AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 5: The Jacksonian Era – Separation of Powers

*Caleb Cushing*, **Relation of the President to the Executive Departments** (1855)[[1]](#footnote-1)

*The Jacksonians took a stronger view of presidential power than did the Jeffersonians. President Franklin Pierce’s attorney general, Caleb Cushing, disagreed with Wirt on the relationship between the president and lower officials of the executive branch. In numerous official opinions, Cushing detailed his view that the president was the chief executive of the federal government, and that empowered him to exercise authority over all of the executive branch. In contrast to the Jeffersonian Wirt, Cushing laid out the Jacksonian doctrine of a unitary executive. In this view, the subordinate officers in the executive branch were always answerable to their superiors, right up to the president of the United States:*

*Question has existed as to the relation of the President and the respective heads of departments to the chiefs of bureaus, and especially the accounting officers of the Treasury.*

*It is not the duty of the President, and in general it is not convenient for him, to entertain appeals from the departments on the various matters of business, and especially the private claims, on which they have occasion from time to time to pass. . . .*

*Now, from the fact that the executive agents . . . are assigned by law to particular duties, it has been somewhat hastily inferred, that while it is indubitably true that he may direct the heads of departments, yet he has no authority over the chiefs of bureaus, and especially those in the department of Treasury. . . .*

*Such a doctrine was against common sense, which assumes that the superior shall overrule the subordinate, not the latter the former. It was contrary to settled constitutional theory. That theory . . . while it supposes that in all matters not purely ministerial, that executive discretion exists, and that judgment is continually to be exercised, yet requires unity of executive action, and, of course, unity of executive decision; which, by the inexorable necessity of the nature of things, cannot be obtained by means of a plurality of persons wholly independent of one another . . . and released from subjection to one determining will. . . .*

*. . . [I]f an opinion delivered many years ago by Mr. Wirt is now to be received as law . . . [an] auditor is wholly above the authority of the President. . . . Such an assumed anomaly of relation, therefore, as this idea supposes, resting upon mere opinion or exposition, must, of course, yield to better reflection, whenever it comes to be a practical question demanding the consideration of any Attorney General.[[2]](#footnote-2)*

*When asked for an opinion on whether instructions issued by “Heads of Department” to lower level executive branch officers were still lawful if they did not expressly say that they were being issued at the direction of the president, Cushing took the opportunity to elaborate a general theory of executive authority under the Constitution. Whether expressed or implied, executive officers always operated under the authority of the president – and were always accountable to the president for their actions. The president could delegate almost any executive task to someone else to perform, but there were no important circumstances under which executive officers could be insulated from presidential oversight and direction.*

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The Constitution of the United States assumes that the political powers, which the people of the several States united have intrusted to the Federal Government, are primarily subdivided into three great branches, or, as they are sometimes called, departments, namely, the Legislative, the Executive, and the Judicial.

The Legislative Department raises taxes and directs how the proceeds shall be expended; it authorizes the levy of troops and the organization of military force of land or sea; it declares war; and in general, it enacts laws applicable to those objects as to which it is empowered by the Constitution.

The Executive Department holds and expends the public money, negotiates treaties, appoints to and removes from office, commands the public force, and, in general, executes and administers the Constitution, the public treaties, and the laws enacted by the Legislative Department.

The Judicial Department construes and applies the laws of the land in all contentious matters of suit in law, whether between individuals, or, in certain cases, between them and the United States, and between the several States.

Now, by the explicit and emphatic language of the Constitution, the executive power is vested in the President of the United States. In the perception, however, of the fact, that the actual administration of all executive power cannot be performed personally by one man – that this would be physically impossible, and that if it were attempted by the President, the utmost ability of that one man would be consumed in official details instead of being left free to the duty of general direction and supervision – in the perception, I say, of this fact, the Constitution provides for the subdivision of the executive powers, vested in the President, among administrative departments, using that term now in its narrower and ordinary sense. . . . [T[hose officers are sometimes characterized, and not improperly, as “constitutional advisors” of the President.

Meanwhile, the great constitutional fact remains, that the “executive power” is vested in the President, subject only, in the respect of appointments and treaties, to the advice and consent of the Senate.

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. . . . [T]he original theory of departmental administration continued unchanged [through the creation of several new departments], namely, executive departments, with heads thereof discharging their administrative duties in such manner as the President should direct, and being in fact the executors of the will of the President. All the statutes of departmental organization, except one, expressly recognize the direction of the President, and in that one, the Interior, it is implied, because the duties assigned to it are not new ones, but such as had previously been exercised by other departments. It could not, as a general rule, be otherwise, because in the President is the executive power vested by the Constitution, and also because the Constitution commands that HE shall take care that the laws be faithfully executed: thus making him not only the depository of the executive power, but the responsible executive minister of the United States.

I perceive, in the Constitution or in the general statutes of departmental organization, no departure from this rule except where advice or an opinion is to be given. That advice or opinion must of course embody the individual thought of the officer giving it. . . .

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In speaking of the subordination of the Departments to the President, we are to understand, of course, that the several executive bureaus are included, for they themselves subordinate to the Department, under the supervision of which they are placed respectively, whether by statute or by order of the President.

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[I]f the direction of the President to the executive departments must be assumed generally, or at least, in the general statutes of organization, may there not still be cases of distinction in which, by the Constitution or by statute, specific things must be done by the President himself or by Heads of Departments? Such cases do undoubtedly exist, and any view of the subject which omits to consider them, must be partial, defective, imperfect.

We begin with examples of acts performed by the President, as prescribed by the Constitution.

Thus it may be presumed that he, the man discharging the presidential office, and he alone, grants reprieves and pardons for offenses against the United States, not another man, the Attorney General or anybody else, by delegation of the President.

So he, and he alone, is the supreme commander-in-chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States. That is a power constitutionally inherent in the person of the President. No act of Congress, no act even of the President himself, can, by constitutional possibility, authorize or create any military officer not subordinate to the President.

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But the question, whether a given duty is to be the immediate deed of the President, or to be performed by delegation, does not seem to depend, at least in all its degrees, upon the fact of its being expressly enumerated in the Constitution. . . .

At the same time, be it observed that, in the Constitution, no case occurs of the communication of power directly to any Head of Department, except in the respect of the appointment of such inferior officers as may be intrusted to them by act of Congress. . . . [E]ven this cannot be regarded as a power independent of that of the President.

The question of distinction between those acts of the President or the Heads of Department, which are strictly personal and ministerial, to be exercised in every instance by the individual himself by his own hand, and those which appertain to the office, and the performance of which may be delegated, as that question arises on statutes, requires examination, somewhat in detail, of the letter of particular acts of Congress.

On such examination of the whole body of the statutes of the United States, it will be found that, in the designation of executive acts to be performed, there is no uniformity of language, no systematic style of legislation. Sometimes a statute says the President shall perform the act – sometimes that this or that Secretary shall perform it – without there being, in general, any constitutional or legal distinction between the authority of the respective acts, all of them being of things which, on the one hand, the President may, if he please, delegate to a Head of Department, and which, on the other hand, cannot be done by a Head of Department without direction of the President.

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[I]n general, when Congress speaks of acts to be performed by the President, it means by the executive authority of the President.

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Take now the converse form of legislation, that common or most ordinary style, in which an executive act is, by law, required to be performed by a given Head of Department. I think here the general rule to be as already stated, that the Head of Department is subject to the direction of the President. I hold that no Head of Department can lawfully perform an *official* act against the will of the President; and that will is by the Constitution to govern the performance of all such acts. If it were not thus, Congress might by statute so divide and transfer the executive power as utterly to subvert the Government, and to change it into a parliamentary despotism, like that of Venice or Great Britain, with a nominal executive chief utterly powerless – whether under the name of Doge, or King, or President, would then be of little account, so far as regards the question of the maintenance of the Constitution.

Without enlarging upon this branch of the inquiry, it will suffice to say that, in my opinion, all the cases in which a Head of Department performs acts, independent of the President, are reducible to two classes, namely: first, acts purely ministerial; and, secondly, acts in which the thing done does not belong to the office, but the title of the office is employed as a mere *designatio personae*.

Of the first class are all acts of legal attestation, such as the certificates of copies by Heads of Department, or the signature of warrants as the Secretary of Treasury. . . . These are acts in which the given signature is legally requisite; but as to which, the right to sign at all, depends on the appointment and applied direction of the President.

To the same class belong those acts, the performance of which is compellable by judicial mandamus. It is now perfectly settled that acts of this nature are few in number, being such only as are purely ministerial, it might almost be said mechanical, admitting of no discretion or volition, but prescribed by positive law.

Of duties imposed on a Head of Department, unofficial, and where his name of office appears only as a *designatio personae*, an example is afforded in the statute which provided “That the Attorney General of the United States shall be, and is hereby authorized and empowered to adjudicate the claims arising under the Convention concluded between the United States and the Republic of Peru.”. . .

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[W]hile there is a general solidarity of responsibility for public measures, as between the President and the Heads of Department, and while a general responsibility of direction is attributable to the President and of execution to the Heads of Department, yet the weight of historical responsibility, and perhaps of legal, may be shifted partially from one to another, according as the determination is governed or evidenced by the written direction of the President or by the written advice of the Head of Department.

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. . . . I trust enough has been said . . . to establish the general position, that, in their executive acts, instructions, and orders, the Heads of Department speak for and in the authority of the President; that, if the act be within the lawful jurisdiction of such Head of Department, the direction of the President is presumed in law; that, whether to name the President or not, in a departmental order, becomes, in most cases, a matter of discretion, judgment, or taste, according to the subject matter; that, if he be named, it is for emphasis or enforcement, rather than from necessity; that, whether he be named or not, the act or order is to have legal effect as, by construction, the act or the order of the supreme executive authority, civil and military, of the United States.

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It may be affirmed, as a general proposition, that the determination of all executive questions belongs, in theory and by constitutional right, to the President, howsoever in practice such determination may, in each or in any case, be intrusted by him to a Head of Department.

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1. Excerpt taken from 7 *Opinions of the Attorney General* 453 (1855). [↑](#footnote-ref-1)
2. . Caleb Cushing, Opinion on the Offices and Duties of the President, March 8, 1854, 6 Op. Att’y Gen. 326, 342–345 (1854). [↑](#footnote-ref-2)