Congressional Encroachment on Executive Branch Communications

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INTRODUCTION

In 1989, the Department of the Interior began to document all of its contacts with members and committees of Congress. The legislature's reaction to this new procedure was swift and disapproving, and in floor debate the House of Representatives voiced its concern that the practice would "really muzzle employees" of the Department in their communications with Congress. Congress responded to this fear by including a provision in the Department of the Interior and Related Agencies Appropriations Act of 1990, which read: "None of the funds available under this title may be used to prepare reports on contacts between employees of the Department of the Interior and Members and Committees of Congress and their staff." This rider on the Appropriations Act, § 119, purported to restrict the Interior Department's ability to communicate with anyone, including the President, about its activities involving and testimony before Congress. The Bush Administration notified Congress that it considered § 119 an unconstitutional intrusion on the chief executive's power to communicate with department members who were executing the law under his supervision and guidance. In a letter commenting on the proposed legislation, the Office of Management and Budget argued that § 119 "is highly objectionable and raises Constitutional concerns. It interferes with the Department's ability to carry out Executive functions, and impairs the Department's efforts to act on congressional inquiries in a responsible manner."

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¶ Letter of Richard G. Darman, Director, Office of Management and Budget, to the Committee on Appropriations, US House of Representatives (Sept 7, 1989), reprinted in 135 Cong Rec H6501-02 (Oct 3, 1989) (statement of administration policy on HR 2788). OMB did not explicitly mention either the Opinion Clause or the separation of powers doctrine in its "Major Administrative Objections to Non-Conferenceable Provisions."
Subsequently, the White House indicated that § 119 might afford a good opportunity to test the existence of a presidential line-item veto power. Congress, apparently considering that possibility too dangerous to risk, amended § 119 to be effective for only one day—a Sunday three weeks before the bill was passed. Section 119 thus had no practical effect. Nevertheless, the specter of future congressional intrusions on executive communications remains.

Should Congress attempt a more effective attack on communications between executive agencies and the President, both the Opinion Clause and the separation of powers doctrine support a conclusion that such efforts are unconstitutional. Section I of this Comment examines the unitary executive concept and the Opinion Clause and shows how a limitation like § 119 violates them. Section II analyzes the separation of powers doctrine as an independent ground for holding § 119 unconstitutional. Three groups of cases shed light on the President’s power and congressional encroachments upon it: (1) cases concerning presidential power to remove agency officers, (2) cases involving former President Nixon that examine the special status of the President and establish a balancing test for evaluating conflicting assertions of power by different branches, and (3) recent separation of powers cases revealing the Supreme Court’s greater deference to explicit than to implicit powers. These cases, combined with an understanding of their underlying doctrines, mandate the conclusion that § 119 violates the separation of powers principle.

I. THE UNITARY EXECUTIVE AND THE OPINION CLAUSE

The President has the constitutional authority to “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 . . . .” This section outlines the origin of this clause and its role in the Framers’ conception of the Presidency, and explains the constitutional error of § 119’s limitation on this affirmative grant of power to the chief executive.

4 L. Gordon Crovitz, ‘Met w/Keating’s S & L Senators. Again. End of Log.’, Wall St J A15 (Jan 24, 1990). A line-item veto power would enable the President to veto only a portion of a bill.

5 “This section shall be effective only on October 1, 1989.” Department of the Interior and Related Agencies Appropriations Act of 1990 (cited in note 2).

6 US Const, Art II, § 2, cl 1.
A. Historical Background of the Unitary Executive

Confronted with the unqualified failure of the Articles of Confederation, the Framers of the Constitution gathered in Philadelphia in 1787 to reconsider the distribution of powers among the three branches of government. The Articles had not provided for a truly tripartite system; rather, a Congress composed of state delegates was the "central law-making and governing institution." The members of the Philadelphia convention were particularly concerned that legislative power might continue to overwhelm that of the executive and judicial branches. Having witnessed many assertions of control by state legislatures after the Revolution, they hoped to avoid "the supremacy of faction and the tyranny of shifting majorities." Alexander Hamilton, for one, lamented the "propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments." Similarly, James Madison accused the legislative branch of "everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."

The Framers addressed this concern not through an absolute separation of the three named branches but by delineation of distinct powers and functions, combined with means to check the intrusions of one branch upon another. As Madison wrote in The Federalist, "the powers of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others." While the doctrine of separation of powers, supported by a system of checks and balances, is mentioned nowhere in the Constitution itself, it undergirded many of the Framers' notions about the structure of the new government.

The Framers established the powers of the new President against this background desire to provide separate but interactive powers to the named branches and to protect the executive and

10 Federalist 48 (Madison) in The Federalist at 308-09 (cited in note 9).
12 See Casper, 30 Wm & Mary L Rev at 212-24 (cited in note 7).
the judiciary from legislative encroachment. They created a unitary executive, popularly elected and politically accountable: a single person in whom all executive power would reside.\textsuperscript{13} This President was required to “take Care that the Laws be faithfully executed.”\textsuperscript{14} The Framers did not envision, however, that he would perform this task singlehandedly; his role is necessarily limited to directing, coordinating, and accounting for executive branch actions. According to Madison, “the persons . . . to whose immediate management these different matters [of government administration] are committed ought to be considered as the assistants or deputies of the Chief Magistrate, and on this account . . . ought to be subject to his superintendence.”\textsuperscript{15} Clearly, the Framers anticipated that presidential oversight would involve close communication with executive branch subordinates.

Some of the Framers vehemently opposed the unitary executive concept,\textsuperscript{16} but the prevailing view was that unity was essential for energetic and vigorous execution of the laws.\textsuperscript{17} In The Federalist, Hamilton defended the unitary executive and warned:

This unity may be destroyed in two ways: either by vesting the power in two or more magistrates of equal dignity and authority, or by vesting it ostensibly in one man, subject in whole or in part to the control and cooperation of others, in the capacity of counselors to him.\textsuperscript{18}

The concern about both of these plural executive structures was essentially the same. Whether the executive power was directly or indirectly controlled by more than one person, “such a participation in the executive power has a direct tendency to conceal faults, and destroy responsibility.”\textsuperscript{19}

\textsuperscript{13} “The executive Power shall be vested in a President of the United States of America.” US Const, Art II, § 1, cl 1 (emphasis added).
\textsuperscript{14} Id at § 3.
\textsuperscript{15} Federalist 72 (Madison) in The Federalist at 435-36 (cited in note 9).
\textsuperscript{16} Max Farrand, ed, 1 The Records of the Federal Convention of 1787 64, 66 (Yale, 1937).
\textsuperscript{17} “Energy in the Executive is a leading character in the definition of good government. . . . That unity is conducive to energy will not be disputed.” Federalist 70 (Hamilton) in The Federalist at 423-24 (cited in note 9). The Framers “considered energy as the most necessary qualification of the [executive] power, and this as best attained by reposing the power in a single hand.” Joseph Story, 3 Commentaries on the Constitution of the United States § 1413 at 281-82 (Da Capo, 1970).
\textsuperscript{18} Federalist 70 (Hamilton) in The Federalist at 423-24 (cited in note 9).
\textsuperscript{19} Story, 3 Commentaries on the Constitution § 1419 at 287 (cited in note 17). As Woodrow Wilson wrote much later, “somebody must be trusted, in order that when things go wrong it may be quite plain who should be punished. . . . Power and strict accountability
As the administrative state has expanded, the notion of a unitary executive required to "take care" to execute the laws has maintained its force. Three reasons are commonly cited to explain this continued vitality: the President is best situated to coordinate agency activities and their overlapping responsibilities; he is electorally accountable; and, by virtue of his accountability and central position, he can bring an energy to the administrative process that agency officials could not muster by themselves. While the growth of the administrative state has complicated analyses of all three branches' roles in the federal government, this conception of the unitary executive has retained its validity, at least when considering presidential involvement with Cabinet agencies like the Interior Department. These executive agencies are particularly within the province of presidential authority, and they have been recognized as such since their inception.

B. Origin and Meaning of the Opinion Clause

While the Framers accepted the inadvisability of a plural executive, lingering fears of monarchical attitudes in the President led to persistent attempts by various factions at the Convention to provide the chief executive with an advisory council. The most popular suggestion placed the Chief Justice of the Supreme Court and the heads of the executive departments in this council. Other proposed advisors included representatives of each congressional house, or members of each of the three branches with appointment periods to be fixed by the Senate. No such advisory council was ever created, however, largely due to the Framers' disagreement regarding its membership. The Framers also recognized that a unitary executive, while he would centralize both the power and the decisionmaking authority of the Presidency, would be vulnerable to hostility from his putative subordinates. Having empowered a single individual, they had to ensure that his power would not be mooted by those below him who might effectively frustrate any


See text at note 30.

meaningful exercise of his power by refusing to communicate with him.

The agreed solution to both these problems was the adoption of the Opinion Clause, which was designed to serve the purposes of a presidential council while allaying fears that such an advisory group could shield the President from direct responsibility for executive branch actions. Because the President would use his own judgment in following or rejecting any advice he solicited, he would get blame for bad measures as well as credit for good ones. Thus, the Framers reinforced the visible and actual responsibility of their unitary executive, while giving him sufficient power to make well-informed decisions. The Opinion Clause makes explicit the authority of the President to receive information from his subordinates and to direct their performance of administrative activities, thereby insuring his ability to wield his constitutionally defined powers effectively.

Furthermore, when considered with the Take Care Clause, the Opinion Clause indicates that it is not the President, alone and unaided, who will perform the myriad functions of the executive branch. The Take Care Clause does not direct the President to perform these tasks personally but rather to make sure that they are performed, presumably by others in the executive branch. As the Supreme Court observed before the Civil War:

The President's duty in general requires his superintendence of the administration; yet this duty cannot require of him to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform. This cannot be, 1st, Because, if it were practicable, it[s effect] would be to absorb the duties and responsibilities of the various departments of the government in the personal action of the one chief executive officer. It cannot be, for the stronger reason, that it is impracticable—nay, impossible.

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23 US Const, Art II, § 2, cl 1 (quoted in text at note 6).
25 Id at 13.
26 See Myers v United States, 272 US 52, 117 (1926) ("The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.").
27 Williams v United States, 42 US 290, 296 (1843).
The President, then, must use subordinates to execute the laws; to do so, he must be able to communicate with them.

Like the Take Care Clause, the Opinion Clause permits the President to rely on the assistance of others in performing executive functions. In *Youngstown Sheet and Tube Co. v Sawyer*, Justice Jackson found the Opinion Clause redundant, for "[m]atters such as these would seem to be inherent in the Executive if anything is." Jackson's view underscores a comprehensive understanding of the unitary executive: the President fulfills his role largely by directing the actions of his subordinates, including Cabinet officials and their staffs. Only through these agents can the President fulfill his responsibilities as chief executive, and his right to communicate with them is rarely questioned. Indeed, the Opinion Clause has been mentioned, but never interpreted, by the Supreme Court or any other court. It is only in a situation like the peculiar one presented by § 119 that this clause is called upon to provide explicit textual force to the full powers of the unitary executive.

C. Violation of the Opinion Clause

The infrequent invocation of the Opinion Clause, however, does not diminish its central importance to the President's functions. The Framers' desire that the President be supplied with informed and expert opinions from members of the executive branch has been realized in practice by George Washington and his successors in office. Every President establishes a Cabinet and consults its members, singly or together, as he deems necessary. The Supreme Court noted in *United States v Germaine* that while the President routinely and habitually consulted his Cabinet members for advice in their areas of expertise, it was unaware of any instance in which the President had needed to invoke the power of the clause to acquire a written opinion.

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28 343 US 579, 641 n 9 (1952) (Jackson concurring).
30 99 US 508, 511 (1878).
Even Hamilton thought the Opinion Clause redundant, "as the right for which it provides would result of itself from the office."\textsuperscript{31} Apparently the Framers exercised more care in securing a means of counsel for the President than the office ultimately required, but this rarely used power is nonetheless a constitutionally protected one. Although the inclusion of the clause was unnecessary and redundant of implicit presidential powers, Congress has not been deterred from trying to obviate the obvious. Congress has forbidden Interior Department employees to prepare reports for anyone about their dealings with Congress. The President falls within the class of "anyone." Section 119 is therefore unconstitutional.

Reliance on the text invites textual attack: first, that the clause refers to an "opinion" rather than a factual report; second, that the opinion must be "in writing"; and third, that the opinion must come from the "principal Officer in each of the executive Departments" rather than agency subordinates. All of these contentions fail; common sense and the Framers' clear intent demand a more generous understanding of the text. Agency reporting would be of little real value if the President could not assert meaningful authority over agency functions.\textsuperscript{32} The Framers intended for the department heads to supply information to help the President make decisions; he must be able to demand that information at the time and in the manner he deems most helpful.\textsuperscript{33} A crabbed adherence to the narrowest meaning of the clause would reduce its power to only vestigial significance.

First, the notion that an opinion is limited to speculations and advice, exclusive of facts, is nonsensical. The Convention history does not indicate that the Framers intended to so limit this clause; moreover, their purpose in creating the clause soundly supports a broader understanding of the term "opinion." The clause was included to ensure that the President would be apprised of the workings of the executive branch in order that he might effectively direct its operation. If the simple facts of the branch's daily functions were withheld from him, he would effectively be paralyzed. To restrict the President to receiving communications devoid of facts, limited solely to subordinates' speculations, would devastate the Framers' conception of the unitary executive.

Second, the writing requirement was designed not to preclude oral communications but to require thoughtful ones: "the necessity

\textsuperscript{31} Federalist 74 (Hamilton) in The Federalist at 447 (cited in note 9).
\textsuperscript{33} Strauss and Sunstein, 38 Admin L Rev at 197 (cited in note 20).
of their opinions being in writing, will render them more cautious in giving them, and make them more responsible should they give advice manifestly improper.\textsuperscript{32} The Framers’ emphasis on care and caution in the proffered opinions reflected their concern that the President not be left without counsel altogether. Thus, the insistence on written communications should not be understood to limit the President, who could certainly waive this requirement and accept oral reports, but rather to allow him to impose a constraint on the agencies from which he might demand information.

Third, the clause mentions only the “principal Officers” of the executive departments as sources of advice, but practical considerations favor a more expansive view of this power. When the Opinion Clause was drafted, the executive departments were not yet formed, and the possibility of an administrative leviathan with its thousands of workers was not envisioned. Therefore, it was reasonable to expect that the President could learn all he needed to know from the head of each department. Today, however, logic dictates that the department head must speak with his own subordinates on matters within their spheres of activity, and practical considerations suggest that the President may obtain that same information directly from departmental underlings. It would be a strained construction of the clause to insist that it requires the President to instruct the Secretary to question his subordinates and then transmit the information to the President. The very structure of this chain of authority implies presidential power to receive communications directly from their source, wherever it exists in the department.

While the Opinion Clause is an affirmative grant of executive power, so too is Congress’s appropriations power. Thus, an alternative to attacking the scope of the Opinion Clause text is to argue that Congress’s appropriations power is explicit and nearly plenary. But of course no power under the Constitution may be used to undermine other constitutional provisions.\textsuperscript{36} In United States v Lovett,\textsuperscript{38} the Court declared unconstitutional a congressional appropriations measure denying any compensation to certain govern-

\textsuperscript{32} Kurland and Lerner, eds, 4 The Founders’ Constitution at 12 (statement of James Iredell) (cited in note 24).

\textsuperscript{36} See J. Gregory Sidak, The President’s Power of the Purse, 1989 Duke L J 1162, 1202-22 (criticizing congressional misuse of the appropriations power to place unconstitutional restrictions on the President’s performance of duties and thereby to threaten the principle of the unitary executive).

\textsuperscript{38} 328 US 303, 318 (1946).
ment employees known to be Communists. That legislation was found to violate the explicit prohibition on bills of attainder and ex post facto laws. Section 119 of the Appropriations Act similarly would be found to violate the Opinion Clause.

Where the Constitution expressly grants power to a particular branch, the balancing test typically applied in the Court's separation of powers cases is irrelevant. Instead, absolute respect for the mandates of the Constitution prevails. The Opinion Clause assigns the President a specific power that entitles him to be informed of all Interior Department activities, including contacts with members and committees of Congress; § 119 interferes with this textual mandate and is therefore plainly unconstitutional. Any future Congressional limitations on executive branch communications should similarly be found to violate the plain language of the Opinion Clause.

II. SEPARATION OF POWERS

Textual and historical arguments from the Opinion Clause fully demonstrate the constitutional error in § 119 of the Appropriations Act. But the textual argument need not stand alone, for the separation of powers doctrine provides an entirely independent ground for holding § 119 unconstitutional. Supreme Court jurisprudence concerning the scope of executive power and the separation of powers demonstrates the invalidity of this legislative intrusion into the executive realm. In considering a clash of asserted powers between Congress and the President, the Court will look first to the text of the Constitution. If it reads that text as allocating a power specifically to the legislature or the executive, that explicit power prevails. If the power is not enumerated, in the Court's understanding, the Court will balance the conflicting interests of the branches. The outcome of this balance is strongly, if not dispositively, influenced by whether the claimed powers are essential to the operation of the branch—whether they are "core functions." The Supreme Court's jurisprudence offers no precise definition of core functions, but it does suggest that intrabranch

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57 "We . . . cannot conclude . . . that § 304 is a mere appropriations measure and that, since Congress under the Constitution has complete control over appropriations, a challenge to the measure's constitutionality does not present a justiciable question in the courts, but is merely a political issue over which Congress has final say." Id at 313.

58 See text at notes 77-90.

executive communication is "core" and thus entitled to protection from intrusions like § 119.

A. Supreme Court Jurisprudence on Executive Power and Separation of Powers

While the Court has never directly addressed interference by Congress with communications between an executive agency and the President, three groups of related cases shed light on the questions raised by § 119. First, early cases concerning the executive removal power highlight the difficulty of determining the nature and extent of executive prerogatives not explicitly defined in the Constitution. These cases recognize an unfettered executive power of removal over purely executive officers, thus preserving the President's control of executive officers like those in the Interior Department. Second, cases involving former President Nixon reveal some of the Court's views on the special status of the President and establish a balancing test for evaluating conflicting assertions of power by different branches. Finally, recent Supreme Court decisions on the separation of powers use "core functions" terminology to detect impermissible legislative encroachments into executive territory.

These three groups of cases set the framework for evaluating the constitutionality of § 119 under the doctrine of separation of powers. While the definition of "core functions" remains uncertain in Supreme Court jurisprudence, communication with subordinates in the executive branch is so critical to the President's performance as a unitary executive that it must fall within that ill-defined category. Since § 119 violates the Opinion Clause, it should be invalidated under the Court's initial textual analysis. Even absent a specific and sufficiently broad presidential right of intrabranch communication, however, § 119 would be struck down under the balancing test.

1. Early removal cases and executive power.

The rise of the administrative state complicated the framework of the tripartite government in ways the Framers had not foreseen. New Deal distrust of political accountability as a sufficient guide to good policymaking, combined with reliance on technical expertise, led to greater agency independence from the President's political control. Simultaneously, the 1930s saw a change in the Supreme Court's attitude toward the presidential removal power, as evidenced by the series of cases discussed below. In re-
stricting the President’s ability to control some agency members who were performing arguably executive tasks, the Court highlighted the difficult task of delineating those presidential functions not explicitly mandated by the Constitution.

In *Myers v United States*,\(^4\) the Court exhaustively addressed the President’s power to remove government officials. A postmaster had sued for back salary, claiming that his summary discharge by the President was illegitimate because the statute establishing his post required the advice and consent of the Senate in removals as well as appointments.\(^4\) The Court held that this congressional restriction unconstitutionally encroached on executive power:

The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment. . . . [A]nd when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.\(^4\)

Requiring the President to seek Senate approval before discharging executive officers would “make impossible that unity and coordination in executive administration essential to effective action.”\(^4\) The Court thus relied heavily on the Framers’ insistence on a unitary executive and held that this executive could not be expected to perform his functions without control over subordinate members of the executive branch.\(^4\) Subsequent cases have tested the extent of this necessary presidential control, but none has denied that control outright.

*Humphrey’s Executor v United States*,\(^4\) decided nine years later, sharply limited the *Myers* holding. A Federal Trade Commissioner sued for back pay after being dismissed without cause by President Roosevelt. The relevant statute specified “inefficiency, neglect of duty, or malfeasance in office”\(^4\) as the only acceptable grounds for removal. To justify the dismissal, Roosevelt cited dis-

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\(^{40}\) 272 US 52 (1926).
\(^{41}\) Id at 107.
\(^{42}\) Id at 122.
\(^{43}\) Id at 134.
\(^{44}\) Id at 127, 131, 135; see also id at 117 (“As [the President] is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws.”).
\(^{45}\) 295 US 602 (1935).
\(^{46}\) Id at 623.
agreements between himself and Humphrey about the policies and administration of the Commission.47

Determining that the FTC’s duties were “neither political nor executive, but predominantly quasi-judicial and quasi-legislative,” the Court held that the President could not unilaterally remove the Commissioner.48 The Court thus restricted the broad sweep of the presidential removal power approved in Myers to “purely executive officers.”49 Commentators have scorned the reasoning and result in Humphrey’s Executor, for “[i]t was nonsense to assert that the FTC did not act in an executive role.”50 The FTC’s enabling statute directed it to file, prosecute, and appeal complaints,51 which are archetypal executive activities.

Nevertheless, the Humphrey’s Executor stance was reasserted and affirmed in Wiener v United States,52 where the Court held that it was not within the presidential removal power to dismiss a member of the War Claims Commission. Relying on Humphrey’s Executor, the Court decided that the Commission was an adjudicatory body and therefore the President had no power to remove its members.53 Although Congress had not explicitly restricted presidential removal of Commissioners, the Court “inferred that Congress did not wish to have hang over the Commission the Damocles’ sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.”54

As in Humphrey’s Executor, the Court in Wiener had little difficulty distinguishing congressional and executive authority when the scope of those powers could be readily defined. In Myers, the postmaster was undeniably an executive officer, and the Court strongly advocated presidential control, through the removal power, over a subordinate executive officer. In contrast, the commissioners in Wiener performed no executive functions, and thus the Court could easily deny exclusive presidential control. It is in a case like Humphrey’s Executor, where the agent’s role is neither clearly executive nor clearly non-executive, that difficulties arise. In this border zone, the Court seems to prefer to entrust control over such functionaries to Congress.

47 Id at 618-19.
48 Id at 624.
49 Id at 627-28.
50 See, for example, Miller, 1988 S Ct Rev at 93 (cited in note 32).
52 357 US 349 (1958).
53 Id at 351, 355.
54 Id at 356.
2. The Nixon cases and executive power.

_United States v Nixon_55 ("Nixon") departed from the Court's inflexible delineations of authority in _Humphrey's Executor_ and _Wiener_. In so doing, it laid the groundwork for the "balancing test" used in subsequent litigation involving the former President. This test reflected the Court's view that absolute demarcations of authority among the branches are unnecessary (and probably impossible). Rather, peripheral functions may be sacrificed to the needs of other branches—only the "essential functions" of each branch remain unassailable. Where non-essential powers and prerogatives are at issue, their exercise is subject to balancing against conflicting assertions of authority by the other branches.

The _Nixon_ Court held that neither separation of powers nor the general need for confidentiality of high-level presidential communications could alone sustain absolute presidential immunity from the judicial process. As a result, Nixon failed in his attempt to quash the subpoena for his tapes. The Court balanced the constitutional claims of the President and the judiciary, and found that it was "necessary to resolve those competing interests in a manner that preserves the essential functions of each branch."56

The Court was not troubled by the fact that the executive power in question was not explicit in the Constitution.57 It balanced Nixon's claim of absolute constitutional protection for the confidentiality of non-military, non-diplomatic discussions with his advisors against the subpoena power of the courts in an ongoing criminal prosecution. The latter prevailed. While recognizing the importance of confidentiality in presidential communications as an adjunct to execution of the laws, the Court determined that an in camera inspection of Nixon's tapes scarcely harmed that interest. On the other hand, an absolute privilege against a subpoena would interfere seriously with the "primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions."58

Like the executive communication power infringed by § 119, the power Nixon asserted was no less compelling because it was

56 Id at 707.
57 "Since this Court has consistently exercised the power to construe and delineate claims arising under express powers, it must follow that the Court has authority to interpret claims with respect to powers alleged to derive from enumerated powers." Id at 704.
58 Id at 707.
implicit in the Constitution rather than explicit. The Court asserted that "[n]owhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based." Nixon established that implicit powers deserve the same judicial respect that explicit ones command, and that both types of powers may be balanced against conflicting claims of constitutional authority. Thus, even if the President's power to communicate with his Cabinet departments were merely implicit, it would merit respect equivalent to that afforded textually explicit powers. The problem for a general analysis of the balancing test—as well as the specific issue of § 119's validity—is that the Court left open the question of which functions qualify as "core functions" and are thereby exempted from balancing. 

Nixon v Administrator of General Services60 ("Administrator") partially answered that question. There, the Court declared that the Presidential Recordings and Materials Preservation Act, which permitted an authority within the executive branch to archive the former President’s papers and tapes, neither violated the separation of powers doctrine nor intruded impermissibly on the executive privilege.61 The Court emphatically rejected the notion of completely distinct branches of government, thus turning away from the Humphrey's Executor Court's neat (if inaccurate) insistence on classification. Citing Nixon, the Court wrote:

[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.62

Although the Court did not definitively describe the scope of sacrosanct activities, it did express an unequivocal preference for functional over formal analysis of interbranch conflicts.

Here, the former President claimed that archiving his papers under the Act interfered with the presidential prerogative to con-

60 Id at 711.
62 Id at 441, 455.
63 Id at 443 (citations omitted).
trol executive branch affairs, thereby offending the separation of powers principle. The Court appealed to the balancing test. But whereas the *Nixon* Court acknowledged explicit and implicit powers as equally valid, the *Administrator* Court required inquiry only into disruptions of “constitutionally assigned functions.” This language might be meant to repeat the *Nixon* concern with constitutionally valid powers, but the term “constitutionally assigned” seems to refer to powers allocated specifically in the text of the Constitution. The Court clearly sought to protect core functions, but it remained uncertain precisely what those functions were and to what extent they might be vulnerable to attack by powerful constitutional interests of other branches.

The Court applied its new balancing test in *Nixon v Fitzgerald* and *Harlow v Fitzgerald*, companion cases in which a “whistleblower” sued the President and his aides for an allegedly unlawful discharge. The Court held that the former President enjoyed absolute immunity from civil liability for such acts performed in office, while his highest aides enjoyed only a qualified privilege. Both the majority and the dissent in *Nixon v Fitzgerald* adhered to the balancing test set forth in *Nixon*, ac-

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63 Id at 440.
64 Id at 443.
67 In this context, a whistleblower is a government employee who informs the relevant authorities that his employer is engaged in illegal or illicit activities. Fitzgerald had been dismissed from his position as a management analyst with the Department of the Air Force after he testified before a congressional subcommittee about cost overruns on a department project. Two months after Fitzgerald's testimony, the White House staff prepared a memo outlining several means of discharging Fitzgerald and presented it to Air Force authorities. 457 US at 734 n 1.
68 Id at 758.
69 *Harlow*, 457 US at 818. Rather than extend the cloak of presidential protection to the aides who implemented his decisions, the Court distinguished the leader from his minions. The Court relied heavily on “the president's unique status under the Constitution” in making its decision. *Nixon v Fitzgerald*, 457 US at 785 (White dissenting). Absolute protection for the President but not his aides is troubling from the perspective of the unitary executive doctrine. In practice, denying presidential aides immunity eviscerates much of the President's own privilege. If they cannot act in his stead with impunity, then he is essentially disempowered from acting.

Compare *Gravel v United States*, 408 US 606 (1972) (legislative aides protected by the Speech or Debate Clause insofar as they were engaged in activity that would be protected were the legislators themselves involved). Surely individuals who work for the executive deserve the same treatment as those who work for legislators, at least in the performance of their duties. Thus, if a legislative aide may seek shelter under her boss's Speech or Debate Clause immunity, so too should an Interior Department employee find protection in carrying out executive functions, as long as the President himself would have enjoyed immunity.
knowing that the Court “must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch.”

The Justices disagreed vehemently, however, about whether civil liability was indeed too great an intrusion on the special position of the President. The majority wrote that Nixon’s claimed immunity was “a functionally mandated incident of the President’s unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.” This special position warranted granting him absolute immunity. The majority implicitly invoked the unitary executive doctrine: “This grant of authority [the vesting of executive power in Article II] establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity.” The dissent, on the other hand, stressed functions, not offices, in determining immunity: “Attaching absolute immunity to the Office of the President, rather than to particular activities that the President might perform, places the President above the law.” While they arrived at different answers, all the justices agreed that “the only question is whether the dismissal of employees falls within a constitutionally assigned executive function, the performance of which would be substantially impaired by the possibility of a private action for damages.”

While the Opinion Clause undeniably outlines a “constitutionally assigned” function, an implicit power of intrabranch communication could not lay that claim. If communication between the President and the Interior Department qualifies as a core executive function, however, then it deserves greater protection by the Court and greater respect from Congress. Unfortunately, the Court has failed to define these core functions.

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70 457 US at 754. All the Justices agreed that interference with constitutionally assigned functions was the hallmark of a legitimate immunity claim; the decision to recognize or reject a claim of presidential immunity in such a situation required examination of “the impact of immunity on the ability of the President to carry out his job as unitary executive and counterweight to Congress . . . .” Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum L Rev 573, 628 (1984).

71 Id at 749.

72 Id at 750.

73 Id at 766 (White dissenting).

74 Id at 785 (White dissenting).
3. Separation of powers and executive power.

The Court's flexible approach to conflicting claims of constitutional authority in the Nixon cases (in stark contrast to the strict delineation of powers adopted in the removal cases) is reflected in recent Supreme Court cases dealing with the separation of powers doctrine. In the last fourteen years, the Court has decided eight cases based on this notion of governmental structure.\(^7\) Several of these cases have implications for Congress's attempt to limit communications between the Interior Department and the President. They reveal that where the Court can find a function enumerated in the Constitution itself, it defers to the textual authority. Where the Court cannot, it balances the extent of the intrusion against the core nature of the function intruded upon.\(^8\)

In the Nixon cases, the Court invoked the balancing notion to analyze a situation neither anticipated by the Framers nor addressed in the Constitution. These cases imply that core functions include at least those powers explicitly allocated in the Constitution. The Opinion Clause falls within this category. As discussed below, however, even an implicit version of the Opinion Clause power would also qualify as core, for explicit grants of power are merely a subset of the broader category of core functions.

If the argument for presidential authority to demand communications from the Interior Department is based not on the textual ground of the Opinion Clause, but on the separation of powers doctrine, the Court will invoke a balancing test. Those functions that are absolutely essential—"core" in the Court's terminology—will be protected, while encroachments that do not debilitate the operations of another branch might be accepted in the face of the intruder's "core" functional needs. Considering a provision such as § 119, the executive interest in communication and the legislative interest in interference will be weighted according to their relative importance in the branches' functions.


\(^8\) See Public Citizen v Department of Justice, 109 S Ct 2558, 2581-83 (1989) (Kennedy concurring) (distinguishing Chadha from Morrison and Administrator on this ground).
a) Reliance on constitutional text. In *Buckley v Valeo*, the Court struck down the Federal Election Campaign Act. The Act created a Federal Election Commission exercising regulatory powers and comprising six commissioners, two appointed each by the Senate, the House, and the President. While the Court did not object to the FEC's investigatory duties, it found congressional appointment power impermissible where the FEC made rules under the Act. Rulemaking activities involve "the performance of a significant governmental duty exercised pursuant to a public law," and therefore are reserved by the Constitution to the executive branch and its appointed officers. Although it acknowledged that the Framers did not intend a complete separation of powers, the Court nonetheless rejected congressional involvement in the appointment of executive-functioning officers, for the Constitution expressly vested in the President the power to "appoint . . . Officers of the United States . . ."). The Court reiterated that Congress may not appoint executive officers, although it may vest the power to appoint all inferior officers—not constitutionally required to be appointed by the President—in the President, the courts, or the heads of departments.

*INS v Chadha* presented a similar problem, and the Court again rested its decision on the text of the Constitution. In *Chadha*, the Court held unconstitutional a provision of the Immigration and Naturalization Act that authorized the Senate or the House, acting alone by resolution, to invalidate the Attorney General's decision to allow a deportable alien to remain in the United States for reasons of personal hardship. Congress had reserved for itself a "legislative veto," as it had done in nearly two hundred statutes. The Court did not hesitate, however, to reject the validity of the device, even though Congress routinely included such provisions in its agency-empowering legislation and the executive branch could confer Chadha's right to remain in the United States only with legislative concurrence. Congress would not be permit-

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78 Id at 137 (Those powers were "in the same general category as . . . Congress might delegate to one of its own committees.").
79 Id at 141.
80 Id at 121.
81 US Const, Art II, § 2, cl 2.
82 *Buckley*, 424 US at 132.
84 *Pierce*, 1988 S Ct Rev at 11 (cited in note 75).
85 Strauss, 84 Colum L Rev at 634-35 n 4 (cited in note 70).
ted to circumvent the constitutional requirements of bicameral passage and presentment to the President in creating legislation. Referring to these procedural steps, as well as the presidential veto and the congressional override, as prescriptions designed to prevent injudicious exercise of governmental power, the Court declared that "[t]o preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded." 87

Bowsher v Synar 88 indirectly extended the Chadha logic. The Bowsher Court held that Congress could not constitutionally endow itself with removal power over the Comptroller General, an officer with budget-cutting authority under the Gramm-Rudman Act. Writing that the "Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts," the Court refused to permit an officer controlled by Congress to execute the laws. 89 Justice Stevens's concurrence put the issue more accurately: the solution to the question lay not in resolving the difficult puzzle of which functions were executive and which were legislative, but rather in reading the text of the Constitution. 90 Because the legislature is directed to act through bicameral passage and presentment to the President, Article I dictated the result in this case. As Congress had not followed its prescribed lawmaking procedure, its position was indefensible.

Buckley, Chadha, and Bowsher reflect the Court's attitude toward the special status of constitutionally enumerated functions. Where the Court reads the Constitution to grant the branches certain powers (or to place certain restrictions on their powers), the Court adheres to that discovered textual mandate. In the § 119 debate, the Opinion Clause should qualify as a textually-assigned power that deserves absolute judicial deference.

b) Reliance on balancing test absent clear constitutional mandate of power. The cases above indicate the Court's willingness to bar Congress from interfering with textually explicit grants of presidential power and from avoiding constitutionally-required legislative procedures. But where the function at issue does not lie

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87 462 US at 957-58.
89 Id at 722-23, 726-27.
90 Id at 737 (Stevens concurring); see also Pierce, 1988 S Ct Rev at 14 (cited in note 75).
within the confines of the constitutional text, as in the Nixon cases, the Court uses a balancing test. Communication with subordinates is so crucial to effective functioning of the executive branch that the President's right to demand such communication would prevail in this balance, even if the Opinion Clause did not provide an explicit textual source for this power.

In *Morrison v Olson*, the Court upheld the constitutionality of the independent counsel provisions of the Ethics in Government Act. Those provisions required the Attorney General to show "good cause" in order to remove the independent counsel. The Court conducted a two-part inquiry in addressing the separation of powers concerns: first, whether the "good cause" requirement restricted the exercise of the President's constitutionally appointed functions, and second, whether the Act as a whole violated the separation of powers doctrine by reducing the President's control over the prosecutorial power of the independent counsel.

The Court conceded that the investigatory and prosecutorial functions of the independent counsel were "executive." It drew support for its holding from its finding that the counsel was an "inferior officer," and thus appointable by a court (here the Special Division) at Congress's behest under Article II. Recognizing the need to distinguish *Myers* and *Bowsher*, both of which prohibited Congress from reserving to itself removal power over executive officers, the Court asserted that the Act "does not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction." Because the independent counsel was not appointed by the President and the power of removal—limited as it was by the "good cause" provision—was vested in the Attorney General, the Court concluded that the removal restrictions did not impede the President's ability to perform his constitutional duty.

In upholding the removal provisions, the Court said that it did not believe the President's need to control the independent counsel's discretion was so central to executive branch operations as to

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82 Id at 685.
83 Id at 693.
84 Id at 691.
85 Id at 671, quoting US Const, Art II, § 2, cl 2 ("... but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper ... in the Courts of Law . . . .").
86 487 US at 686.
87 Id at 693.
require that he be able to terminate the counsel at will. The removal provisions did not “impermissibly burden[] the President's power to control or supervise the independent counsel, as an executive official, in the execution of her duties under the Act.” The balance between the presidential interest in controlling officers performing executive duties and the congressional interest in promoting rigorous oversight of government functionaries was struck in favor of Congress. The Court invoked, but did not really describe, the actual balancing; rather, it determined that the presidential interest was simply not of significant weight.

B. Unconstitutionality of Section 119 Under the Separation of Powers Doctrine

The Opinion Clause explicitly defines a narrow power granted to the President. On either the textual argument in Section I, or the judicial analyses like those performed in Buckley, Chadha, and Bowsher, it deserves complete deference over congressional concerns. But even if the scope of this power were viewed too narrowly to protect presidential communication, this executive communication power is implicitly core and outweighs any congressional interest in protecting whistleblowers or in appropriations generally. In addition, § 119 of the Appropriations Act sufficiently offends the separation of powers principle to render it unconstitutional. The power to command communication from Cabinet departments should prevail in the balancing test, for it qualifies as an implicit executive “core function.”

The removal cases address presidential power over subordinate officials: Myers insisted upon—and even Humphrey's Executor acknowledged—the necessity of executive control over executive officers. Unlike the uncertain position of many administrative agencies and regulatory commissions, a Cabinet department rests squarely within the executive domain. The Secretary is removable at the President's will and thus qualifies as an executive officer. The balancing test defined in the Nixon cases and applied in Morrison weighs branches' conflicting claims of authority. Conspicuously exempt from this balance are explicit constitutional powers. Where the Court finds a clear assignment of authority in the text of the Constitution, that textual power prevails.

The Court in other situations, however, seeks to shield from interference the implicit, but nonetheless crucial, core functions of

** Id at 692.
the bickering branches. The "core function" protected from congressional interference, alluded to but never defined in *Administrator*, was implicitly reinvoked by the *Morrison* Court. In deciding that the good cause requirement of the Ethics in Government Act did not trammel unduly on executive power, the Court determined that the Act did not intrude on the essence of executive authority—the core function of the President.

The sole dissenting voice belonged to Justice Scalia. He insisted that "[i]t is not for us to determine . . . how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they all are." He decried the lack of a justiciable standard in the majority's opinion and predicted that "it is now open season upon the President's removal power for all executive officers, with not even the superficially principled restriction of *Humphrey's Executor* as cover."

Scalia's critique of the majority is appealing but somewhat Utopian, for his strong version of separation of powers would require restructuring the federal government. Setting that objection aside, insisting that all executive authority resides in the President creates another problem: defining those powers. The Constitution does not explicitly delineate all executive powers. While the Opinion Clause describes a narrow presidential function, the Take Care Clause, for example, confers countless unnamed corollary powers. The obligation to take care that the laws are faithfully executed necessarily assumes different forms in different circumstances, and to say that the power is textual, and therefore core, is true but unhelpful.

It is beyond the scope of this Comment to define a "core function" for all purposes, but communications between the President and the Interior Department certainly qualify as core executive functions. The starting point in this analysis must be continued recognition of and respect for the unitary executive concept so painstakingly crafted by the Framers. The separation of powers

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99 See id at 711 (Scalia dissenting) ("The Court has . . . replaced the clear constitutional prescription that the executive power belongs to the President with a 'balancing test.'").
100 Id at 709 (Scalia dissenting) (emphasis in original).
101 Id at 726-27 (Scalia dissenting). Justice Scalia pointed out that "good cause" removal provisions were viewed as means of intruding upon presidential control of agency officers in *Humphrey's Executor*, while in *Morrison* the Court determined them to be the means of ensuring presidential control over his executive agents. Id at 707 (Scalia dissenting).
102 See Pierce, 1988 S Ct Rev at 4 (cited in note 75).
principle requires the three branches to check one another's assertions of power; each branch must be able to defend its own turf through the use of constitutional authority. As the Framers realized in 1787, and as scholars and the Supreme Court continue to appreciate, a unitary executive is essential to the proper functioning of this system. The coordination and energy requisite to effective operation of the executive branch rest in the President.

As the early removal cases indicated, the President must be able to control at least the purely executive officers of the government. Moreover, the practical reality of the executive task requires these subordinates, for the President cannot do the job alone. He centralizes decisionmaking and oversees implementation of those decisions, but he depends on numerous individuals beneath him to perform the executive branch duties. In short, the separation of powers doctrine requires a unitary executive, the unitary executive requires subordinates, subordinates require control, and control requires communication. Cutting off communications from the Interior Department to the President by curtailing the Department's ability to report its interactions with Congress violates the separation of powers doctrine and offends the unitary executive principle.

Should the legislature breach the boundaries of a core executive function, the Court presumably will order it back across the line. In enacting §119 of the Appropriations Act, Congress attempted to interfere with communications between the President and one of his Cabinet departments. An encroachment that reaches into the Cabinet itself is insupportable, and even under the lenient considerations of the Morrison court, it should provoke constitutional scrutiny. While the Opinion Clause provides persuasive grounds for finding §119 unconstitutional, the same result derives from separation of powers principles alone.

**CONCLUSION**

Where a constitutional provision definitively indicates a boundary of authority, the Court rigorously enforces that line. Faced with §119, the President can command such energetic protection of his "core functions" from the Opinion Clause. That clause permits him to demand communications and advice at will from any of his Departments, including their heads and their underlings. Even without explicit textual support for broad executive branch communication powers, the nature of the unitary executive, an essential component of a political system based on separation of powers, requires that the President be able to communicate with all of his executive branch subordinates, including his Cabinet de-
departments' members. Congress's attempt to intrude on this channel of communication through its appropriations rider is unavoidably unconstitutional.