Readings by Our Unitary Executive

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Here is a claim, taken from an Office of Legal Counsel ("OLC") memorandum, that fits within the category (familiar to all constitutional lawyers) of a "must have been" truth: Said OLC, Plenary power over the legal affairs of the United States was vested in the Attorney General when the Office of the Attorney General of the United States was first created by the Judiciary Act of 1789. Such must have been true (we are likely to think), for where else (we are likely to ask) would plenary power over legal affairs be vested, but in the legal agent of the President. Directing the nation's legal affairs is inherently executive, anything inherently executive must be vested directly in the President or in him through his agent, and any view so inherently correct must have been shared by the fathers of our constitutional scheme, the Framers of the Judiciary Act of 1789. That the power over legal affairs would be so vested follows from our Unitary Executive—that central conceptual aspect of the Framers' constitutional design.

Now however much OLC's claim must have been true, it takes little to see that in fact, the claim is just plain false. Indeed, one need look no further than the footnote that followed the just quoted text. In that note, OLC explains just what it means by "plenary power" being vested in the Attorney General. As the footnote says:

Section 35 of the Judiciary Act provided in pertinent part that: "[T]here shall . . . be appointed a meet person . . . as attorney-general . . . whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned . . . ."

[To carry out the mandate of the Judiciary Act,] "District attorneys" now known as "United States Attorneys," were to be appointed to conduct litigation in the lower courts of the United States but were not placed under the Attorney General's authority until 1861. From 1820 until 1861, the "district attorneys" were supervised by the Department of the Treasury.
So the Attorney General in 1789 had *plenary* power over legal affairs of the United States in the sense that he had *partial* power over the legal affairs of the United States—although he had full power over affairs prosecuted in the Supreme Court, he had no power over affairs prosecuted anywhere else.

What makes for this kind of mistake?

The topic of this conference is the unitariness of executive branch interpretation, and in a way, the very fact that we are asking this question in this way—that is, the fact that we focus on "unitariness" in our inquiry—suggests that we suffer from exactly the confusion that leads good lawyers like Ted Olson to gaffes like the one set out above. For why not a conference on the efficiency of executive branch interpretation, or the federal budget and executive branch interpretation, or, here’s an idea, the *truth* of executive branch interpretation? What is it about unitariness that so completely draws our collective imagination?

I suggest that we focus on unitariness because we suppose that lurking behind these otherwise pedestrian questions of policy—i.e., should the Solicitor General be made relatively independent of the President, can one agency of the executive take a legal position contrary to the President’s—is some sort of deep constitutional command that arises from something the Framers of our Constitution did, and that compels the continued reverence of anyone committed to constitutional fidelity. Unitariness is our focus because we have come to believe that unitariness (as we have come to understand that notion) was essential to the Framers’ design. And because we believe unitarism essential to their design, we read what constitutionalists do, and did, to fit as much as possible this model of unitarism. We *believe* the Constitution is unitarian, so we see unitarianism in all things the Framers did. Believing is seeing.

A picture holds us captive. For as should have been clear long ago, the view that the Framers embraced anything like the unitarianism spouted by the modern unitarians is just plain myth. For the Framers, unitariness was just one organizational norm, appropriate to some (but not all) aspects of executive structure, no different in kind from efficiency, independence, or disinterestedness. To the extent that we elevate unitariness over all, for all types of executive structures, we have, I suggest, misunderstood the Framers’ design. In effect, we have *Lochner-ized* unitarianism, where *Lochnerizing* means the constitutionalizing of what has come to appear natural by those who should know much better. Unitarianism, so understood, has become an unquestioned and unquestionable reading of our executive’s de-
sign. We have forgotten how unnecessary or contentious a reading it might be.

In this essay, I examine just two dimensions of the Framers actual constitutional practice: first, the control of the government's legal affairs, and second, the role the Framers envisioned for something like a centralized legal authority. Each dimension is just a small aspect of the Framers' conception of the nature of the executive, but together, they may hint at a conception of the executive quite contrary to that of the modern unitarians. I then apply this understanding to specific questions raised by executive interpretation. As I argue, the issues raised by executive interpretation are similar to the more fundamental questions of agency independence generally, and my discussion of it is simply an application of this more general idea.

I should say up front that it is not my claim that ultimately the best reading of our constitutional design is not unitarian. Indeed, Cass Sunstein and I have argued elsewhere that although we believe it was not the design of the Framers, unitarianism may be the reading most faithful to the Framers' original design today. Instead, my claim here is much more limited: an argument for unitarianism cannot rest upon an argument of originalism, as that type of argument has most recently been understood. If we are unitarians, it cannot be because we are originalists; and if we are originalists, then we should be quite skeptical about constitutionalizing unitary values, or so I hope the following suggests.

I. THE ORIGINALIST'S METHOD AND THE UNITARIAN'S IDEALS

Begin first with something of the originalist's way of reading, and second, with something of the unitarian's conception of the executive. How should an originalist determine whether unitarianism was within the Framers' design, and what is this unitarianism that is claimed for the Framers' design?

Scads have been written about the theory of originalism and the theory implicit in its methodology. But focus here on originalism in

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practice, as revealed by originalism’s most consistent Supreme Court Justice, Antonin Scalia. Three terms ago, in *Harmelin v. Michigan*, writing only for himself and the Chief Justice, Scalia sketched a clear and unambiguous originalist methodology while explicating the scope of the Eighth Amendment’s “cruel and unusual” punishments clause. His practice helps guide our efforts here.

At issue in *Harmelin* was a Michigan statute that imposed a life sentence for the possession of a (relatively) small amount of cocaine. Ronald Allen Harmelin claimed that this sentence was disproportionate to the offense, and hence cruel and unusual within the meaning of the Eighth Amendment. Although five Justices disagreed, only two did so on what could be described as strictly originalist grounds. For Justice Scalia and Chief Justice Rehnquist, the originalist’s inquiry proceeded in two well defined steps: asking first, whether the constitutional text, in the language of the time, proscribed disproportionate sentences and second, whether despite the absence of express language to that effect, such a proscription was so clearly presumed that one could consider it a presupposition of the amendment’s enactment. To both questions, Scalia answered no.

To answer the first question, Scalia looked not to the language of the Eighth Amendment as understood today (in which “cruel” may indeed include disproportionality), nor to the language as understood when the phrase first appeared in England (in which it meant a punishment not prescribed by Parliament), but rather to the lan-

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6 *Id.* at 2684-701.
7 *Id.* The Cruel and Unusual Punishments Clause states in relevant part: “nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.
8 *Harmelin*, 111 S. Ct. at 2684 n.1.
9 *Id.* at 2684.
10 *See id.* at 2684-96.
11 *See id.* at 2696-701. This would be similar to the way, for example, that sovereign immunity was said to be a “presupposition of our constitutional structure.” *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 2581 (1991) (holding that the Eleventh Amendment bars suit by native Americans against a state without its consent since the states entered the federal system with their sovereignty intact, and that the judicial authority in Article III is limited by this sovereignty).
12 *Harmelin*, 111 S. Ct. at 2691.
13 *See id.*
14 *Id.* As Scalia wrote, “unless one accepts the notion of a blind incorporation, however, the ultimate question is not what ‘cruell and unusuall punishments’ meant in the Declaration of Rights, but what its meaning was to the Americans who adopted the Eighth Amendment.” *Id.* To those Americans, “[w]renched out of its common-law context, and applied to the actions of a legislature, the word ‘unusual’ could hardly mean ‘contrary to law,’ ” since already punishments not prescribed by the legislature were illegal in America. *Id.* On the question of whether the Framers actually thought they were rejecting common law crimes, see Gary D.
guage as understood by the American Framers and their political community.¹⁵ So qualified, Scalia argued that it was plain that the language did not proscribe disproportionate punishments.¹⁶ As the amendment does proscribe "excessive bail,"¹⁷ this suggests that the drafters knew how to signal a proscription against disproportionality. Instead, as Scalia concluded, the language "would have been an exceedingly vague and oblique way of saying what Americans were well accustomed to saying more directly."¹⁸

Thus the only remaining question for the originalist was whether language notwithstanding, the amendment should be understood to include a proscription against disproportionality. And to this question too Scalia found an easy answer. At the time the Bill of Rights was ratified, a debate over disproportionality was raging throughout the newly formed nation. Jefferson had proposed a reform of criminal sanctions to reflect the emerging drive for "humane" sentences,¹⁹ but the first Congress had rejected his call, as had many states.²⁰ Whatever the relative strength of the various positions on the question, what was clear for Scalia was that the Framers had not yet cohered on any single position. The question was still an open one in 1791, and therefore, a requirement on proportionality could not be understood to be presupposed within the Framers' design. As Scalia concluded, "if the Constitution does not affirmatively contain such a restriction, the matter of proportionality is left to state constitutions or to the democratic process."²¹

Harmelin's model of originalism provides a strikingly clear method for testing claims of implicit restrictions on government power generally, and it provides a useful model for examining the claims of the unitarian to restrict the power of Congress in particular.²² For the unitarian, like Ronald Allen Harmelin, seeks to limit an otherwise proper exercise of the power of Congress. And to justify this limitation within the contours of Harmelin's originalist methodology, the unitarians, like Harmelin, must show that the Constitution

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¹⁵ Harmelin, 111 S. Ct. at 2691.
¹⁶ Id. at 2692-96.
¹⁷ U.S. CONST. amend. VIII ("Excessive bail should not be required").
¹⁸ Harmelin, 111 S. Ct. at 2692.
¹⁹ Id. at 2694-95.
²⁰ Id. at 2694.
²¹ Id. at 2692 n.6.
²² Note that the originalist could argue that the methodology of Harmelin applies to individual rights alone, and not to the structural limitations such as separation of powers. But this distinction has yet to be argued, and I leave it to the originalist to raise it.
“affirmatively contain[s]” the restrictions on Congressional power that they claim, either (a) in the text itself, or (b) in how that text was universally understood. Otherwise, like Ronald Allen Harmelin, the unitarians are relegated to “the democratic process” alone.23

What are the unitarian’s implicit limitations on the democratic process? Here we can draw on a summary of the unitarian’s views provided recently by Stephen Calabresi and David Rhodes.24 As they describe it, the unitarian position is grounded in the Vesting Clause of Article II, which provides: “The executive Power shall be vested in a President.”25 This clause, plus the “Take Care Clause,”26 creat[es] a hierarchical, unified executive department under the direct control of the President. . . . [Thus,] the President alone possesses all of the executive power and . . . he therefore can direct, control, and supervise inferior officers or agencies who seek to exercise discretionary executive power. The practical consequence of this theory is dramatic: it renders unconstitutional independent agencies and counsels to the extent that they exercise discretionary executive power.27

The unitarians conclude that the Constitution embraces a single organizational structure, with the Take Care Clause empowering the President to exercise control over the executive branch subordinates, at least so far as those subordinates exercise “discretionary executive power.”28

“Unitary executive theorists reject the view that the Take Care Clause contemplates merely a housekeeping role for the President, who ‘takes care’ from a distance while unnamed others ‘faithfully execute’ the laws.”29

Of course Congress has some role in filling in the details, but that role is crucially limited. “Unitary executive theorists concede that Congress has broad power under the Necessary and Proper Clause to structure the executive department. . . . They maintain, however, that ‘no matter what structure Congress selects[,] . . . the President must retain the authority to give directives to the officers who assist’

23 Harmelin, 111 S. Ct. at 2692 n.6.
25 U.S. CONST. art. II, § 1, cl. 1.
26 U.S. CONST. art. II, § 3 (“he shall take Care that the Laws be faithfully executed”).
27 Calabresi & Rhodes, supra note 24, at 1165-66 (footnotes omitted).
28 Despite its central role in their analysis, Calabresi and Rhodes do not attempt a definition of “executive power.” Id. at 1165 n.52.
29 Id. at 1167-68.
Finally, the unitarian rejects textual clues that may suggest a structure somewhat to the contrary. Thus, though the Constitution contemplates some appointments being vested (and hence some loyalty engendered) in heads of departments and courts of law, and not the President alone, and though the Framers oddly (for the unitarian) felt it necessary to make explicit that the President could get written reports from his principal officers,

unitary executive theorists reject the contention that Congress's power to vest the appointment of inferior officers in the "Heads of Departments" necessarily insulates these officers from Presidential control. Rather, these theorists contend, this Clause was an insignificant housekeeping provision added at the last minute. Unitary executive theorists also deny that the President's explicitly delineated power to "require the Opinion, in writing, of the principal Officer in each of the executive Departments" implies that the President has no inherent power to tell principal officers what to do. Unitarians contend that the Opinions Clause represents too slender a reed to support this qualification of the substantial grant of power embodied in the Article II Vesting Clause.\(^3\)

Now there is no doubt that the words to which the unitarian points could bear the meaning that the unitarian proposes—that is, no doubt there is a possible reading of "vested" and "executive power" which would support a reading of the executive power as the unitarian reads it. But so too is there a reading of "cruel and unusual punishments" that supports Ronald Allen Harmelin's claim that the Eighth Amendment forbids disproportionate sentences. For the originalist, in neither case is the question whether the words would bear a particular reading; for the originalist, the question is what the originals' reading was: To discover this, we must return to the Framers' actual practice.\(^3\)

In this essay, I ask that question for the control of legal affairs at the founding. Applied to the legal affairs of the founding government, unitarianism should have straightforward implications. Begin within its narrowest domain: federal prosecution. If anything is "purely ex-

\(^{30}\) Id. at 1168 (quoting Lee S. Liberman, Morrison v. Olson: A Formalist Perspective on Why the Court Was Wrong, 38 AM. U. L. REV. 313, 316 (1989) (footnotes omitted)).

\(^{31}\) Calabresi & Rhodes, supra note 24, at 1168 (footnotes omitted).

\(^{32}\) The methodology of relying on the Framers' and the First Congress's actual practice under the new Constitution as a way of understanding their understanding of the Constitution's meaning is of course central to originalism, and to constitutional interpretation generally. See, e.g., Marsh v. Chambers, 463 U.S. 783 (1983) (holding that weighed against the historical background of the use of clergymen in the legislatures at the time of the founding, the Nebraska Legislature's chaplaining practice does not violate the Establishment Clause).
ecutive,” prosecution of federal crimes is;\textsuperscript{33} thus, it should follow that the authority to direct and control federal prosecution would have rested with the President, or with those over whom he had unhindered control, such as the Attorney General. Much of OLC’s proposition quoted above seems to promise—that “plenary power” over the legal affairs be vested in the Attorney General—and so much we should be able to verify in the Framers’ actual practice.

I will begin, then, with this original practice. Once I sketch the framing control over federal prosecution, I will then address more generally the Framers’ conception of the President’s control over the legal affairs of the executive department. Again, if unitarianism is correct, the President should have been empowered to control all discretionary executive power—including not just legal opinions within the executive branch, but also the position taken by members of the executive branch with others outside the executive branch. If, as Roger Clegg said of the Solicitor General, those taking such positions were mere “tool[s] of the President,”\textsuperscript{34} then as with any employee, the President should have been empowered to control their work product.

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\textbf{Original Understandings: Prosecution}
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Begin with the extent to which the President had “plenary power” to direct the legal affairs of the nation through his agents, at least so far as prosecution is concerned, and distinguish first between two kinds of executive control: one I will call directory, and the other, removal.\textsuperscript{35} The President has “directory” control when he can direct an agent about how that agent should decide a question within the agent’s authority to decide; the President has “removal” control when, though he cannot decide the question directly, he can remove the agent who decides it in a way that he does not like.\textsuperscript{36} The unitarian claims that the President must have either directory or unconditioned removal control over everyone exercising prosecutorial

\textsuperscript{33} All seem to make this assumption. See Morrison v. Olson, 487 U.S. 654, 691 (1988) (Scalia, J., dissenting).


\textsuperscript{35} For an excellent and extensive cataloging of types of executive control, see Itzhak Zamir, Administrative Control of Administrative Action, 57 CAL. L. REV. 866 (1969).

\textsuperscript{36} Removal control could likewise be further analyzed into unconditioned removal control, where dismissal could be for any reason or no reason at all, and conditioned removal control, where the reasons for dismissal are limited—for example, to a “for cause” limitation. When I use the term removal control, I am speaking of unconditioned removal control.
power.\textsuperscript{37} How far does the history support this claim?

As we have seen, if there was executive control of prosecution at the founding, it was not through the person we would think most likely vested with such control—the Attorney General. In general, federal prosecution was conducted by district attorneys who did not report to the Attorney General. As Charles Tiefer explains:

When Congress created the government departments in 1789, it did not create a centralized Department of Justice. Instead, individual federal "district attorneys," predecessors of the current United States Attorneys, acted without central control. They conducted prosecutions and performed litigative services for other federal officials on a fee basis. The Attorney General did not control or supervise federal district attorneys; his function was merely to advise the President and the Cabinet.\textsuperscript{38}

Any control over prosecution was achieved without the Attorney General. But this does not yet mean that the President did not have directory control over federal prosecution. Judge Easterbrook points, for example, to President Jefferson's orders to district attorneys to cease prosecution under the Alien and Sedition Act.\textsuperscript{39} And even if one questions the effect of such orders—suggesting, as some have, that the district attorneys treated such orders, even from the President, as advice rather than commands—\textsuperscript{40} it still appears that the President retained the power to remove these agents. Thus even if the Attorney General did not, the President did have directory and removal control over district attorneys.

But this does not yet show that the President had directory control over all federal officials conducting prosecution. He had, for example, no directory control over the Comptroller General.


\textsuperscript{40} Consider, for example, the way in which Jefferson "ordered" the Attorney General to stop Sedition Act prosecutions. In a letter to General Lincoln, Jefferson writes:

To punish however is impracticable until the body of the people, from whom juries are to be taken, get their minds to rights; and even then I doubt its expediency. While a full range is proper for actions by individuals, either private or public, for slanders affecting them, I would wish much to see the experiment tried of getting along without public prosecutions for libels. I believe we can do it. Patience and well doing, instead of punishment, . . . would be a happy change in the instruments of government.

("Comptroller")—the very first executive branch official who was "granted centralized control of the enforcement power." The Comptroller was the first to have a general power "to direct suits and legal proceedings, and to take all such measures as may be authorized by the laws to enforce prompt payments of all debts to the United States." Many have noted that the Comptroller was an independent officer within the Department of Treasury. As Charles Tiefer describes, the Comptroller "clearly was expected to exercise independent judgment, since the safeguard of having him countersign the Secretary's warrants would be lost if he were wholly under the Secretary's direction." 

Now one might think, if unitarianism was the Framers' focus, that this independence would have been troubling to the Framers. But the Framers and the early congresses treated this independence as flowing from the nature of the Comptroller's duties. Indeed, so different was the Comptroller's office within the original design that it led James Madison, an otherwise strong supporter of unconditioned removal power, to say "there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the Government." And while Congress in the end did not make the Comptroller unremovable by the President, it did (in 1795) make his decisions against claimants "final and conclusive."

The best understanding of the Comptroller's office was that he was to exercise judgment independent from the President, as the President did not have directory control over him. Still, removal control was retained, and the unitarian could claim this sufficient to sustain the unitarian's conception of presidential control: And so again, nothing yet shows the President was limited in his power to remove anyone with the presidential prosecutorial power.

The diversity of the originals' prosecutorial bureaucracy does not

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41 Tiefer, supra note 38, at 75. In 1797, in Congress's first effort to centralize control of federal litigation, it conferred on the Comptroller power "to institute suit for the recovery of a sum or balance reported to be due to the United States upon the adjustment of [a tax officer's] account." Id.

42 Id.


44 Tiefer, supra note 38, at 73-74.

45 1 ANNALS OF CONG. 636 (Joseph Gales ed., 1789). Madison's views can be questioned, given the indication from the House Journal that he subsequently asked to "withdraw" his proposal. Id. at 639. That this should draw Madison's views into doubt itself can be questioned, as we apparently have no other indications of the debates on that day.

46 Act of March 3, 1795, ch. 48, § 4, 1 Stat. 441, 442 (1795).
end, however, with the Comptroller. For even if the President retained removal control over the Comptroller, what type of control did the President exercise over state prosecutorial officials? If the unitarian predicts that the President retained control over all prosecution, how does the unitarian account for the following? As Professor Harold Krent reports, "Congress vested jurisdiction in state courts over actions seeking penalties and forfeitures, granted concurrent jurisdiction to state courts over some criminal actions, and assigned state officials auxiliary law enforcement tasks . . . to state officials who were far removed from control of the executive branch."47

According to the utilitarian model, if state officials exercise federal prosecutorial authority, they too must be subject to some type of presidential control.48 But of course they were not. Even when actions were criminal, "[t]he decisions whether to sue and what punishments to seek remained in the discretion of individuals outside the Executive's control."49 Thus, Krent concludes, the Framers and the first Congress clearly vested some prosecutorial authority outside the reach of the federal executive. And to the extent that some was without the federal executive, the federal executive did not have "plenary power" over the legal affairs of the nation. Thus, at least with respect to this narrow aspect of legal affairs, this essential condition of the unitary executive did not obtain.

But the independence does not stop there. For not only was federal prosecution vested in at least some federal officers subject only to removal control, and vested in some state officers not subject to executive control, but federal prosecutorial authority was also granted to private individuals, wholly outside any executive's control at all. Both through citizen access to federal grand juries, and through civil qui tam actions (treated for at least some purposes as criminal actions), citizens retained the power to decide whether and when to prosecute for violations of federal law.50 These individuals exercised prosecutorial power in every meaningful sense of that power, thus again undermining the claim that prosecution was exclusively the executive's.

48 One might distinguish executive from prosecutorial authority by arguing that the former obtains only when the suit is brought in the name of the United States.
49 Krent, supra note 47, at 304.
Standing issues aside then, for the Framers it appears that the decision regarding "who should prosecute whom" was a judgment primarily of pragmatics, not constitutional politics. As summarized by one commentator:

[The Framers intended that prosecution would be undertaken by, not constitutionally assigned to, executive officials. [They also] intended that executive officials would typically, not always, prosecute. [And they] intended that prosecution would be an executive, but not necessarily a Presidential, function. Hence, they provided that most prosecution would be undertaken by officials within the executive branch, but not necessarily executive officials subject to Presidential control through appointment, direction, and removal.]

For the originalist applying Harmelin's methodology, this history has significant consequences. As in Harmelin, the history suggests at the least that the Framers were not of one mind about that which is offered as a constraint on the democratic process—here, the principle of unitariness, and in Harmelin, the requirement of proportionality. And as in Harmelin, that the Framers were not of one mind should suggest that how prosecutorial power was to be structured remained within Congress's judgment, at least so long as its structuring is "necessary and proper." A limitation on the structure for prosecution was not stated affirmatively in the constitutional text itself, and the practice of the founding generations reveals that it was not clearly understood to limit otherwise granted Congressional power. Thus, for a Harmelin originalist, it should follow at least with respect to prosecution, that the Constitution leaves the question up to the democratic processes. The unitarian, at least with respect to prosecution, cannot be an originalist.

**Original Understandings: Legal Affairs**

If not prosecution, then what about legal affairs more generally? Did the Framers erect a fundamentally unitarian structure for controlling legal affairs beyond prosecution? Is there historical evidence that supports the belief that the President retained an inherent power to direct these clearly discretionary judgments, including interpretive or legal judgments, as applied to legal affairs? That he had (as Chief

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53 U.S. CONST. art. I, § 8, cl. 18.
Justice Taft said in *Myers v. United States*\(^{54}\) that he must have the power to "supervise and guide" officials in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone."\(^{55}\) Are they, as the unitarian apparently assumes, the servants (mere "tools")\(^{56}\) of the President alone?

In my view, no area better than legal affairs puts into relief the differences between the unitarian conception of the executive and the conception of the Framers. It has become second nature to treat the law-executing branch as the President's, as if those within that branch have duties only to the President, and to treat suggestions of independence within the law-executing branch, from independent prosecution to independent Attorneys General, as not just bad ideas, but as unconstitutional.\(^{57}\)

But our confidence in this picture derives in large part from a well-developed conceptual anachronism. We appear to share with the Framers a similar language—we have the words "executive discretion," "executive removal power," or "executive power" itself—and we pour into these words the substance of our modern notions of the same name. But if we are to reconstruct the Framers' understanding whenever we read the Framers speaking of "discretion"; we have a conception of "removal," and we see the Framers as speaking of the same power when they speak of the power to remove. But if we are to reconstruct the Framers' understanding of the notion of executive control, or of the power of removal, or even of executive power, we must look for clues to their understandings in what appear to be the anomalies of their practice. And within the domain of executive control over legal affairs, I suggest, there are plenty of oddities to consider.

Begin with the Attorney General's official opinion practice. As described above, the Attorney General had essentially two duties in the early administration: representing the United States before the Supreme Court, and providing written opinions on legal matters for the President or heads of departments.\(^{58}\) The source of both duties is

\(^{54}\) 272 U.S. 52 (1926).

\(^{55}\) Id. at 135.

\(^{56}\) Clegg, supra note 34, at 968.

\(^{57}\) See Morrison v. Olson, 487 U.S. 654, 715-23 (1988) (Scalia, J., dissenting) (arguing that the appointment of independent counsel is unconstitutional); Proposals Regarding an Independent Attorney General, 1 Op. Off. Legal Counsel 75 (1977) (arguing that the appointment of an independent Attorney General would be unconstitutional).

\(^{58}\) See supra notes 1 and 2.
quite specific. The Judiciary Act of 1789 required he represent the United States in the Supreme Court; it also granted to the heads of departments the power to request the Attorney General's "advice and opinion on questions of law." 59

How might this last duty, the statutory "opinions clause," be understood? To one who conceived of the Attorney General solely as the agent of the President, this statutory opinions clause might be understood as a further extension of that presidential authority, by channeling legal determinations through the Attorney General. Such a reading would not explain why department heads had just the option of requesting such opinions; if indeed this was an extension of presidential control, one might expect department heads to be required to request and defer to the legal judgments of the President's agents. Nonetheless, to the extent that one understands the Constitution's opinions clause to betoken the implicit control that the President has over the heads of the departments, 60 so one might understand the Attorney General's opinions clause to betoken the implicit control that the Attorney General was to have over the legal opinions of the heads of departments. And so understood, the statute would conform to the unitarian's notion of a central role for the President in controlling the legal determinations of those within his administration.

The originalist's understanding of this statute was quite a bit different. Indeed, rather than founding a general power to control legal opinions throughout the executive branch, the statute was read as a limitation on the scope of the Attorney General's power to give legal opinions at all. 61 For reasons very much analogous to the reasons behind the Justices' refusal in Hayburn's Case 62 to decide questions not judicial (having been given power X means we do not have power Y), the early Attorneys General understood the statutory opinions clause to preclude the Attorney General from issuing opinions more broadly than the text of the statute allowed.

The foundation of this early reading of limitation was sketched by General Wirt in 1818. 63 In response to a request for an opinion

59 See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (1789). As the Attorney General was not the head of a department, the Constitution's opinions clause would not of its own force reach him. See U.S. CONST. art. II, § 2, cl. 2.
61 See infra text accompanying notes 62-75.
62 See Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).
63 Office of Attorney General, 1 Op. Att'y Gen. 211 (1818). Prior to this, the system of the Attorney General's opinion practice was less uniform, and there is good reason to believe that what motivated Wirt was simply a desire to reduce the demands on an already understaffed office.
from a member of a department who was not a head of a department, Wirt wrote:

Under this law, which is the only one upon the subject, I do not think myself authorized to give an official opinion in any case, except on the call of the President, or some one of the heads of departments; and I should consider myself as transcending the limits of my commission in a very unjustifiable manner, in attempting to attach the weight of my office to any opinion not authorized by the law which prescribes my duties.  

Standing alone, of course, this refusal tells us little. For it is fully understandable why Wirt would refuse a lesser officer an opinion when the statute seems to contemplate the request from the head of a department. But more telling is Wirt's later refusal on precisely analogous grounds of a request by Congress. Again, Wirt stated:

The Attorney General is sworn to discharge the duties of his officer according to law. To be instrumental in enlarging the sphere of his official duties beyond that which is prescribed by law, would, in my opinion, be a violation of this oath. Under this impression I have, with great care, perused all the documents which have been handed to me in this case, for the purpose of ascertaining whether the order with which I have been honored from the House of Representatives falls under either head of my official duties; and it appears to me that it does not . . . .

No such provision having been made, and believing, as I do, that in a government purely of laws it would be incalculably dangerous to permit an officer to act, under color of his office, beyond the pale of the law, I trust I shall be excused from making any official report on the order which the House has honored me.  

Thus Wirt understood the statutory opinions clause as imposing both a duty "to give opinions to the heads of departments" and a limitation to give legal opinions only to the heads of the departments on the Attorney General's power. And neither was this reluctance to offer guiding legal advice an idiosyncratic weakness of Wirt. To this 

64 Id. at 212. This was the argument of the dissent in Morrison v. Olson, 487 U.S. 654, 715-23 (1988) (Scalia, J., dissenting), and this argument of course has not disappeared. See Lee S. Liberman, Morrison v. Olson: A Formalist Perspective on Why the Court Was Wrong, 38 Am. U. L. Rev. 313 (1989).

65 Duties of the Attorney General, 1 Op. Att'y Gen. 335, 336 (1820). Attorney General Cushing later indicated that this limitation was specific to the power to issue legal opinions as provided by the opinions clause of the Judiciary Act, and did not mean that the Attorney General was free to refuse requests from Congress about activities within the scope of the Attorney General's office. Office and Duties of Attorney General, 6 Op. Att'y Gen. 326, 335 (1854). My point here however is limited to the way the opinions clause is read, and does not concern more general considerations about the Attorney General's role with respect to Congress.
day, except for advice about the legality of bills, the Attorney General refuses to give Congress its legal opinion. Indeed, the Attorney General had developed quite an intricate jurisprudence for determining whether giving an opinion is, under the statute, appropriate. Beyond the refusal to give an opinion to an inferior officer, or to Congress, the Attorney General will refuse to provide an opinion: (1) when it is not yet necessary for the department's deliberations; (2) when the opinion is likely to be revised by other department heads; (3) when the opinions are sought merely as a confirmation of the department's own internal position; (4) when the matter requires either an investigation or the evaluation of facts; or (5) when the matter is either presently before a court, or is likely to come before a court.

One way to understand this jurisprudence of limitation on the Attorney General's power is as an attempt by the Attorney General to protect his office from ever increasing demands placed upon it by a wide range of government officials; no doubt, this is in part a good explanation. But for our purposes, what is important about the limitation is the norm that it trades upon in justifying its self-imposed limitation—a norm of strict respect for the domain of action that Congress has set (even for an officer fully removable by the President), and an implicit respect for the power of Congress to set limits on domains.

But more than the limitations just sketched, the most revealing aspect of the Attorney General's refusal to propagate legal opinions comes not from his refusal to aid Congress, or inferior officers, but from his refusal to provide legal opinions to his own district attorneys prosecuting for the United States. According to Wirt, the Attorney General was not even permitted to give legal advice or directions ("instructions") to district attorneys prosecuting in the name of the United States. Leonard White's account on this is fantastic:

72 WHITE, supra note 38, at 338-39.
73 Susan Bloch has argued, however, that the originals may not have considered the Attorney General removable by the President. See Susan L. Bloch, The Early Role of the Attorney General in our Constitutional Scheme: In the Beginning There was Pragmatism, 1989 DUKE L.J. 561, 582.
Wirt ruled that the district attorney could not expect advice from ... him on law questions. His opinion on this point is significant.

The district attorney for the Western District of Virginia had transmitted to the fifth auditor in 1823 the record of a pending case involving the accountability of a public agent, with a request for instructions from the Attorney General. Wirt declined to give instructions, on the same ground taken in declining opinions to congressional committees, and also because to do so would be to perform the duties of district attorneys "in all other cases, in which, for their own ease, they may call for such aid. . . ." Wirt recognized, of course, that the Treasury Department might call for his opinion in a proper case, and to defend his position he was consequently required to show that the district attorney could not call in the Treasury Department for instructions of this sort. His argument left the district attorneys with no possibility of professional advice.74

As White suggests, consider the position in which the district attorneys were placed as a result of Wirt's decision. Not only were they, by Wirt's reasoning, unable to turn to the Attorney General for legal advice, but they were, by the nature of their office, not permitted to turn to anyone for legal advice; legal advice was what they were hired for, and it would be inconsistent with their commission to delegate that responsibility to another. To us, of course, the notion that district attorneys are unable to rely upon legal advice from the Attorney General is bizarre at best. But in the early republic, it rendered these district attorneys independent from superior discretion, at least so far as their legal judgments were concerned, despite being fully removable by the President. Again, White's characterization is helpful:

The narrow construction of his powers by Wirt necessarily forbade the extension of his supervisory authority over the district attorneys, leaving these law officers in an independent and anomalous position. Failing to create a Home Department in 1789, Congress confided the general supervision of the district attorneys to the State Department. In a very casual way Jefferson and his successors instructed the attorneys on cases involving international law, foreign ministers and consuls. . . . Much business, however, arose from the navigation and revenue laws, and in 1789 Congress had authorized the comptroller to direct prosecution for all debts due to the United States. By clear implication and subsequent practice the district attorneys thus became subject to the comptroller's instructions for this class of cases, as well as the fifth auditors

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74 WHITE, supra note 38, at 340-41 (ellipsis in original) (footnote omitted).
instructions after 1820 in cases involving delinquent collectors of revenue. They also assisted the Postmaster General in suits against delinquent postmasters and their sureties, and in the prosecution of offenses against the mails. The attorneys might, therefore, receive instruction from three major federal agencies, to none of which they were clearly responsible.\textsuperscript{75}

What would explain this pattern of control? One way would be to understand it as deriving from a stronger conception of the "law" to which an executive officer owes a duty—stronger not because we would not understand an officer’s duty to follow particular laws, but because we would not understand (as firmly as they) the integrity they considered "the law" to have.

A duty to "the law" was an obligation in part to stand independent of politics. Thus making someone an officer of the law meant making him independent of the executive. To us, such a picture of law seems just naive—as Brandeis said (quoting Holmes) in a similar reflection, law "in the sense in which courts speak of it today" hasn’t this life.\textsuperscript{76} But to the extent that "law" had for early Congresses this type of life, was the extent that the officers of the law were independent of the President. So understood, even if district attorneys were tools of the President, for the Framers and the first Congresses the President’s wish would not be the attorney’s demand.

Former Attorney General Griffin Bell suggests a second understanding of this diffusion of control over legal affairs which complements the first. In asking why the originals departed from the unitarian’s hierarchical model of executive power, at least with respect to the department of legal affairs, Bell suggests that the early and restrictive understanding of the clause could have reflected a profound "fear of the Attorney General."\textsuperscript{77} Congress, Bell suggests, intentionally divided the power over legal affairs, perhaps in part to protect against the temptation to conform legal opinion to political practice.\textsuperscript{78} If Wirt’s reading of the statutory opinions clause is correct, Congress’s continued refusal to further empower the Attorney General (by, for example, granting him power over lower court prosecutions) could have been in recognition of the potential harm such centralization could have had.

This reading, suggesting Congress’s fear of a powerful Attorney General, is supported by the immediate history following the Judici-

\textsuperscript{75} \textit{Id.} at 340 (second ellipsis in original) (footnote omitted).
\textsuperscript{76} \textit{Erie R.R. Co. v. Tompkins}, 304 U.S. 64, 79 (1938) (quoting Justice Holmes).
\textsuperscript{78} \textit{Id.} at 1052-54.
ary Act of 1789. As Attorneys General pressed Congress for some centralized organization within which to draw together the disparate legal services in the various departments, Congress continued to resist. In 1791, Attorney General Randolph was the first to make such a request. His plea was endorsed by President Washington, but to no avail. Bell describes the history:

The congressional snub of Randolph's recommendations in 1791 established a pattern that was to persist for decades. Seven Attorneys General had succeeded Randolph before Congress in 1818 finally appropriated funds for the hire of a clerk. Despite renewed recommendations by President Jackson in 1829 and 1830, by President Polk in 1846, and by President Pierce in 1854, it was not until 1861—a full seventy years after the first request by Randolph and Washington—that Congress finally gave the Attorney General some measure of authority over the district attorneys. 79

Decentralization was not just desired; for close to 100 years, it seemed to be essential to the design. But what is important for our purposes are the reasons why this decentralization would make sense. I suggest the following. The originals understood well the need for a divided loyalty in this inherently executive officer—a loyalty to both the President and (as they saw it) to the law. To assure such dual loyalty, executive officers charged with executing the legal affairs of the nation were also charged as officers of the law; according to this notion of independence, in exercising legal judgment, officers were understood to be independent, not just in the sense that they could claim independence, but also in the sense that they were commanded to claim independence—that is, they were not permitted to defer to the political center. Finally, and most interestingly, to preserve this independence, the first Congresses adopted a familiar technique of divided power, to assure that the temptations for disloyalty to the law would not operate on officers too forcefully. Congress, that is, kept legal affairs decentralized so that political influence had but a diffuse target upon which to focus. Thus, by dividing legal power so completely, the temptation for political power to overwhelm was thereby diminished.

None of this is meant to suggest that the Attorney General's role was never as the President's agent alone. Of course he functioned as an agent both of the President and "of the law." 80 Instead, what it should suggest is something of the Founder's conception of the proper role for a legal officer within the structure of the original's executive.

79 Id. at 1052.
While we have come to view the advocate Attorney General as unproblematic, these snippets suggest a view of a far more reserved legal agent, and a sense of why this legal agent was to remain reserved.

Consider some of the ways in which this difference between our conception and theirs might be manifested. For example, would it be consistent with this original hostility to a centralized legal authority, and in particular, with a narrow reading of the Attorney General's statutory opinions clause, for the Attorney General to take an active role in advancing the executive's legal opinion in the Supreme Court in cases where the United States is not a party? Consider the recent practice of the Court to ask for the opinion of the Attorney General (or her agent, the Solicitor General) on a matter then pending in the Court, where the United States is not a party. As the graph indicates, not only is this practice of relatively recent origin, but also the rate of requests has recently increased quite dramatically. Where before 1958 the practice appears not to exist at all, in 1991, the Court requested the government's views some forty-one times, three times the average for the period prior to 1982.

As an initial matter, one might ask whether this practice of giving (in essence) legal opinions to the Supreme Court at the Court's request is consistent with Wirt's refusing opinions to Congress upon Congress's requests. But my point about the Attorney General is not so direct. Instead, my point is simply to suggest the tension that must exist between a conception of the executive where it seems natural to lobby widely for the President's legal views in the Supreme Court, and one where it seems quite unnatural even to give opinions to Congress, or more tellingly, to district attorneys. If an element of the original design was to divide legal affairs, even if only to keep them legal as opposed to political (again, in the sense in which the Founder's would have understood that distinction), then at a minimum, the practice

81 The data for this graph was collected from a search on Mead Data's LEXIS service, searching on the form of the Court's order requesting the government's views. According to the Supreme Court's Clerk, the form of this order has remained stable. Nonetheless, the graph requires two significant qualifications. First, there is no attempt to correct for any shift towards an increase in federal cases. Second, it may be that the voting rules for requesting the views of the Solicitor General have changed.

82 One might distinguish what the Attorney General refuses to give Congress from what the Solicitor General willingly gives to the Supreme Court by arguing that the former are legal opinions, while the latter are not. While this would comport with current understandings, it seems clear that at least the earlier attitude was broad enough to cover both, and therefore, that read according to that practice, the current practice is quite inconsistent. Indeed, the Judiciary Act spoke not just of "opinions," but also of "his advice and opinion upon questions of law." Judiciary Act, ch. 20, § 35, 1 Stat. 73, 93 (1789) (current version at 28 U.S.C. § 512 (1988)). This is broader than the current act; 28 U.S.C. § 512 does not speak of "advice," and would undoubtedly have proscribed advice in a significant percentage of the current cases.
today stands in tension with that original ideal. And to the extent the current practice stands in tension with the original, it reflects a shift in something more fundamental than the practice itself. It reflects, I suggest, a shift in our understanding of what the natural role of the executive is over the full range of things arguably executive—we, more than the originals, believe that the natural role is unitary; they, by their actions, reveal that they constitutionalized no such thing.

Our conception of the proper control of legal affairs has then changed. But for the originalist, the test of constitutionality is not our shifting understanding of what the “natural role” of the executive is. The test is the Framers’ conception. And as these examples suggest, the practice of the executive in the early republic was inconsistent, or at least in tension, with the unitarian’s claim that the executive possesses an inherent power to direct and control all inferior officers. The Framers’ and the first Congresses’ treatment of the power to direct the legal affairs of the nation weakens the unitarian’s claim that the Framers were unitarians. The Framers seem to have been untroubled with vesting prosecutorial authority in those not directly responsible to the President. Even more telling, they seemed affirmatively to have chosen a structure that assured a relatively weak and decentralized legal department. For the originalist, this should mean that the Constitution leaves “to the democratic process” the process of selecting an appropriate governmental structure for control by the executive.

II. Non-Unitary Implications for Interpretation

The Constitution no doubt constrains Congress in its structuring of executive and administrative departments. The question is by what standard. The unitarian claims, by one standard: one that cuts across all departments, requiring that the President possess ultimate control over the exercise of all discretionary, executive, or administrative power.

The unitarian’s picture, however, is inconsistent with much of the originalist’s practice at least with respect to legal affairs. For the originalist, who, like the originalist in Harmelin, must find a uniform practice at the founding to counter the presumption that questions not addressed explicitly in the Constitution are left to the democratic process, the diversity of the originalist’s practice should entail a similar diversity of permissible practice today. For the originalist to follow the command of the unitarian, she must conclude

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83 For a discussion of other inconsistencies, see Lessig & Sunstein, supra note 3.
both that the Framers conceived of only one proper mode of organi-
ization—unitary—and that they constitutionalized that single mode; this conclusion their practice does not support.

So what does all this suggest about the question for this panel—
the unitariness of executive branch interpretation—for the originalist?84

As suggested above, of course, the great unitarians of our consti-
tutional history certainly believed that interpretation (like any other
executive practice) must be unitary. Chief Justice Taft claimed, for
example, that the President must “supervise and guide [executive of-
fers] in their construction of the statutes under which they act in
order to secure [the] unitary and uniform execution of the laws which
Article II of the Constitution evidently contemplated . . . .”85

But as an initial question, we might ask whether the demand for
unitariness in executive branch interpretation is really distinct from
the general question of agency independence more broadly. If it is
not, then the originalist has no more reason to find an implicit re-
straint on Congress’s power here than in any other area where Con-
gress structures the executive.

To give some context to this problem consider a recent example. In Martin v. OSRC, Occupational Safety and Health Review Commiss-
ion86 two administrative entities within the Department of Labor
presented contrary claims about the meaning of a certain “OSH Act”
regulation.87 One entity—the Secretary—had promulgated the regu-
lation at issue, and was empowered under the statute to charge com-
panies with violations of her regulations. The other entity—the
Occupational Safety and Health Review Commission—had the power
to adjudicate disputes arising out of citations issued by the Secretary.
Before the Supreme Court, each entity had a different reading of the
regulation at issue, and each claimed for its reading interpretive defer-
ence: the Secretary, as regulator, claimed deference for her interpreta-
tion of the OSH Act rule; the Commission, as the body interpreting
and applying the regulation, claimed the same deference for its
interpretation.

The Court resolved this conflict by assigning deference to the
Secretary as regulator, rather than the Commission as adjudicator.
As the entity charged with rulemaking in the first place, the Secretary,

84 For a discussion of whether the constraint of non-unitarianism extends beyond the
originalist, see Lessig & Sunstein, supra note 3.
the Court concluded, was best positioned to receive interpretive deference—it knew better the purposes of the regulation at issue and it had a wider exposure to regulatory problems, and hence, was more likely to develop administrative expertise.

Does this type of conflict—a conflict in interpretations within the executive branch—present a different or more troubling constitutional question than a conflict over policy within the executive branch? If a conflict within the executive branch over policy is not necessarily constitutionally proscribed—which is true if independent agencies are constitutionally permissible—then why would a conflict over interpretation be any more constitutionally suspect? Or put another way, is there a stronger reason why (constitutionally) interpretation, more than policy positions, must be unitary within the executive branch?

One reason for arguing that interpretation must be more unitary than administrative lawmaking could be tied to the link between interpretation and the presidential duty to “Take Care.” Since interpretation is more closely linked to the duty to “take Care that the laws be faithfully executed” than policy making is, interpretation is an essentially executive function. And likewise since the policy making functions of agency rulemaking are not directly tied to any executive function textually committed to the President, but rather derives from delegations from Congress, it would make sense that the President could be more easily alienated from control over rulemaking than from control over interpretation.

But note that this distinction rests upon an important presupposition—that the activities of interpretation and lawmaking are fundamentally distinct. Would this special demand for unitariness survive if this presupposition proved false? For indeed, as Martin conceived the question, the activity of the Secretary’s that merited deference was not “interpretation” simpliciter, but rather “interpretive lawmaking”—that in this act of interpretation, the Secretary was engaging in lawmaking as certainly as if she engaged in rulemaking. And if indeed the activity engaged in by the Secretary in Martin was nothing less than lawmaking by other means, then any constitutional distinction between the demands for unitariness in interpretation and the demands for unitariness in rulemaking seems quickly to fade. If interpretation cannot in principle be distinguished from lawmaking, then, in principle, there is no reason to demand a greater degree of unitariness in interpretation than in rulemaking.

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88 U.S. CONST. art. II, § 1, cl. 1.
89 Martin, 111 S. Ct. at 1176.
90 However, the answer is not so simple to resolve. An originalist might first want to ask
These considerations suggest that the issue of unitariness in interpretation is no different in kind than the issue of unitariness for executive agencies in general, and that the constitutional analysis required should be the same with either. For an originalist, the question would resolve not to the single quality of unitariness, but rather to the multiple qualities that would define Congress's "proper" division of powers to carry a law into effect.

Two points follow. First, to carry through the analysis whether a particular division of administrative functions is "proper" for an originalist no doubt requires the kind of analysis that my colleague Geoff Miller offers.\(^9\) That is, the question whether particular divisions are proper is an inquiry that necessarily invokes questions about the values and the functions of the division being made. But the originalist then faces a question of some moment—whether the values she consults to test a particular division of functions are the values of the Framers or ours. If the latter, the result will most likely look something like the mix of independence Miller suggests generally.

But a second aspect of Miller's paper suggests a second implication for the non-unitarian's approach. That is, given the openly value-burdened inquiry required of anyone deciding whether a particular degree of independence is "proper," it may be that the judiciary must take a relatively passive role in testing this primary judgment of Congress. Either because one believes, as originalists should, that there is no single principle within the constitutional command that divisions be "proper" (again because the original practice was so varied), or because, as modern constitutionalists believe, the Court has absolved itself from so many similarly burdened judgments that it could not, consistent with those abstentions, intervene here.\(^9\) It may be that, as a constitutional matter, the question whether a particular type of interpretive independence is legitimate is beyond the scope of the Court.

**Conclusion**

I have argued that the originalist must abandon the view that unitariness is a dominating (or constitutionalized) value of administrative structures. I have also suggested that we understand the source of our tendency to privilege unitariness as a mistaken concep-

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\(^9\) Id.
tion of the place that concept had in the scheme of the Framers. Once the originalist abandons unitariness as the single test of legitimate agency structure, the remaining judgment is simply one of propriety, a judgment that might best (or of necessity) be left to Congress.

The inquiry in each case where Congress aims to make some interpretive authority independent of the President is simply the inquiry of propriety. That is, accounting for the full range of values Congress can legitimately consider, is this type of independence proper? Such a method I have tried to argue an originalist must embrace; and, as a corollary, if this method is rejected by the unitarian, it must be rejected on non-originalist grounds. The originalist cannot be unitarian; the unitarian cannot be originalist.