THE PRESIDENT'S APPROVAL POWER

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This Essay introduces the President's approval power as it was originally understood in the United States. Leading proponents of a unitary executive President have asserted that the President's absolute power to control subordinate officers includes power to veto or approve subordinates' discretionary actions before they take effect. This Essay reconsiders the approval power's purportedly unitary function and presents previously overlooked evidence of the originalist foundations of a presidential approval power. My comprehensive analysis of every public act passed by the First Congress shows that the founding generation never understood Article II to grant the President general authority to approve subordinates' decisions. Approval was instead a permissive power that the First Congress withheld in a vast majority of statutes and granted in only a handful of laws. Even when statutes granted the President or superior officers an approval power, moreover, they did not gain unitary control. Approval afforded only ex post review without power to force nonremovable subordinates to initiate regulatory action implementing superiors' preferred policies.

Early practices surrounding approval power offer further evidence against originalist arguments for a unitary executive President with absolute control over subordinate officers. At the founding, approval offered a partial measure of accountability that Congress could incorporate when allocating decision-making power within the executive branch. Approval sometimes checked spending and contracting decisions that would be difficult to undo by removing an officer. In other instances, approval governed executive adjudications conducted by officials who operated outside formal levers of control established by appointments and removal. Statutory approval permissions reflected the understanding that the President and other superior officers would exercise partial but not absolute control over subordinates' execution of the laws.

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INTRODUCTION

The fundamental textual and historical flaws in arguments that Article II creates a unitary executive President with illimitable removal power[1] leave unanswered questions about other mechanisms by which presidents may control subordinates.[2] In particular, unitary scholars have proffered a presidential power to veto or approve subordinates' decisions as a leading

1. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1244 n.74 (1994) (explaining that a presidential removal power is "nonexistent" in the text of Article II); Jed Handelsman Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753 (2023) (comprehensively reviewing congressional debates on the removal power and showing that the "real Decision of 1789 was a rejection of the unitary model"); Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 130 (2022) ("The First Congress repeatedly delegated . . . significant executive discretion[] to independent judges and lay persons whom the President could not remove"); Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 67 (2022) ("Well into the first decades of the twentieth century, the President did not have effective authority over all executive branch agencies, nor was the Constitution understood to grant the executive an independent power as 'administrator in chief.'").

2. *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 550, 595 (1994) (proffering "originalist textual and historical arguments for the unitary Executive" and asserting that "removal, a power to act in [subordinates'] stead, and a power to nullify [subordinates'] acts . . . must be clearly encompassed within the President's grant of the executive power"); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1166 (1992) (asserting the same proposition); Lawson, *supra* note 1, at 1243–45 (arguing that it is "plausible" that Article II grants the President either power "personally to make all discretionary decisions" or "veto actions by subordinates" "in order to ensure a constitutionally unitary executive").

alternative to removal power.[3] Approval offers a distinct form of presidential supervision: it applies only to a subset of cases in which a subordinate has initiated executive action, and it grants the President official decision-making power to approve or veto the proposed action before it can take final effect.[4] Unitary scholars have asserted that approval is one of the powers that Article II grants the President and that this power affords the President greater control than the ability to remove officers who refuse to comply with the President's orders.[5] Despite this purported benefit, leading advocates of a presidential approval power have failed to support their assertions with textual or historical evidence establishing that Article II vests a unitary approval power in the President.[6]

This Essay reconsiders approval's purportedly unitary function and introduces previously overlooked historical evidence of the original understanding of the President's approval power.[7] By focusing on the underlying constitutional parameters of the President's approval power, this Essay moves beyond the interpretive debate as to whether statutes delegating authority to subordinate executive officers should be construed as implied

3. *See* Lawson, *supra* note 1, at 1245 (asserting presidential power to "veto actions by subordinates"); Calabresi & Prakash, *supra* note 2, at 541, 550, 595 (identifying nullification as one of the powers that Article II affords a "unitary executive" President).

4. *See infra* notes 42–43 (discussion surrounding fig. 3).

5. *See* Lawson, *supra* note 1, at 1244 (arguing that removal is "constitutionally inadequate" because the officials' "exercise of power" may remain after they have been removed); Calabresi & Rhodes, *supra* note 2, at 1166 (arguing that removal is the "weakest model of the unitary executive" and affords the President less power than the ability to "veto [subordinates'] exercises of discretionary executive power").

6. *See* Calabresi & Rhodes, *supra* note 2, at 1166 (explaining that nullification or approval is a presidential control "mechanism" not "mentioned in Article II"); Calabresi & Prakash, *supra* note 2, at 595 n.208 (recognizing that their argument—that Article II vests in the President "a power to nullify" subordinates' actions—requires "an enormous amount of additional elaboration and support"); Lawson, *supra* note 1, at 1245 (noting that the First Congress "did not once focus on a presidential power to make discretionary decisions or to veto actions by subordinates" in debates leading up to the Decision of 1789); *id.* ("[M]any Attorneys General in the nineteenth century affirmatively denied that the President must always have the power to review decisions by subordinates."); *cf.* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1237 (2014) ("[T]he President's control over execution does not naturally include nullification, which is not executing the laws, but rather invalidating prior execution.").

7. Earlier historical analyses of executive practice lump approval and direction together and fail to account for statutory approval provisions that applied to officials who operated outside formal requirements of appointment and removal. *See, e.g.*, Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half Century*, 47 CASE W. RES. L. REV. 1451, 1478–82 (1997) (focusing on accounts of President Washington's approval and direction of actions taken by Alexander Hamilton and other department heads removable at will); *id.* at 1483–84 (discussing Washington's directions to U.S. Attorneys and the Attorney General); STEPHEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE 53 (2008) (discussing the Sinking Fund Commission without addressing the President's power to approve its purchases). Other work points to the approval power without recognizing its inherent limitations. *See* SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 279 (2015) (emphasizing that the Sinking Fund Act "expressly authorized the [P]resident to approve the [C]ommissioners' decisions" to purchase debt in the form of U.S. securities).

delegations of directive authority to the President.[8] It is the first work to recover fundamental constitutional assumptions reflected in approval provisions enacted by President George Washington and the First Congress, a body that included several framers of the Constitution. As the U.S. Supreme Court and leading originalist scholars have reiterated, "the practice of the First Congress is strong evidence of the original meaning of the Constitution."[9] As noted in my earlier and comprehensive analysis of every public act passed by the First Congress, the founding generation's practice was to repeatedly reject unitary structures: it delegated significant executive discretion to officials who were not removable at will[10] or appointed to executive offices.[11] The First Congress further undermined unitary control when it withheld approval power from the President by granting unchecked, final decision-making authority to subordinates in a vast majority of

8. *See* Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 268, 278–82 (2006) (advancing a "statutory interpretation conclusion that only grants of authority to the President by name confer directive authority to the President" but failing to distinguish statutes that confer approval as opposed to directive power); *cf.* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2329 (2001) (noting that a bare delegation to a subordinate officer might not imply presidential control if "Congress sometimes stipulated that a delegation of power to an agency official was subject to the ultimate control of the President"). A seminal Attorney General opinion rejected an implied presidential approval power in a statute awarding the U.S. Comptroller General final decision-making authority. *See* The President & Acct. Offs., 1 Op. Att'ys Gen. 624, 627 (1823) (concluding that "the law contemplates no farther examination by any officer[] after" the U.S. Comptroller General's "decision" and did not implicitly subject this matter to the further "revision and decision of the President"). *But cf.* Rel. of the President to the Exec. Depts., 7 Op. Att'ys Gen. 453, 469 (1856) (noting that when "an executive act is, by law, required to be performed by a given Head of Department . . . the general rule" is that the "Head of Department is subject to the direction of the President").

9. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1659 (2020); *see also* Bowsher v. Synar, 478 U.S. 714, 723–24 (1986) (finding that an act passed by the First Congress assembled under the Constitution, many of whose members "had taken part in framing that instrument," offers "'contemporaneous and weighty evidence' of the Constitution's meaning" (quoting Marsh v. Chambers, 463 U.S. 783, 790 (1983))); Randy E. Barnett & Laurence B. Solum, *Originalism After* Dobbs, Bruen, *and* Kennedy*: The Role of History and Tradition*, 118 Nw. L. Rev. 1, 6 (2023) (reasoning that "early implementation of the relevant [constitutional] provisions" reflects original public meaning (quoting Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1654)); Chabot, *supra* note 1, at 152 nn.130–31 (citing additional sources). *But cf.* Gary Lawson, *The Constitution's Congress*, 89 B.U. L. REV. 399, 403–06 (2009) (noting that early Congresses' enactments on oaths for state officials and the Sedition Act were "flagrantly unconstitutional").

10. Chabot, *supra* note 1, at 201 tbl.2, 207 tbl.3 (listing 49 early statutory provisions that delegated significant executive discretion to nonremovable private parties and judges in matters ranging from prosecution and removal of executive officers to other enforcements and adjudications).

11. Christine Kexel Chabot, *Is the Federal Reserve Constitutional?: An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1, 52 (2020) (noting that the Chief Justice served on the Sinking Fund Commission ex officio and without appointment to an executive office); Chabot, *supra* note 1, at 201 tbl.2, 207 tbl.3 (listing early statutes in which Congress delegated executive discretion to judges and private parties who were not appointed as executive officers).

statutes.[12] The First Congress granted the President approval power as a form of partial control in only a minority of laws.[13]

The First Congress's selective approval permissions undermine claims that the Article II vests an inherent and illimitable approval power in the President. Members of the First Congress sometimes objected to legislation granting executive powers that were already vested by the Constitution.[14] With respect to removal, the First Congress debated legislative grants of an arguably constitutional removal power[15] and adopted initial departmental statutes that were at best ambiguous as to whether the President's removal power derived from Congress or the Constitution.[16] Approval power did not factor into these constitutional debates.[17] By contrast, the First Congress treated approval power as a permission granted by statute, omitting it from a vast majority of statutes while expressly granting it in a minority of laws.[18] Approval thus aligned with Congress's power to structure the executive department under the Necessary and Proper Clause rather than an unalterable prerogative power under Article II. In particular, early statutes reflected Congress's power to assign executive decisions to particular officials, and in some cases to give presidents the final power to approve or veto executive decisions. In the Sinking Fund Act of August 12, 1790,[19] for example, Congress authorized open-market purchases of U.S. securities upon (1) the vote of "any three" of the Commissioners of the Sinking Fund and (2) "with the approbation of the President of the United States."[20] As noted in Part II, below, a select set of additional statutes conferred express approval powers, often termed "approbation," on the President and, in some cases, principal officers.[21]

Even when they occurred, statutory grants of the approval power did not afford the President unitary control over subordinates. The approval powers granted by the First Congress afforded the President limited supervisory

12. Of the fifty-six initial public acts delegating executive power, fifty lacked presidential approval provisions and six granted the president approval power. An additional ten statutes granted the Secretary of the Treasury and collection officers power to approve subordinates' decisions. *See infra* Figs.4,5.

13. *Id.*

14. *See, e.g.*, 10 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789–1791: DEBATES IN THE HOUSE OF REPRESENTATIVES 726 (Charlene Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds., 1992) (the House voted to "strik[e] out" statutory language providing that the Secretary of Foreign Affairs "'shall be appointed by the president, by and with the advice and consent of the senate'" in response to Rep. William Loughton Smith's objection that this language was "repetitive" and "look[ed] as if [Congress] were conferring power" already granted by the Constitution).

15. Shugerman, *supra* note 1, at 760 (noting concern that "one might wrongly infer that the clear statement," "*removable by the President*," amounted to a congressional grant of removal power over the Secretary of Foreign Affairs).

16. *Id.* at 809 (the "Foreign Affairs debate" over removal power was "either an 'Indecision of 1789' or a decision against presidentialism by forcing this retreat to ambiguity").

17. *See* Lawson, *supra* note 1, at 1245.

18. *See infra* figs. 4–5.

19. Ch. 47, 1 Stat. 186.

20. *Id.* § 2.

21. *See infra* Part II.

powers to control subordinate actions ex post.[22] When applicable to nonremovable officials who had never been appointed to an executive office, approval left the President and superior officers powerless to shape subordinates' initial policy decisions. For example, the President's statutory power to approve the Sinking Fund Commission's discretionary open-market purchases left him powerless to force the commission to initiate purchases in the first instance.[23] When coupled with the commission's independent structure—including commissioners whom the President could not appoint, remove, or replace—approval afforded the President no control over subordinates who refused to take action effectuating the President's policy preferences.[24] This assignment of a presidential power to approve some but not all of the commission's independent decisions passed without apparent constitutional objection.

In addition, approval powers reflected the founding generation's understanding that the President lacked unitary control over the lower ranks of the executive branch. No one expected the President's removal power to provide adequate supervision of inferior collection officers scattered throughout over fifty ports on the East Coast of the United States.[25] That is why early statutes subjected certain actions of collection officers to alternative forms of supervision.[26]

This Essay draws on history to develop a broader understanding of approval power as it relates to the unitary executive debate. The current debate over accountability to the President leaves a wide gulf between formal requirements of plenary removal power and tenure protections that do not "unduly trammel" the President's role.[27] Founding-era practices with respect to approval power show that early Congresses recognized and implemented a variety of accountability measures rather than adhering to rigid unitary requirements of exclusive presidential control and plenary removal power. Approval permissions provide further evidence that the founding generation never recognized a unitary executive President with absolute control, rather than partial control, over subordinate officers. This Essay proceeds to address these issues as follows: Part I reconsiders unitary scholars' hierarchy of presidential control mechanisms from a functional perspective; Part II recovers historical evidence of the First Congress's functional implementation of approval powers; and Part III concludes that statutory approval powers offer an important originalist and functionalist alternative to formal arguments for a unitary executive.

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22. *See infra* fig. 3 (noting that approval power operates ex post).

23. *See infra* fig.6.

24. *See* Chabot, *supra* note 11, at 50.

25. *See* Chabot, *supra* note 1, at 165.

26. *See infra* discussion surrounding notes 101–03. These alternative forms of supervision included the Secretary of the Treasury's approval of collection officers' significant spending decisions. *See* notes 101–03 and accompanying text.

27. *Compare* Morrison v. Olson, 487 U.S. 654, 691 (1988), *with id*. at 705, 724 n.4 (Scalia, J., dissenting).

I. THE HIERARCHY OF UNITARY CONTROL MECHANISMS, RECONSIDERED

This part revisits the hierarchy of control mechanisms asserted by unitary scholars. According to Kevin H. Rhodes and Professor Steven G. Calabresi, unitary "[s]cholars have identified three mechanisms, none mentioned in Article II, by which the President might exercise his constitutional power to control the executive department."[28] First, and most powerfully, the President may have a "direct power to supplant any discretionary executive action taken by a subordinate with which [the President] disagrees, notwithstanding any statute that attempts to vest discretionary executive power only in the subordinate."[29] Second, a "weaker form of the unitary executive . . . recognizes" that the President "has the power to nullify or veto [subordinates'] exercises of discretionary executive power."[30] Finally, the "third and weakest model of the unitary executive contends that the President has unlimited power to remove at will any principal officers (and perhaps certain inferior officers) who exercise executive power."[31]

This hierarchy has not accounted for functional differences in various control mechanisms and has led to the mistaken assumption that an approval or veto power necessarily affords greater control than removal power.[32] The discussion accompanying Figures 1–3 (below) explains why the executive's power to supplant and remove subordinates will generally afford more complete control over subordinate officers' execution of law than the power to approve their actions. This discussion addresses each stage of the executive decision-making process. It illustrates that the approval power omits control over key policy decisions inherent in the initial choice of whether to pursue or decline a particular executive action. This section

28. Calabresi & Rhodes, *supra* note 2, at 1166.

29. *Id.* The sole authority that Calabresi and Rhodes cite for both the power to supplant and the power to approve is a formalist argument by Lee Liberman Otis. *Id.* at 1166 nn.54–55. But Otis ultimately rejected these *presidential* control mechanisms and instead urged "judicial review" to set aside as "void" actions taken by officers who violate the President's directives. Lee S. Liberman, Morrison v. Olson: *A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 353–54, 354 n.241 (1989). She recognized that a judicially enforced remedy would not save the President from "giving orders until he turns blue," *id.*, or from becoming what Chief Justice Roberts would later refer to as a "cajoler-in-chief," Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 502 (2010). Her recognition of Congress's "power to select an instrument for carrying [sovereign] powers into effect" under the Necessary and Proper Clause also contradicts claims that presidents may supplant or approve decisions that Congress has assigned to other officers. *See* Liberman, *supra*, at 353; *see also* Richard J. Pierce, Jr., *Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of the Unitary Executive*, 12 U. PA. J. CONST. L. 593, 596–97 (2010) (reviewing Professors Calabresi and Yoo's later work, *supra* note 7, and noting that they offer "little" to support an approval power "beyond their conclusory statement" on this point).

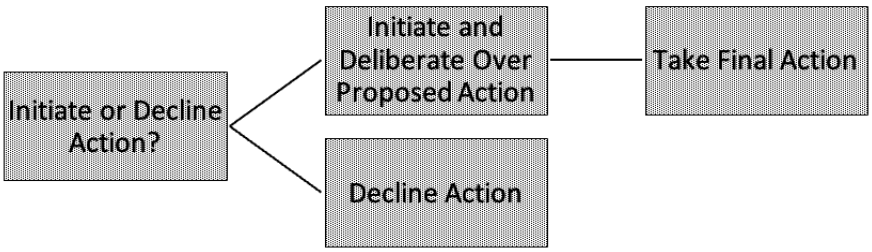
30. Calabresi & Rhodes, *supra* note 2, at 1166.

31. *Id.*

32. *See id.* (arguing that removal is the "weakest model of the unitary executive"). This analysis does not include more recent control mechanisms available to modern presidents. *See* Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 28–31 (2013) (noting budgeting, litigation, interagency negotiations, and reorganization as additional forms of presidential control).

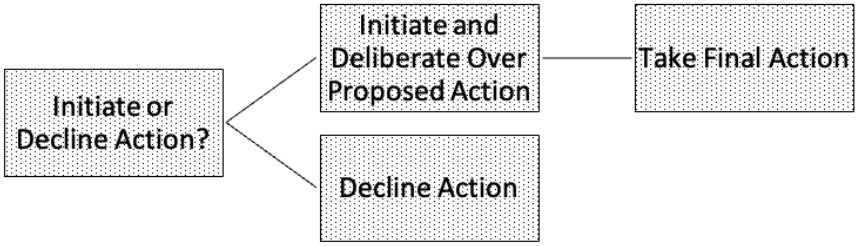
concludes that the hierarchy asserted by unitary scholars does not always hold, as approval fails to afford the President greater control over policy decisions than removal in key instances.

Fig. 1. Power to Supplant: The President Makes All Decisions



The power to supplant assumes that the President can "step into the shoes of any subordinate and directly exercise that subordinate's statutory powers."[33] This power affords the President complete control because the President is the one making all of the decisions leading up to a particular executive action.[34] Presidents assume the initial decision of whether or not to initiate action and, if they initiate action, are in complete control of deliberations and the final action taken.

Fig. 2. Power to Remove: The President Can Remove Officers Who Refuse to Act or Make Disfavored Decisions



The plenary power to remove extends the President's control to all decisions made by subordinate officers. Officers who refuse the President's directions to initiate action or who initiate an action that displeases the President can be removed. Officers who subsequently displease the President in deliberations or final action can also be removed by the President. Removal thus provides incentives for officers to obey the President at every stage of decision making.

33. Lawson, *supra* note 1, at 1243.

34. Calabresi & Rhodes, *supra* note 2, at 1166 (arguing that the President has "direct power to supplant any discretionary executive action").

Plenary removal power provides a critical reinforcement to the President's ability to direct subordinates in their execution of the law.[35] The constant threat of removal hangs a sword of Damocles over subordinate officers. Subordinates who fear removal will obey the President's directives and may voluntarily seek direction or approval from the President in cases in which there is no directive. Fear of removal could spur recalcitrant officers to action and curb disfavored actions. The control afforded by plenary removal power explains why many unitary theorists center their arguments on the power to remove.[36]

Removal power is not a perfect substitute for the power to supplant: Presidents may tolerate certain levels of disobedience rather than incur the political costs of removing an officer,[37] and Presidents cannot be expected to monitor all discretionary decisions that might provide grounds for removal.[38] Further, removing an officer does not automatically undo the initial decision to disobey the President.[39] Removal thus creates temporal "slippage" between the President's immediate wishes and the time needed to displace a recalcitrant officer with a "more pliant" subordinate who will go on to do the President's bidding.[40] Often this slippage will be temporary, and presidents with plenary removal power can expect to get their way in the long run.[41] Despite these imperfections, removal affords the President some control over every stage of subordinate decision making, from refusal to act to action taken.

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35. Perhaps for this reason removal is sometimes referred to as a mechanism for enforcing the power to direct. Rao, *supra* note 6, at 1225 ("[R]emoval provides the necessary and sufficient constitutional mechanism for ensuring control, including through direction of subordinates.").

36. *See* Calabresi & Prakash, *supra* note 2, at 595 (asserting that "removal" is "clearly encompassed within the President's grant of executive power"); Rao, *supra* note 6, at 1209 (asserting a "formal framework of removal as necessary and sufficient for presidential control"); MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING 262 (2020) (asserting that the Take Care Clause is an "indefeasible" source of "supervisory authority" for which "the power of removal is essential"); Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 107–40 (2020) (arguing that removal power is an inherent part of the "executive power" that Article II vests in the President).

37. *See* Rao, *supra* note 6, at 1242 ("[P]olitical realities place practical limits on the extent to which removal can secure presidential control."); Pierce, *supra* note 29, at 609 (noting how political costs of removal limit presidents' control and how Secretary of State George Shultz "prevailed on each one" of his three "highly visible disagreements about major issues" with President Ronald Reagan).

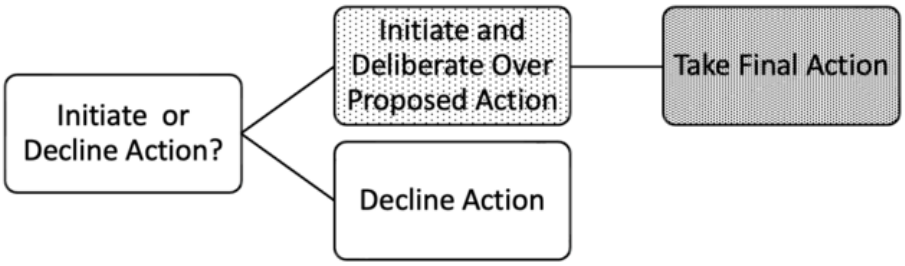
38. *See* Huq, *supra* note 32, at 41 (noting a "subset of cases in which a President's inability to observe directly an officials' actions imposes a constraint on her ability to use (or even credibly threaten) removal in a way that provokes desirable actions"); Pierce, *supra* note 29, at 602 ("There are not enough hours in the day for the President to be aware of more than a tiny fraction of the policy decisions made by agencies every day.").

39. *See* Lawson, *supra* note 1, at 1244 (noting that an insubordinate official's "exercise of power" may remain in place after the official "is . . . removed").

40. MCCONNELL, *supra* note 36, at 348–49.

41. *Id.*

Fig. 3. Power to Approve: The President Controls Only Actions Initiated by Subordinates



The power to approve operates ex post and in most cases affords the President less control than the powers to supplant or remove. The power to approve or "veto actions by subordinates"[42] before they take effect necessarily includes only the actions that subordinates have chosen to initiate in the first place. On its own, this power leaves the President unable to force a recalcitrant subordinate to act in the first instance. If a subordinate refuses to act, then there is no subsequent action for the President to approve or veto. A bare approval power may also allow subordinates to initiate actions disfavored by the President, though the President's ultimate power of approval may dissuade subordinates from pursuing disfavored outcomes in such cases. When subordinates have initiated action, an approval power gives the President the final say over their proposed decisions.[43]

Although approval is important, its greatest limitation is that it leaves the President powerless to force unwilling subordinates to carry out the President's wishes. Inaction looms large when it comes to subordinates' execution of the law and has provided grounds for noteworthy exercises of the President's removal power. Consider the Saturday Night Massacre: in the Office of the Attorney General, Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus refused to fire special prosecutor Archibald Cox, which led to their infamous resignations under threats of removal by President Nixon.[44] Earlier on, President Andrew Jackson fired Secretary of the Treasury William J. Duane for inaction when

42. Lawson, *supra* note 1, at 1245; *see also* Calabresi & Rhodes, *supra* note 2, at 1166 (discussing "power to nullify or veto . . . exercises of discretionary executive power").

43. *See* Gary Lawson, *Command and Control: Operationalizing the Unitary Executive*, 92 FORDHAM L. REV. 441, 444–45 (2023) (stating the President must "retain ultimate responsibility for the actions of subordinates").

44. *See* MCCONNELL, *supra* note 36, at 348–49 (recounting how Nixon pressured Richardson and Ruckelshaus to cede their positions to Solicitor General Robert Bork, who ultimately carried out Nixon's order to fire Cox).

he refused an arguably arbitrary request to withdraw funds from the Bank of the United States.[45]

The Administrative Procedure Act[46] authorizes judicial review of agency inaction alongside agency action,[47] and, in the regulatory arena, inaction can reflect just as much policy discretion as regulatory action. For example, a new President who wishes to roll back what they view as excessive environmental regulation could not effectuate their policy preferences if subordinate officers in the U.S. Environmental Protection Agency (EPA) refuse to initiate proceedings to undo existing environmental regulations.[48] By the same token, a new President who wishes to establish more aggressive environmental regulation would not be able to effectuate these distinct policy goals if subordinate officers in the EPA refused to initiate new rulemaking proceedings. These refusals to act manifest important policy disagreements that the President cannot control through an approval power.

Proponents of an approval power have failed to appreciate its general limitations and have instead focused on a narrow circumstance in which approval provides more control than removal: approval would allow the President to immediately block unwanted action and avoid suffering a disfavored result imposed by an officer who was later removed.[49] Even without approval, the unwanted action would be unlikely to last long, however, as the President could ultimately displace the insubordinate officer with a "more pliant" successor to effectuate the President's wishes.[50] Further, in most cases, removal affords the President broader influence over all stages of decision-making and power to spur to action subordinates who may be reluctant to implement the President's policy preferences. A bare power to approve proposed action leaves the President powerless to force recalcitrant officers to initiate action needed to implement the President's preferred policies.

Of these control mechanisms, the power to supplant affords the strongest option for unitary control. However, unitary theorists have largely discredited the constitutional basis of this power.[51] Assertions of a broad

45. *See* Jerry L. Mashaw, *Governmental Practice and Presidential Direction: Lessons from the Antebellum Republic?*, 45 WILLAMETTE L. REV. 659, 692 (2009) (recounting this episode).

46. Ch. 324, 60 Stat. 237 (1946) (codified as amended in 5 U.S.C. §§ 551, 553–559, 701–706).

47. 5 U.S.C. § 702 (authorizing judicial review for persons "adversely affected or aggrieved by agency action," which under 5 U.S.C. § 551(13) includes "failure to act").

48. *See* STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC 107–14 (2021) (describing the Trump administration's struggle to roll back environmental regulations in the face of internal resistance from EPA staff).

49. Lawson, *supra* note 1, at 1244 (noting that an insubordinate official's "exercise of power" may remain in place after the official "is . . . removed").

50. MCCONNELL, *supra* note 36, at 348–49.

51. *See* Rao, *supra* note 6, at 1235 (noting disagreement with the argument "that the President can execute discretionary duties assigned elsewhere by statute"); Lawson, *supra* note 1, at 1243; Liberman, *supra* note 29, at 353 ("Congress' power to pass all laws necessary and proper for carrying into execution its own powers includes the power to select an instrument for carrying those powers into effect.").

power to supplant seem difficult to reconcile with both founding-era and more recent statutes that assign executive decisions directly to the President in only select statutes, while assigning these decisions to officers other than the President in many other laws.[52] The approval power seems susceptible to the same criticism, given that the First Congress assigned the President an official *part* of a decision (approval) in a small minority of statutes and withheld this power most of the time.[53] The logic of these statutes rejects an understanding that the President has a constitutional power to make final decisions in every case; otherwise, Congress would not bother to include express approval permissions in a narrow subset of statutes. Thus, unitary scholars have generally focused on removal and attempted to justify this power on constitutional grounds that operate independently of statutory permissions.[54]

Finally, unitary scholars' assertion that the approval power affords the President greater control than the removal power cannot be squared with the lifecycle of executive decision making. In cases in which the approval power is granted by statute, this ex post mechanism will not always afford the President as much control as plenary removal power. Approval power affords the President final say over a subset of subordinate actions but denies the President an important ability to force subordinates to take action in the first instance.[55] Early statutes granting approval power over actions taken by nonremovable officials thus provide additional evidence that the founding generation never understood Article II to create a unitary executive President.

II. PRESIDENTIAL APPROVAL AT THE FOUNDING

Founding-era laws reflected the approval power's permissive statutory basis and limited functions. This power never enjoyed express support in the text of the Constitution, as a general presidential power to approve or veto acts of subordinate executive officers appears nowhere in Article II. Article I, section 7 of the Constitution grants the President a limited power to veto legislation approved by both houses of Congress.[56] Article II, section 2 grants the President power to disapprove outcomes of certain criminal

52. *See* Stack, *supra* note 8, at 268 (noting the difference between "grants of authority to the President by name" and other statutes); *see also* Shalev Roisman, *Presidential Law*, 105 MINN. L. REV. 1269, 1282–91 (2021) (listing contemporary statutes that delegate executive decisions directly to the President).

53. *See infra* figs. 4, 5.

54. *See, e.g.*, Shugerman, *supra* note 1, at 5 (responding to unitary arguments that Article II grants the President a plenary removal power); *cf.* Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 25 (2021) (In the founding era, it was "widely accepted" "that absent statutory or constitutional language to the contrary, a term-of-years office foreclosed executive removal . . . .").

55. *See supra* fig. 3.

56. Here, an express veto power was likely needed to empower the President to participate in an otherwise legislative action. Thanks to Gary Lawson for pointing this out. *See generally* MCCONNELL, *supra* note 36, at 105 (explaining that "the veto" in Article I "is of a legislative nature").

prosecutions by granting "Reprieves and Pardons for Offenses against the United States."[57] There are no other express presidential approval powers in the text of the Constitution.

Nor have unitary scholars grounded their assertions that the "executive power" vested by Article II includes a presidential approval power in the historical record. Leading unitary scholars have focused on a removal power.[58] When discussing approval power, Professor Gary Lawson has conceded that debates leading up to the "Decision of 1789" did "not once focus on a presidential power . . . to veto decisions by subordinates."[59] The historical evidence introduced by this Essay establishes that the approval power was a permission granted by statute rather than an illimitable executive power possessed by the President.[60] Early statutes selectively granted the President a limited power, often termed approbation, with respect to certain executive acts.[61] These permissions were conferred by statute in a limited number of regulatory schemes and were distinct from a general power to order or instruct subordinates (or for Presidents to decide matters entirely on their own). For example, many scholars have noted that statutes establishing the Office of Foreign Affairs and the U.S. War Department granted a directive power to "order or instruct" principal officers.[62] Statutes establishing the U.S. Department of the Treasury or the first permanent Post-Office, however, did not.[63] What has not been adequately addressed, however, is the more limited set of approval permissions afforded to Presidents.

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57. Though it is beyond the scope of this Essay to address pardons as an alternative approval mechanism for independent prosecutorial decisions, an understanding that the President has sufficient control based on the "power to pardon either before or after the conviction . . . would mean that *Morrison* was rightly decided . . . ." Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 21 (1994); *see* Calabresi & Rhodes, *supra* note 2, at 1201 (noting that the "pardon power give[s] the President only a tenuous grip on independent" subordinates).

58. *See* MCCONNELL, *supra* note 36.

59. Lawson, *supra* note 1, at 1245; *see also* Pierce, *supra* note 29, at 596–97 (disbelieving "that the President has" a "'power to nullify or veto subordinate officials' exercise of discretionary executive power'" (quoting CALABRESI & YOO, *supra* note 7, at 14)); Peter L. Strauss, *Overseer, or "The Decider"?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 759–60 (2007) ("[W]here Congress has delegated responsibilities to a particular governmental actor it has created, that delegation is a part of the law whose faithful execution the President is to assure.").

60. *See infra* figs. 4, 5.

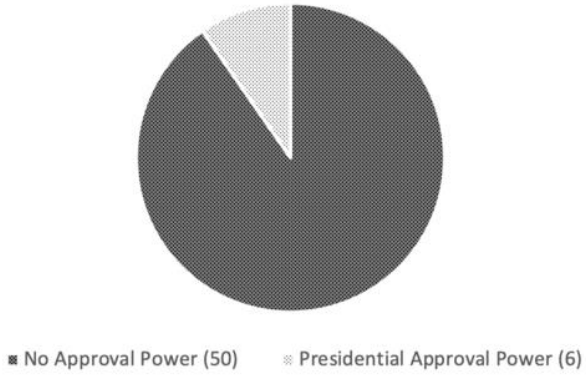
61. *See infra* Parts II.A–B.

62. Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 29 (imposing this duty on the Secretary of Foreign Affairs); Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 50 (imposing this duty on the Secretary of War).

63. Act of Sept. 2, 1789, ch. 12, 1 Stat. 65 (omitting any mention of directive power over officers in the Department of the Treasury). The statute initially establishing a temporary Post-Office subjected the Postmaster General "to the direction of the President." Act of Sept. 22, 1789, ch. 16, § 1, 1 Stat. 70, 70. However, the first statute establishing a permanent Post-Office omitted a directive power for the President. Act of Feb. 20, 1792, ch. 7, 1 Stat. 232; *see* Stack, *supra* note 8, at 278–79 (describing differences in delegations); Lessig & Sunstein, *supra* note 57, at 27–28.

The First Congress granted the President power to approve subordinates' decisions in a small minority of statutes. Of the fifty-six initial statutes delegating executive power, only six authorized the President to approve other officers' initial execution of the powers assigned by those statutes.[64]

Fig. 4. The First Congress: Public Acts Delegating Executive Power



Critically, and as will be described in more detail below, the First Congress and President Washington granted statutory approval power in two narrow categories of cases that removal would not reach as a formal or functional matter: (1) potentially unalterable spending or contract decisions assigned to executive officers whom the President could remove at will or (2) discretionary executive decisions on policy or adjudicative matters assigned to officials who operated outside formal removal and appointment requirements.[65] These nonunitary approval provisions also operated alongside other statutes in which nonremovable private parties and judges exercised significant executive discretion without further approval by the President or superior officers.[66]

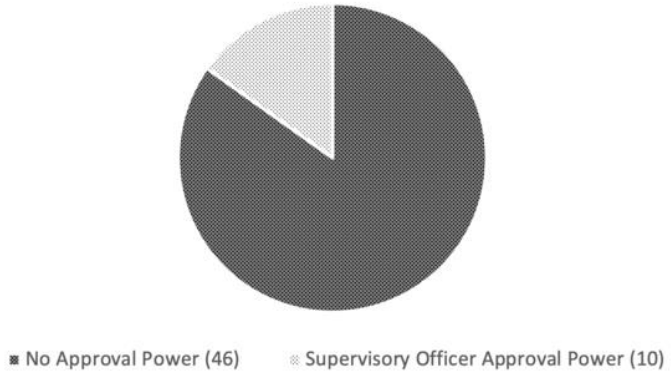
64. *See* Sinking Fund Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186; Act of Aug. 7, 1789, ch. 9, § 3, 1 Stat. 53, 54 (lighthouses); Act of July 16, 1790, ch. 28, § 2–3, 1 Stat. 130, 130 (seat of government); Act of Sept. 15, 1789, ch. 14, § 4, 1 Stat. 68, 68 (seal of United States); Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109, 110 (seal for patented inventions); Act of Aug. 10, 1790, ch. 40, § 5, 1 Stat. 182, 183 (President authorizes patent and seal for land issued to officers and soldiers of the Virginia line).

65. *See infra* Parts II.A–B.

66. A significant category of independent actions that were not subject to approval involved enforcement of public laws through qui tam suits. Several statutes authorized private qui tam suits against officers who misbehaved or shirked their duties but did not give the President power to approve these enforcement actions. *See* Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 45 (stating that officers failing to post or charge a fair table of their fees "shall forfeit and pay" $100–$200 "to be recovered with costs, in any court having cognizance thereof, to the use of the informer"), *repealed by* Act of Aug. 4, 1790, ch. 35, 1 Stat. 145; Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102 (allowing informers to bring private actions in debt and recover "half" of penalties levied against marshals who failed to file census returns)

In a series of additional statutes, the First Congress supplemented approval permissions for the President with provisions extending the chain of command and granting the Secretary of the Treasury and collection officers power to approve subordinates' decisions. Of the fifty-six initial statutes granting executive power, only ten conferred supervisory approval powers on officers other than the President.[67]

Fig. 5. The First Congress: Public Acts Delegating Executive Power



(amended 1790); Act of Mar. 3, 1791, ch. 15, §§ 39, 41, 44, 49, 1 Stat. 199, 208–10 (allowing private parties to sue to recover damages inflicted by officers' "neglect of duty" and forfeitures against officers who engaged in extortion, fraud, or embezzlement by "action of debt") (amended 1792). For additional analysis of independent prosecutorial powers authorized by these statutes, see Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 NOTRE DAME L. REV. 1235, 1294 (2018); Chabot, *supra* note 1, at 178, 180–83; Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 296–309 (1989); *see also* Peter M. Shane, *Prosecutors at the Periphery*, 94 CHI.-KENT L. REV. 241, 256 (2019) ("[P]rivate prosecution in the United States persisted throughout much of the nineteenth century."); James E. Pfander, *Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement for a Partisan World*, 92 FORDHAM L. REV. 469, 473 (2023) (recounting 1794 legislation authorizing private enforcement of public laws against the slave trade). Early statutes also allowed independent judges to police officers' conduct by imposing forfeitures or removing them from office. *See* Chabot, *supra* note 1, at 177, 179–80.

67. *See* Act of July 31, 1789, ch. 5, §§ 5, 9, 16, 22, 1 Stat. 29, 36–38, 41–42, (approval of spending, accounts, and valuations), *repealed by* Act of Aug. 4, 1790, ch. 35, 1 Stat. 145; Act of June 14, 1790, ch. 19, 1 Stat. 126 (extending the same to Rhode Island); Act of Feb. 8, 1790, ch. 1, 1 Stat. 99 (extending the same to North Carolina); Act of Sept. 2, 1789, ch. 12, §§ 3–4, 1 Stat. 65, 66 (approval of accounts); Act of Aug. 4, 1790, ch. 35, §§ 6, 37, 65, 1 Stat. 145, 154, 166–67, 175 (approval of spending, accounts, and valuation); Act of Dec. 27, 1790, ch. 1, 1 Stat. 188 (extending these provisions); Act of Mar. 2, 1791, ch. 12, § 8, 1 Stat. 197, 198 (extending the same to Vermont); Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122 (approval of remission); Act of Mar. 3, 1791, ch. 15, §§ 5–7, 58–60, 1 Stat. 199, 200, 213 (approval of spending, accounts, and remission); Act of Mar. 3, 1791, ch. 24, § 1, 1 Stat. 218, 218 (extending remission provisions).

Even within statutes in which superior officers had an approval power, the approval permissions granted by Congress were sometimes selective and applied to limited categories of subordinates' decisions. In the initial and amended Collection Acts,[68] for example, Congress expressly authorized the Secretary of the Treasury to approve collection officers' expenditures on store-houses, scales, weights, and measures.[69] However, these statutes never granted the Secretary of the Treasury (or the President) power to approve collectors' estimates of duties or permits for unlading of goods.[70] Nor did superior officers have power to approve private parties' qui tam suits against collection officers who failed to post or charge for their services according to "a fair table of the rates of fees, and duties demandable by law."[71]

Statutory approval provisions minimized the likelihood that the President would be required to endure binding but unwanted executive decisions for select matters related to spending, contracts, and executive adjudication. At the same time, approval afforded a partial rather than unitary level of accountability. It denied the President a more complete or enforceable directive power that would require subordinates in the executive branch to pursue the President's preferred policies in the first instance. When coupled with decisions assigned to officers whom the President could not remove, the approval power afforded decidedly incomplete control over subordinates' exercises of executive discretion.

A. Approval Afforded the President Only Partial Control over the Sinking Fund Commission's Discretionary Spending Policies

The Sinking Fund Act is a leading example of the limited power afforded by statutory approval provisions. This legislation was initially proposed by the Secretary of the Treasury, Alexander Hamilton, to provide a reliable mechanism for dispersing funds that Congress earmarked for repayment of U.S. debt.[72] In his writings, Hamilton expressed fear that political actors would misappropriate these funds for politically expedient uses other than paying the debt.[73] Thus, he emphasized the need for "'inviolable application'" of funds set aside to pay the debt.[74] Hamilton's sinking fund proposal effectuated politically independent repayment decisions through discretionary open-market purchases of debt held in the form of U.S. securities.[75] The discretion to engage in fluctuating levels of open-market

68. Act of July 31, 1789, ch. 5, 1 Stat. 29, *repealed by* Act of Aug. 4, 1790, ch. 35, 1 Stat. 145; Act of Aug. 4, 1790, ch. 35, 1 Stat. 145.

69. § 5, 1 Stat. at 36; § 6, 1 Stat. at 154.

70. *See* § 5, 1 Stat. at 36; § 6, 1 Stat. at 154.

71. § 29, 1 Stat. at 45.

72. Chabot, *supra* note 11, at 33–39 (discussing Hamilton's proposal for the Sinking Fund Commission).

73. *Id.* at 38 (recounting Hamilton's concerns regarding sinking fund commissions).

74. *Id.* (quoting ALEXANDER HAMILTON, *Report on a Plan for the Further Support of Public Credit*, *in* 18 THE PAPERS OF ALEXANDER HAMILTON, JANUARY 1795–JULY 1795, at 56, 123 (Harold C. Syrett ed., 1973) (1795), https://founders.archives.gov/documents/Hamilton/01-18-02-0052-0002 [perma.cc/R5AK-QGKH]).

75. Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186.

purchases allowed the Sinking Fund Commission to both repay debt and support U.S. credit by stabilizing the value of existing U.S. securities.[76]

The Sinking Fund Act's provisions afforded markedly different levels of presidential control over borrowing and disbursement aspects of open-market purchases. It granted the President unilateral authority to borrow up to two million dollars for sinking fund purchases.[77] When it came to disbursement of funds for open-market purchases, however, the Sinking Fund Act confined the President to a far more limited role: the President could not disburse funds without the separate approval of a majority of the five-member Sinking Fund Commission.[78] This was a notable departure from a decision to award disbursement power directly to the President or to incorporate a unitary structure that awarded this power to a directly accountable officer such as the Secretary of the Treasury.

The act's structure limited the President's control over membership and decisions of the commission. The act violated formal unitary requirements by limiting the President's appointments and removal power over commissioners.[79] It specified that five officers, two of whom the President could not remove or replace, would serve on the commission ex officio: the Secretary of the Treasury (Alexander Hamilton), Secretary of State (Thomas Jefferson), President of the Senate and Vice President (John Adams), the Attorney General (Edmund Randolph), and the Chief Justice (John Jay).[80] Although this structure was mostly comprised of removable officers (the Secretary of the Treasury, the Secretary of State, and the Attorney General), this fact did not afford the President functional control over the commission's decisions. If any one of these officers were removed or otherwise absent, the controlling third vote would immediately transfer to officers whom the President could not remove from their underlying offices (the Chief Justice or Vice President).[81] Indeed, the Chief Justice served on the commission without an appointment as an executive officer.[82] Thus, the act's requirements that nonremovable officers serve ex officio operated to insulate the commission's initial vote from the President's control. If the President controlled the commission, then there would be no need for Congress to grant him an additional approval power.[83]

The act's approval power afforded the President only partial control over the commission. It left the President powerless to initiate open-market purchases unless a majority of the independent commission also agreed to such action.[84] As noted in Figure 6, below, the approval power effectuated the President's wishes when he agreed with the commission or instead

76. *Id.* § 1, 1 Stat. at 186.
77. *Id.* § 4, 1 Stat. at 187.
78. *Id.* § 2, 1 Stat. at 186.
79. Chabot, *supra* note 1, at 173.
80. Act of Aug. 12, 1790, § 2, 1 Stat. at 186.
81. Chabot, *supra* note 1, at 174 (describing the function of the commission's structure).
82. Chabot, *supra* note 11, at 52.
83. *Id.* at 50.
84. *Id.*

wanted to block a purchase that the commission had already approved. This power left significant policy discretion outside of the President's control, however, as it left the President helpless to force a disbursement of funds for an open-market purchase in cases in which a majority of the commission refused to approve this action in the first instance.

Fig. 6. When Can the Sinking Fund Commission and President Disburse Funds for an Open-Market Purchase?

	President Approves	*President Rejects*
Sinking Fund Commission Approves	Purchase	No Purchase
Sinking Fund Commission Refuses to Approve	No Purchase	No Purchase

Inaction posed a significant problem for the commission in 1792, when Hamilton urged the commission to respond to a steep market crash with aggressive open-market purchases.[85] Although President Washington ultimately approved Hamilton's discretionary spending proposal, members of the President's cabinet and other commissioners provided an initial roadblock.[86] Commissioner John Jay refused to set aside his judicial duties to cast a vote, and Commissioners Edmund Randolph and Thomas Jefferson initially opposed Hamilton's proposal.[87] Randolph later changed his vote, but Jefferson never agreed and openly dissented from policy decisions and purchases that were ultimately approved by a majority of the commissioners and President Washington.[88] President Washington's preferred outcome ultimately prevailed only because of favorable votes from an independent commissioner (Vice President John Adams) as well as cabinet members Hamilton and Randolph.[89] Without their votes there would have been no purchases and disbursement of funds for the President to approve.

85. *See* Richard Sylla, Robert E. Wright & David J. Cowen, *Alexander Hamilton, Central Banker: Crisis Management During the U.S. Financial Panic of 1792*, 83 BUS. HIST. REV. 61, 78 (2009).

86. Chabot, *supra* note 11, at 46 (noting divergence in initial votes).

87. *Id.* at 44–45.

88. *Id.* at 45–46; *see also* Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 131–33 (2021).

89. Chabot, *supra* note 11, at 47.

B. The Approval Power in Other Acts Passed by the First Congress

The First Congress granted the President power to approve officers' decisions in only a handful of statutes beyond the Sinking Fund Act. These approval permissions allowed the President to approve discrete but important spending and contracting decisions as well as decisions to use the seal of the United States.[90] In a small set of additional statutes, the First Congress supplemented presidential approval permissions with provisions extending the chain of command. These laws granted the Secretary of the Treasury and collection officers similar power to approve select spending and adjudicative decisions by subordinates.[91]

1. Additional Statutes Granting the President an Approval Power

As outlined in this section, the First Congress awarded the President permission to approve a handful of discrete regulatory decisions that involved spending or contracting. The President may not have been able to undo these decisions through the removal power as a practical matter. A final set of approval permissions related to the official uses of seals of the United States and departments of government.

An early statute authorized the "building" or "rebuilding" and "keeping in good repair" the "lighthouses, beacons, buoys, and public piers" and required the Secretary of the Treasury "to provide" these services "by contracts."[92] The statute expressly required that the lighthouse building and repair contracts negotiated by the secretary "be approved by the President of the United States."[93] Although the secretary was removable by the President, as a practical matter, the President seemed unlikely to micromanage the secretary's discrete contracting decisions through the removal power.[94] If the secretary entered a contract with which the President disagreed, moreover, removal of the secretary might not allow the President to undo the underlying contractual obligation. The approval power raised the importance of lighthouse building and repair contracts to the highest level of the executive department and afforded the President the final say on these matters.

A subsequent statute afforded the President permission to approve what would otherwise operate as important final decisions by inferior officers.[95] The act allowed two of "three commissioners" appointed as inferior officers by the President to "survey, and by proper metes and bounds define and limit

90. *See supra* note 64.
91. *See supra* note 67.
92. Act of Aug. 7, 1789, ch. 9, § 3, 1 Stat. 53, 54.
93. *Id.*
94. The President also had no statutory power to direct the secretary's discrete spending or contracting decisions. *See* Act of Sept. 2, 1789, ch. 12, 1 Stat. 65; *cf.* Act of Aug. 7, 1789, ch. 9, § 2, 1 Stat. 53, 54 (authorizing the President to "direct" the location but not the building contract for a new lighthouse in Chesapeake Bay).
95. Act of July 16, 1790, ch. 28, §§ 2–3, 1 Stat. 130, 130 (designating "three commissioners" to establish the permanent seat of government "according to such plans as the President shall approve").

a district of territory" on the Potomac River to form the permanent seat of the U.S. government under "the direction of the President."[96] The act recognized the President's need to address commissioners' inaction through removal and appointment power. It authorized the President "to appoint, and by supplying vacancies happening from refusals to act or other causes, to keep in appointment as long as may be necessary, three commissioners . . . ."[97] Still, the removal and appointments provisions alone would leave inferior officers not confirmed by the Senate as final executive branch decision makers.[98]

The act arguably addressed this Appointments Clause concern by granting the President approval power over what would otherwise seem to be binding determinations with respect to land and buildings that would form the seat of government. Section three authorized two of three commissioners to "purchase or accept such quantity of land . . . as the President shall deem proper for the use of the United States" and to "provide suitable buildings for the accommodation of Congress," the President, and public offices "according to such plans as the President shall approve."[99] Thus, the President, and not commissioners appointed as inferior officers, had the final say on binding decisions regarding the purchase of land and provision of buildings for the permanent seat of government. Congress again provided an additional assurance of accountability by requiring the approval of the highest level of the executive branch.

A final set of statutes granted the President power to approve official uses of the seals of the United States and departments of government. The President's power to approve seals appears to have been a vestige of the British monarchy and the requirement that "royal commands, to be effectual, had to bear the Great Seal, the Privy Seal, and/or the Signet" when carried out by officials with authority to act on behalf of the King.[100] In the United States, the initial statute establishing official seals also required the President to approve their use.[101] This act further effectuated the President's appointments power by requiring the President to sign commissions for his appointees before the Secretary of State could affix to these commissions the seal of the United States.[102] The first Patent Act[103] authorized two members of a board comprised of the Secretary of State, the Secretary of War, and the

96. *Id.* § 2.

97. *Id.*

98. This arrangement would likely be invalid under *United States v. Arthrex*, 141 S. Ct. 1970, 1988 (2021) (holding that administrative patent judges appointed as inferior officers could not constitutionally issue final decisions to cancel patents).

99. Act of July 16, 1790, ch. 28, § 3, 1 Stat. 130, 130.

100. JOSH CHAFETZ, CONGRESS'S CONSTITUTION 80 (2017).

101. Act of Sept. 15, 1789, ch. 14, § 4, 1 Stat. 68, 68–69 ("[T]he seal [of the United States] shall not be affixed to any commission . . . nor to any other instrument or act, without the special warrant of the President."); *id.* § 5, 1 Stat. at 69 (requiring that the Secretary of State "shall cause a seal of office to be made for the said department of such devise as the President of the United States shall approve").

102. *Id.* § 4, 1 Stat. at 68–69 (authorizing the Secretary of State to "affix" the seal of the United States to "all civil commissions" that "have been signed by the President of the United States").

103. Act of Apr. 10, 1790, ch. 7, 1 Stat. 109.

Attorney General to "cause letters patent to be made out in the name of the United States . . . ."[104] The "President" would then "cause the seal of the United States" to be "affixed" to letters patent certified by the Attorney General.[105]

2. Statutes Granting the Secretary of the Treasury and Collection Officers Approval Powers

Although many early statutes required executive officers to follow nonhierarchical, shared decision-making structures,[106] in other instances outlined in this section Congress granted the Secretary of the Treasury and collection officers permission to approve decisions by subordinate officials. Congress again focused on approval powers that would enhance accountability in two categories of laws: (1) laws involving executive adjudication by nonremovable officials who lacked appointments as executive officers and (2) laws involving discrete spending decisions that, as a functional matter, would be difficult or impossible to undo through the removal power.

Congress granted the Secretary of the Treasury approval power in the form of final decision-making authority over independent adjudicative determinations on remission of customs fines.[107] The Act of May 26, 1790[108] authorized the Secretary of the Treasury to reduce or eliminate fines for persons who had not intentionally violated the customs laws.[109] To initiate the secretary's review of impending fines, however, the act required the party to petition an Article III "judge of the district" in which the "fine, penalty or forfeiture . . . accrued."[110] The party was required to present "circumstances" showing that the violation was unintentional, and the judge was required to "inquire in a summary manner into the circumstances" noted in the petition and provide notice and opportunity for the government to "show cause" against a reduction of fines.[111] Professor Kevin Arlyck's leading study of these procedures notes that a judge's role in "determining the 'facts'" related to unintentional wrongdoing required "credibility determinations" similar to those assumed by a judge "trying a case."[112] After

104. *Id.* § 1, 1 Stat. at 110.

105. *Id.*; *see also* Act of Aug. 10, 1790, ch. 40, § 5, 1 Stat. 182, 183 (giving the President the power to authorize patent and seal for land issued to officers and soldiers of the Virginia line).

106. *See generally* Chabot, *supra* note 1, at 163–76 (discussing early statutes that incorporated nonunitary, shared decision-making structures).

107. *Id.* at 188–89 (discussing early remission statutes).

108. Act of May 26, 1790, ch. 12, 1 Stat. 122.

109. *Id.* § 1, 1 Stat. at 122–23.

110. *Id.* § 1, 1 Stat. at 122.

111. *Id.*; Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1333 (2006) (discussing judges' preliminary factfinding role in remission and later pension laws that avoided the separation-of-powers concerns raised in *Hayburn's Case*, in which final judicial decisions were subject to revision by the executive branch).

112. Kevin Arlyck, *The Founders' Forfeiture*, 119 COLUM. L. REV. 1449, 1486 (2019).

a hearing, the judge would prepare a statement of "the facts which shall appear upon such inquiry" and then transmit the matter to the Secretary of the Treasury for a final decision on remission of fines.[113]

The secretary retained final power to remit a fine "if in his opinion the same was incurred without wil[l]ful negligence or any intention of fraud."[114] The act also authorized the secretary to address impending fines by "direct[ing]" any "prosecution" for recovery "to cease and be discontinued."[115] This arrangement left the ultimate remission determinations up to the secretary. The First Congress passed a further remission provision with a materially identical role for judges to "inquire" and find initial facts relevant to intentional wrongdoing in the Spirits Act.[116] These executive factfindings assigned an important initial adjudicative role to Article III judges whom the President could not remove and had not appointed as executive officers.[117] The Secretary of the Treasury's review and incorporation of their initial factual determinations into final remission decisions operated as an approval power and afforded control over preliminary determinations by independent judges.

Congress also passed additional laws granting the Secretary of the Treasury direct power to approve discrete spending decisions made by officers in charge of collecting customs duties. In two separate statutes, Congress authorized collection officers to "provide at the public expense, and with the approbation of the principal officer of the treasury department, store-houses for the safe keeping of goods, together with such scales, weights and measures as shall be deemed necessary."[118] Customs officers were also required to "submit their books, papers and accounts to the inspection of persons appointed for that purpose" and "once in every three months . . . transmit their accounts for settlement."[119] A further provision in the amended Collection Act provided that collection officers "may, with the approbation of the Secretary of the Treasury, provide and employ such small open row and sail boats . . . as shall be necessary for the use of the surveyors and inspectors in going on board of ships . . . for the better detection of frauds."[120] Although commissions granted to collection officers making initial spending decisions indicated that they served at the pleasure of the President,[121] discrete decisions on expenditures for storing and measuring imported goods or for financing boats to detect fraud might be difficult to undo through removal. Congress's decision to grant the Secretary of the

113. Act of May 26, 1790, § 1, 1 Stat. at 122.
114. *Id.* § 1, 1 Stat. at 123.
115. *Id.*
116. Act of Mar. 3, 1791, ch. 15, § 43, 1 Stat. 199, 209.
117. This law provides an important precedent for today's tenure-protected administrative law judges. *See* Christine Kexel Chabot, *Article II Vibes*, ADMIN. & REG. L. NEWS, Fall 2022, at 8–9.
118. Act of July 31, 1789, ch. 5, § 5, 1 Stat. 29, 36–37, *repealed by* Act of Aug. 4, 1790, ch. 35, 1 Stat. 145; Act of Aug. 4, 1790, ch. 35, § 6, 1 Stat. 145, 154.
119. *See* Act of Aug. 4, 1790, § 6, 1 Stat. at 155.
120. *Id.* § 65, 1 Stat. at 175.
121. Chabot, *supra* note 1, at 186–87.

Treasury approval power raised the profile of these important expenditures and subjected them to the ultimate approval of the Secretary of the Treasury. Within the U.S. Department of the Treasury itself, Congress created further internal financial checks when it required the U.S. Comptroller General to examine all accounts settled by the Auditor and the Treasurer to submit moneys in hand to inspection by the U.S. Comptroller General and the Secretary of the Treasury.[122]

Congress granted a final set of effective approval powers in laws directing collection of duties on imported goods. The Collection Act incorporated decisions in which private merchants assessed the value of imported goods subject to duties based on their valuation. When goods subject to valuation-based duties were "damaged" or missing the "original invoice of their cost,"[123] the collection officer and importer could each "appoint one merchant" to aid in determining the taxable value of these goods.[124] The merchants would be "sworn or affirmed" to "appraise such goods," [125] and the collection officer would then approve and incorporate these appraisals by "estimat[ing]" the "duties upon such goods . . . according to" the merchants' valuation.[126] The act provided a similar allowance for "two reputable merchants" to "ascertain" the "value" of goods in cases of suspected fraud or irregularly invoiced value.[127] Collection officers would then approve and incorporate the merchants' valuations into "duties arising upon such valuation."[128]

These provisions incorporated discretionary factual determinations by private merchants who executed the law outside of both the President's removal power and Article II's appointment power. By allowing collection officers to effectively approve valuations by incorporating them into estimates of duties owed, Congress provided an important measure of accountability. It ensured that collection officers were responsible for ultimate determinations of duties owed. The First Congress reenacted these provisions when it revised the customs laws in 1790.[129]

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122. Act of Sept. 2, 1789, ch. 12, §§ 3–4, 1 Stat. 65, 66.

123. Act of July 31, 1789, § 16, 1 Stat. at 41.

124. *Id.*

125. *Id.*

126. *Id*; *see also id.* § 5, 1 Stat. at 36–37. The Collector had a general obligation to "estimate the duties" payable on imported goods. Forfeitures and other sanctions for failure to pay duties and obtain the requisite permit for unlading goods were not left "at the disposal of administrative officials." LEONARD WHITE, THE FEDERALISTS 446 (1959). Instead, the law provided that these sanctions "shall be sued for and recovered . . . in any court proper to try the same, by the collector of the district." *Id.* § 36, 1 Stat. at 47.

127. *Id.* § 22, 1 Stat at 42.

128. *Id.*

129. Act of Aug. 4, 1790, ch. 35, § 37, 1 Stat. 145, 167 (requiring the collector to "estimate[] agreeably" to private merchants' "valuation" of the duties upon goods that were damaged or missing an invoice); *id.* § 46, 1 Stat. at 169 (stating that, in cases in which the collector suspects inaccurate invoices, the collector was authorized to impose "duties arising according" to valuation by "two reputable merchants").

CONCLUSION

In the founding era, removal power under Article II never came close to capturing the entire relationship between the President and subordinates who helped execute the law. These relationships were also regulated by Congress and frequently involved delegation of executive power to officials who operated outside formal controls of appointment and removal. In certain statutes, the First Congress offset this independence in part: it granted the President, and superior officers, permission to approve subordinates' actions before they could take effect. These historical practices support an alternative understanding of accountability to the President and the idea that Congress may adjust the level of accountability to the President through a variety of statutory mechanisms including approval power.

Unitary scholars who are unwilling to cede an absolute and formal requirement of removal power over all officers of the United States will ultimately find that the historical record is of no use. Their willingness to upend longstanding regulatory structures based on an evolving and stronger-than-ever unitary executive must sound in living constitutionalism and contemporary understandings of executive power.[130] Other unitary scholars may reconsider formal removal requirements in general or at least recognize an alternative historical mechanism for controlling officers and officials who operate farther down the chain of command. That alternative is the President's approval power.

130. *See* Jarkesy v. Sec. & Exch. Comm., 34 F.4th 446, 465 (5th Cir. 2022) (applying non-originalist, unitary arguments to invalidate tenure protections applicable to the Securities and Exchange Commission's administrative law judges); *cert. granted*, 143 S. Ct. 2688 (2023) (mem.).