial control. Although there can be no doubt about that, it does not follow that Congress is precluded from drafting a special group into the Army on condition that they will be commissioned. Receiving a commission is clearly not a matter of right; but granting it may be a condition for retaining a person in the Army.").

[141] *See Orloff*, 345 U.S. at 90 (1953) ("It is obvious that the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief. Whatever control courts have exerted over tenure or compensation under an appointment, they have never assumed by any process to control the appointing power either in civilian or military positions.").

[142] *Orloff*, 345 U.S. 83, 90 (1953) ("Congress has authorized the President alone to appoint Army officers in grades up to and including that of colonel, above which the advice and consent of the Senate is required.").

[143] *Orloff*, 345 U.S. at 92.

[144] *Orloff*, 345 U.S. at 90 (citing United States v. Mouat, 124 U.S. 303 (1888)).

[145] *See* United States v. Mouat, 124 U.S. 303, 307 (1888) ("What is necessary to constitute a person an officer of the United States, in any of the various branches of

Justice Jackson's concurring opinion in *Youngstown* mentions the Commission Clause once, to support the proposition that the unitarian interpretation of the Article II Vesting Clause is mistaken: it is not true, he argues, that the Article II Vesting Clause "constitutes a grant of all the executive powers of which the Government is capable,"[146] because "[i]f that be true, it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones."[147] While the thrust of Jackson's comment is correct, it is curious that he characterizes the Commission Clause as (a) a power and (b) a trifling one.

Current Supreme Court justices, writing individually, have at times exhibited sloppiness about the distinction between appointing and commissioning—despite its centrality to *Marbury*. Justice Alito and Justice Kavanaugh have both mistakenly conflated commissioning with appointment (an error that scholars have also made on occasion[148]). Alito's concurrence in

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its service, has been very fully considered by this court in *U. S.* v. *Germaine*, 99 U. S. 508. In that case, it was distinctly pointed out that, under the constitution of the United States, all its officers were appointed by the president, by and with the consent of the senate, or by a court of law, or the head of a department; and the heads of the departments were defined in that opinion to be what are now called the members of the cabinet. Unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States. We do not see any reason to review this well established definition of what it is that constitutes such an officer."); *id*. at 308 ("But there is no statute authorizing the secretary of the navy to appoint a pay-master's clerk, nor is there any act requiring his approval of such an appointment, and the regulations of the navy do not seem to require any such appointment or approval for the holding of that position. The claimant, therefore, was not an officer, either appointed by the president, or under the authority of any law vesting such appointment in the head of a department."); *id*. ("Section 1378 of the Revised Statutes enacts that 'all appointments in the pay corps shall be made by the president, by and with the advice and consent of the senate.' Sections 1386, 1387, and 1388 provide that certain classes of pay-masters shall be allowed clerks. It is obvious from the language of section 1378 that the pay corps is limited to officers commissioned by the president, and that clerks and others who are not so commissioned do not belong to the pay corps.").

[146] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring).

[147] *Id*. at 640-41 (citing the Commission Clause alongside the Opinion Clause in footnote 9).

[148] *E.g.* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1215 (2014) ("Even after confirmation by the Senate, the President has the duty and the power to commission officers."); Neomi Rao, *Why*

Department of Transportation v. Association of American Railroads[149] misstates the reasoning of *Marbury*, suggesting that someone cannot be an officer without possessing a commission. Marshall in fact says the opposite of what Alito asserts: that the commission is only evidence of the appointment, not constitutive of the appointment.[150] Brett Kavanaugh, in an article published during his tenure on the D.C. Circuit, similarly misstates the reasoning of *Marbury*.[151] In fact, Kavanaugh gets things precisely backwards: the appointment necessitates the commissioning, not vice versa. An officer does not become an officer because the President signs their commission; rather, the President must sign an officer's commission because the officer is an officer. Just because the President's signing of a commission is connected to the appointments process does not mean that it is constitutive of the appointment or that it is discretionary—and Marshall's opinion says that it is neither.[152] The Commission Clause is joined not to the Appointments Clause but to the Take Care Clause. Its purpose is not to elaborate on the

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Congress Matters: The Collective Congress in the Structural Constitution, 70 FLA. L. REV. 1, 47 (2018) ("The President, however, has the sole power of appointment, and even after confirmation by the Senate, the President has the sole power to commission officers." (citing the Commission Clause)).

[149] Dep't of Transp. v. Ass'n of Am. Railroads, 575 U.S. 43, 57 (2015) (Alito, J., concurring) ("And this Court certainly has never treated a commission from the President as a mere wall ornament." (citing *Marbury v. Madison*)); *id*. ("There should never be a question whether someone is an officer of the United States because, to be an officer, the person should have sworn an oath and possess a commission.").

[150] *See supra* notes 113-117 and accompanying text.

[151] Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 NOTRE DAME L. REV. 1907, 1917 (2014) ("In other words, just because you are confirmed by the Senate does not make you an officer; the President has one final discretionary step to complete, namely, the commissioning of the officer. At that point, the President could decide not to commission the officer, and the individual would not be appointed, notwithstanding having been nominated and confirmed.").

[152] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 167 (1803) ("The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. . . But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated."). Marshall here makes no mention of the commission, only the President's appointment and the Senate's advice and consent. Elsewhere in the opinion, Marshall clarifies repeatedly that a commission is only evidence of the appointment. *See supra* notes 112-117 and accompanying text.

appointments process but to underline the President's duty of fidelity with an archetypal example.

IV. THE DISUNITARY EXECUTIVE

The Commission Clause has important implications for the debate over presidential removal. Prior literature has focused on the absence of a constitutional provision for presidential removal authority and on the difficulty of squaring a broad reading of the Article II Vesting Clause with the Opinion Clause.[153] The Commission Clause has not entered into the conversation, yet it is perhaps the clearest statement that there is a constitutional limit—indeed an Article II limit—on presidential removal power. It would make little sense to obligate a President to respect an officer's appointment while simultaneously authorizing the President to remove the officer. Indeed, it strains credulity to imagine that the Constitution would obligate the President to commission officers appointed by others (the import of the Commission Clause) if the President could immediately turn around and remove the officer. This would, in effect, empower the President to do precisely the thing the Constitution forbids the President from doing, namely refusing to respect the officer's appointment. The obligation imposed by the Commission Clause has significance only in those cases where the President lacks unfettered removal authority—as *Marbury* recognized. Thus, the Commission Clause provides very strong evidence that Article II does not confer an unfettered presidential removal power. The President's duty to commission only makes sense if the President does not possess an indefeasible power of removal.

Put another way, the unitary executive theory renders the Commission Clause a nullity. If the unitary executive theory is correct, then the President possesses an unlimitable removal authority over executive officers. But, as the previous paragraph argued, understanding the Commission Clause as imposing a presidential duty to respect the lawful appointments of executive officers appointed by officials other than the President implies that there must be limits to the President's removal authority. Thus the duty interpretation of the Commission Clause and the unitary executive theory cannot both be correct. The unitary executive theory then requires construing the Commission Clause in an implausible way—and in a way that renders the Commission Clause constitutional surplusage.[154]

Yet this is not the extent of the problem for the unitary executive theory. The problem is not just that the unitary executive theory would render the

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[153] *See supra* Part I.A.

[154] *See supra* note 80 and accompanying text.

Commission Clause a nullity. It is also that there is strong evidence that the Commission Clause was not and is not a nullity.[155] Moreover, the Commission Clause imposes on the President the duty to commission an officer in *any* situation in which the officer was properly appointed by an agent other than the President.[156] Thus this Article's interpretation of the Commission Clause implies sharp limits on the unitary executive theory. Indeed, the Commission Clause reflects—and exemplifies—a constitutional design that is fundamentally anti-unitary. Because the Commission Clause means precisely what it appears to mean, the unitary executive theory is false.

That is why unitarians have struggled to make sense of the Commission Clause.[157] In the course of McConnell's discussion of the Commission Clause, he asks, with apparent puzzlement, "what does the commission signify, other than a piece of paper to hang on the wall, since the President can fire the officer as soon as the commission has been delivered?"[158] Then, in the footnote to this sentence, McConnell in effect answers his own question, noting that *Marbury* was "overruled on this point by *Myers*."[159] The original understanding, reflected in *Marbury*, contradicts the revisionist rule of *Myers* that the default is presidential removability—and certainly contradicts the much more novel rule of *Seila Law* that there are hard-wired constitutional limits to Congress's power to protect executive officials from presidential removal.

The architecture of Article II fits with the Necessary and Proper Clause much more than present conventional wisdom acknowledges. It is customary today to imagine that there exists some constitutional limit on congressional authority to constrain presidential removal. Even most opponents of the unitary executive theory accept that there is some area of core executive functions within which the President must have an unfettered removal power, at least over principal officers. In adopting this view, Lessig and Sunstein conceded too much to the unitarians. And so do anti-unitarians like Shugerman now. The constitutional design is one of congressional discretion.[160]

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[155] *See supra* Part III.

[156] *See* U.S. CONST. art. III, § 3 (imposing the duty to commission "*all* the Officers of the United States" (emphasis added)).

[157] *See supra* note 44 (giving the example of Michael McConnell).

[158] MCCONNELL, *supra* note 44, at 395.

[159] MCCONNELL, *supra* note 44, at 395 n.12.

[160] *See* Barry Sullivan, *Lessons of the Plague Years*, 54 LOY. U. CHI. L.J. 15, 52 (2022) ("The Constitution therefore leaves to Congress, subject only to whatever limitations may exist by virtue of the principle of separation of powers, all decisions relating to the architecture of the executive branch. Congress is empowered by the Necessary and Proper Clause to create executive departments and offices, prescribe

The disunitary interpretation of the Article II Vesting Clause would be as follows.[161] The enumerated Article II powers belong to the President (save for the Senate's advice-and-consent function). Thus it is the case that all "[t]he executive power" conferred by Article II—and thus all the executive power conferred directly by the Constitution—belongs to the President.[162] Indeed, the Constitution in itself creates no executive officers other the President and the Vice President. But the Necessary and Proper Clause permits Congress to create new executive powers vested in other officers. And the Appointments Clause of Article II implicitly refers back to the Necessary and Proper Clause in recognizing that Congress may subdivide executive power. The Constitution's architecture, understood holistically, establishes a "departmental structure of executive power."[163] The Article II Vesting Clause—in contrast to the Article I Vesting Clause—does not say "[a]ll . . . powers herein granted" precisely because it does not extend to the executive powers that may be granted pursuant to the Necessary and Proper Clause. Executive power is something that Congress and not only the Constitution can create, because executive power is simply the power to put laws into operation.[164] Moreover, the Necessary and Proper Clause expressly grants this power to Congress.

Congress has the authority under the Necessary and Proper Clause to structure the government. And the Take Care Clause and the Commission Clause, in conjunction, indicate that the President is obligated to comply. Indeed, the Necessary and Proper Clause itself gives Congress the power to

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their duties, apportion responsibilities among them, set qualifications for 'officers of the United States,' and provide for the method of their selection, consistent with the requirements of the Appointments Clause. Congress may also create civil service positions for 'employees' who are not 'officers of the United States.' Most of those who work for the federal government are 'employees,' rather than 'officers;' they lack the formal power to make final decisions on behalf of the United States and have security of position under civil service laws that are meant to insulate them from political pressures." (footnotes omitted)).

[161] This discussion assumes *arguendo* the validity of the Vesting thesis—the proposition that the Constitution's Vesting Clauses are appropriately read as substantive grants of unenumerated powers—which I have elsewhere questioned. See Froomkin, *supra* note 24.

[162] There remains a puzzle about the Senate's advice-and-consent function, which seems to give the Senate a portion of the executive power, contradicting the apparently ironclad text of the Article II Vesting Clause. For a similar puzzle about the Article I Vesting Clause, see Froomkin, *supra* note 24.

[163] Blake Emerson, *The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller*, 38 YALE J. ON REGUL. 90 (2021).

[164] *See* Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269 (2020).

make laws not just for carrying into execution its own powers but also for carrying into execution any power "vested by this Constitution . . . in any Department or Officer" of the United States.[165] This language obviates any doubt that powers "vested" by the Constitution in the President are subject to the laws that Congress makes.[166] The Take Care Clause provides the reciprocal obligation on the part of the President. Just as Congress has the authority under the Necessary and Proper Clause to impose regulations on the exercise of powers vested by the Constitution, so the President has the obligation under the Take Care Clause to comply with those regulations.

Lessig and Sunstein rightly argued that part of the law that the President must take care be faithfully executed is congressional choices about the structure of the executive.[167] Congress has the power to provide for the manner of execution of the laws, under the Necessary and Proper Clause. The President has the duty to respect Congress's prescription, under the Take Care Clause. The Commission sub-clause of the Take Care Clause refers specifically to congressional choices about offices—also singled out as important by the Appointments Clause.

It is not puzzling why the Constitution would single out appointments as a particularly important area in which to secure presidential compliance with congressional instructions about the structure of government. The main thing the President does (in the domestic policy sphere) is make appointments. The Constitution otherwise confers no substantive domestic policymaking authority on the President. But the Constitution imposes constraints on the President's appointment power—in particular by enabling Congress to subject appointments to Senate advice and consent and to lodge appointments in officials other than the President, namely heads of departments or judges. The Commission Clause obliges the President to respect these congressional choices. The Commission Clause thereby reinforces the departmental structure of executive power.

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[165] U.S. CONST. art. I, § 8, cl. 18.

[166] There would still be a constitutional limit on Congress's power to regulate the President's enumerated Article II powers. If Congress burdened the President's attempt to exercise an enumerated Article II power to the extent that the President became unable to exercise it, then Congress would not be legislating for the purpose of "carrying into Execution" the vested power.

[167] Lessig & Sunstein, *supra* note 31, at 69. *See also* David B. Froomkin, *The Nondelegation Doctrine and the Structure of the Executive*, 41 YALE J. ON REGUL. 60 (2024) (arguing that the constitutional structure seeks to encourage Congress to subdivide executive power, in the interest of regularity and accountability).

A. Minimal Disunitariness

As McConnell says, in many cases the President would have no reason to want to challenge an executive appointment, since all executive officers are appointed either by the President or by an appointee of the President.[168] All the same, even if the President agrees with another official's appointment decision, vesting the decision in another official creates some disunitariness as a formal matter. Beyond merely formal disunitariness, there are two instances in which the President's duty to commission officers is consequential: (1) where an executive officer is appointed by an official other than the President; (2) where an executive officer has a legal protection against presidential removal.

Even excluding the second category of Commission Clause significance, the case of tenure protection for an executive officer, the Commission Clause clearly implies a minimal level of disunitariness in the Executive. The President lacks the authority to disregard an appointment by a Head of Department of an inferior officer whose appointment Congress chose to commit to the Head of Department. Similarly, the President lacks the inherent authority to remove such an inferior officer, which would be the functional equivalent of denying the validity of the appointment. McConnell is thus wrong to suggest that the Constitution provides a stronger basis for presidential control over inferior officers than over principal officers.[169]

Unitarians might want to suggest that there are important differences between the two situations in which *Marbury* recognized that the President's duty to commission officers meaningfully applied, the case in which the officer was appointed by a Head of Department and the case in which the officer was appointed by a previous President.[170] Unitarians could argue that officers appointed by a department head appointed by the current President are effectively within the current President's control because of the President's power over the department head (satisfying the unitary executive theory's requirement that the President retain total "executive power"), whereas officers appointed by a previous President are not. At least if the President has removal power over the department head and the department head has removal power over the inferior officer, it seems like the President

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[168] MCCONNELL, *supra* note 44, at 270-71.

[169] *Id*. at 266 ("The modern view, propounded by Justice Brandeis, that the President has less power over inferior than principal officers, has neither textual nor functionalist logic. A low-ranking official should be able to exercise less discretionary independence, not more.")

[170] There is also a third situation, in which an appointee of the current President acts in such a way that the President becomes dissatisfied with their behavior, yet the appointee is protected by law against presidential removal.

could then induce the department head to remove the inferior officer by threatening to remove the department head.

But unitarians in fact reject the sufficiency of this response. This was precisely the statutory scheme at issue in *Morrison v. Olson*, which Scalia regarded, in the ur-statement of the unitary executive theory, as diluting presidential power too much. For unitarians to adopt the rebuttal suggested in the previous paragraph, therefore, would already be a substantial concession.

The mooted argument also runs into a number of problems. Most obviously, it clearly contradicts *Marbury*, which recognized both cases as equally significant applications of the President's commissioning duty. Additionally, the suggested unitarian response fails to explain why temporal disunitariness of the executive is more tolerable than organizational disunitariness. That is, it seems plausible to say that if an officer was appointed by a preceding President, they were sufficiently within the control of the office of the President. It does not matter that they were not selected by the current holder of the office of the President.[171] They were properly appointed under the Appointments Clause.

It is even possible to give the President's obligation under the Commission Clause something of a unitarian flavor, by taking the point to be that President lacks authority to deny that her appointees speak for her. According to this interpretation, the important thing is that there should be a clear apportionment of executive authority, such that there are not conflicting decisions purporting to speak for the executive. That the President must respect the commissions of properly-appointed executive officers means that the President must acknowledge their authority to speak in a legally valid way on behalf of the executive.

This interpretation suggests a different picture of the putative unitariness of the executive than the traditional sense in which scholars have used that term, in that it focuses on the coherence of the policy of the executive branch rather than the supremacy of the will of a single decision-maker. At the same time, it is not unreasonable to want continuity and consistency in the policy of the executive.[172] Note also that this way of interpreting the purpose of the Commission Clause moves substantially in the direction of centering the office of the presidency to the detriment of the personality of the current inhabitant of that office. Adopting this way of understanding the presidency could be consistent with the unitary executive theory as a formal matter, but it would have very different substantive implications from those that

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[171] *See generally* Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119 (2020).

[172] *See* Renan, *supra* note 171.

unitarians typically expect.

B. Constraining Nonenforcement Structurally

The connection of the Commission Clause to the Take Care Clause may suggest that the Take Care Clause seeks to prevent executive nonenforcement.[173] The President at least should not stand in the way of positions being filled. Where officials other than the President are granted lawful appointment authority by statute, the Commission Clause forbids the President from preventing those officials from exercising their lawful appointment authority. It thus provides some protection for the effective operation of government, even in the face of an anti-regulatory President.

This Article's understanding of the Commission Clause might also imply that the Take Care Clause seeks more broadly to prevent presidential nonenforcement. After all, the Commission Clause is only an illustrative example (albeit an archetypical example) of a broader presidential duty imposed by the Take Care Clause. Insofar as the purpose of the Commission Clause is to deter presidential nonenforcement, the Commission Clause may indicate a similar concern of the Take Care Clause more broadly. Refusing to enforce the law is one of the most direct ways in which the President could fail to take care that the law is faithfully executed.

The Take Care Clause and the Commission Clause in tandem clearly do suggest that the President lacks authority to inhibit the administrative process. To the extent that lenity is a policy concern in the background of Article II, which might suggest constitutional approval of presidential discretion about nonenforcement, the President has the pardon power. Lenity is a policy of Article II, but Article II provides a specific instrument to vindicate that policy.

Through the Commission Clause, rather than a substantive rule about enforcement or nonenforcement, the Constitution establishes a structural policy in favor of administration. The Constitution does not contain an express prohibition on presidential nonenforcement, but it does enable Congress to distribute executive authority in a way that is conducive to proregulatory governance. To the extent that there is an implicit bar to presidential nonenforcement in the Take Care Clause, moreover, the Commission Clause suggests that it should be vindicated structurally.

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[173] *See* Daniel E. Walters, *The Judicial Role in Constraining Presidential Nonenforcement Discretion: The Virtues of an APA Approach*, 164 U. PA. L. REV. 1911 (2016) (noting that the purpose of the Take Care Clause is to some extent to prevent presidential nonenforcement but questioning the administrability of judicial efforts to enforce it).

C. The Court's Power to Review Presidential (In)action

This Article's interpretation of the Commission Clause yields powerful evidence against the political question interpretation of the Take Care Clause as a textual commitment to the President of the power to ensure that law is faithfully executed. According to the political question interpretation, the Take Care Clause forecloses judicial intervention to question presidential choices about execution, because the Take Care Clause constitutes a textual commitment of power about law execution to the President—and so, implicitly, not to the judiciary.[174] Yet the Commission Clause, as interpreted by *Marbury*, implies that a court can enjoin presidential refusal to commission a duly appointed officer.[175]

Drawing on language from *Marbury*, the *Myers* Court distinguished different kinds of executive functions that are differently reviewable: "the duty of the Secretary in delivering the commission to the officer entitled was merely ministerial and could be enforced by mandamus,"[176] whereas "the function of the Secretary in this regard was entirely to be distinguished from his duty as a subordinate to the President in the discharge of the President's political duties which could not be controlled."[177] It is not clear that this was part of *Marbury*'s holding. Rather, the point of understanding the Secretary's duty to deliver a commission as "ministerial" was that it was outside of the scope of duties in the exercise of which the Secretary was controllable by the President.[178]

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[174] *See* Franklin v. Massachusetts, 505 U.S. 788, 829 (1992) (Scalia, J., concurring in the judgment) ("Unless the other branches are to be entirely subordinated to the Judiciary, we cannot direct the President to take a specified executive act.").

[175] Note that this is not to say that courts should be more active in policing executive action, just to reject one extreme theory with growing prominence.

[176] Myers v. United States, 272 U.S. 52, 140-41.

[177] *Id*., at 141.

[178] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 141 (1803) ("In the performance of all these duties he is a public ministerial officer of the United States. And the duties being enjoined upon him by law, he is, in executing them, uncontrollable by the President; and if he neglects or refuses to perform them, he may be compelled by mandamus, in the same manner as other persons holding offices under the authority of the United States. The President is no party to this case. The secretary is called upon to perform a duty over which the President has no control, and in regard to which he has no dispensing power, and for the neglect of which he is in no manner responsible. The secretary alone is the person to whom they are entrusted, and he alone is answerable for their due performance.").

Nevertheless, courts have generally held that it is beyond their competence to enjoin other government actors when they are exercising duties that involve a "political question." A nonjusticiable political question exists either when the Constitution textually commits a power to the legislative or the executive branch or when an issue is not fit for judicial resolution for any of various reasons.[179] Courts do not make operational military decisions.[180] Among other reasons, doing so would run afoul of the President's constitutional authority as Commander in Chief. Presumably a court would not presume to direct the President in exercising (or declining to exercise) the pardon power.

The President's duty to take care that the laws be faithfully executed is not such a power. By creating a legal duty, the Take Care Clause does the opposite of conferring unreviewable discretion. The Commission Clause, as interpreted by *Marbury*, makes clear that at least some subset of presidential duties under the Take Care Clause are legally enforceable. At the same time, the content of the President's obligation under the Take Care Clause to take care that the laws be faithfully executed must be filled in by the content of laws that generate presidential obligations.

CONCLUSION

The existence of the Commission Clause is the most straightforward evidence that the Constitution rejects a unitary executive, in the sense that unitarians use that term. The Constitution takes steps to prevent the President from exercising an unfettered removal power: beyond declining to provide an enumerated removal power, it affirmatively restrains presidential removal by obligating the President to commission properly-appointed officers. This Article's recovery of the Commission Clause therefore contributes to the

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[179] Baker v. Carr, 369 U.S. 186, 217 (1962) ("It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.").

[180] *See, e.g.*, Austin v. U.S. Navy Seals, 142 S. Ct. 1301 (2022).

overwhelming evidence that the constitutional design is one of congressional discretion to structure the executive branch, including by insulating officers from presidential removal and control. Moreover, the Commission Clause reinforces the reading of the Take Care Clause as a duty, and it may further provide clarity about the content of that duty. The Commission Clause is a characteristic example of the general duty imposed by the Take Care Clause, and it underscores the Clause's purpose of securing presidential obedience to congressional instructions—including via judicial supervision.

Beyond recovering and explicating the substantive implications of the Commission Clause, this Article demonstrates the value of careful attention to all of the Constitution's text. The Commission Clause has been almost entirely neglected, despite its centrality to the most famous case in U.S. constitutional law, *Marbury v. Madison*, and its clear relevance to current debates. Theorists have something distinctive to offer precisely in their ability to think with some remove from the patterns of present controversies, and the Constitution offers many neglected resources for carrying out this distinctive theoretical work.