GOVERNMENTAL PRACTICE AND PRESIDENTIAL DIRECTION: LESSONS FROM THE ANTEBELLUM REPUBLIC?

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In *Association of Data Processing Service Organizations, Inc. v. Camp*,[1]

any question. They largely cancel each other."[9] And yet, like Justice Jackson and his colleagues, we often turn to practice.[10] Surely what people have done in running the government should give us some purchase beyond the narrow decisions of courts, the speculations of scholars, and the self-interested rhetoric of partisans during congressional-presidential struggles.

Yet, however sensible our turn to practice for guidance, we should pause to consider just how deeply problematic our reliance might be. The problems occur at two levels. First, what is the normative claim of practice as evidence of what the law is or should be? "Practice", within which I mean to include both repeated prior actions and particularly salient events, are just facts. What gives them the power to bind us even presumptively? Second, assuming the normative force of practice, how is it to be interpreted? If we

In the end, however, I want to argue that recognition of the difficulty of deriving constitutional meaning from governmental practice contains its own normative implications. The very opaqueness of the normative claims of the past demands a particular form of responsibility from lawyers operating in the present. When combined with the knowledge that most issues of executive power will themselves be decided by practice, not by judicial opinions, we who struggle to discern the meaning of past practice have a special ethical duty not to overstate our positions or to ignore contrary evidence. We should recognize that our institutional arrangements have always been more experimental and various than can be captured by a single narrative.

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this practice is so firmly established that it is difficult to imagine a different approach.[16]

But a decision that departments should be created by law is not a decision about what their relationship should be to the political departments once created. And on this question the practices of the first Congress were quite various. When creating the departments of War and Foreign Affairs, Congress by statute did little more than direct the respective secretaries to carry out the President's instructions.[17] On the other hand, the statute that established the Treasury Department[18] gave the Secretary of the Treasury a substantial number of specific tasks. Moreover, Congress seemed jealous of its own authority over the Treasury. Because the Treasury collected and disbursed all public money, oversaw the Bank of the United States, and was in charge of all military procuremenseda

Congress sometimes treated the Treasury Secretary almost as a part of that body. When Hamilton was confirmed as Secretary of the Treasury, the House abolished its Committee on Ways and Means and turned over those functions to the Secretary.[22] But, this action, like so many in American history, is ambiguous. Giving Hamilton the leading role in proposing tax legislation could be seen as reinforcing executive authority. During Hamilton's energetic stewardship at the Treasury, it certainly did. Thus, when Jeffersonian Republicans, led by Albert Gallatin, sought to bring the Treasury more firmly under congressional control, their chief reform was to re-establish the Ways and Means Committee.[23]

The presumption of special position for the Treasury in relation to the legislature would also seem to follow from colonial and state precedent concerning financial administration.[24] It was not until late in the Constitutional Convention that a provision for appointment of the Treasurer of the United States by both houses of Congress was eliminated in favor of presidential appointment of all department heads.[25] Does this suggest that the drafters believed that congressional control would be assured by statute in any event? Perhaps. But the clause was stricken in favor of presidential appointment. Avoiding the inefficiency and incompetence of administration by the Continental Congress in the confederation period, and the weaknesses of executives with limited appointing authority under state constitutions, was part of the point of the design of the new national Constitution.

The statute establishing the Treasury Department also failed to denominate it an "executive department." Is this significant? Perhaps, not. The Salary Act, which was adopted only nine days after the statute establishing the Treasury Department, described the Secretary of the Treasury as an "executive officer."[26] That the Secretary had the

22. Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 241 (1989).

23. JOHN SPENCER BASSETT, THE FEDERALIST SYSTEM: 1789–1801, at 141 (1968).

24. *See* HENRY BARRETT LEARNED, THE PRESIDENT'S CABINET: STUDIES IN THE ORIGIN, FORMATION AND STRUCTURE OF AN AMERICAN INSTITUTION 101 (1912) (recognizing that Colonial and State practice tended to lead administration and financial matters, not just appropriations, in the hands of legislative committees or officials appointed matters,by

There was disagreement in the first Congress concerning whether the Constitution presumed a power of removal in the President, presumed such a power subject to the consent of the Senate or presumed that Congress would provide by statute for removal. The provision in the House bill to establish the Department of Foreign Affairs, that the Secretary might be removed by the President, was opposed both by those who thought the advice and consent of the Senate was required, and by those who thought that to put this provision in the statute would imply that the President's removal power flowed from Congress rather than the Constitution. To complicate matters, some of those who thought the provision unnecessary nevertheless favored its inclusion in the statute in order to cement a clear statutory majority favoring the President's removal power.[45]

To resolve the impasse, Representative Benson proposed to strike out the clause specifically providing the presidential removal power, but to insert a section making the Chief Clerk the custodian of the records of the department "whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy."[46] Benson's amendment thus seemed both to provide for and to presume a presidential removal power, and his amendment passed. But, of course, it passed without resolving the dispute over whether the removal power could be regulated by statute.[47]

Indeed, not only was the language ambiguous, the procedure by which this provision was adopted further clouded the picture. James Madison, who favored the position that the Constitution presumed presidential removal authority, engineered votes on amendments which divided the opposition into two groups, but which allied one of those groups with his position on each vote.[48] The Benson compromise was thus the product of clever agenda manipulation. Perhaps, as Harold Bruff recently wrote, in the so-called "Decision of 1789," "The only position . . . that had been definitively rejected was . . . that Congress could always participate in particular removals by

45. For discussion of these debates, see DAVID C. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 36–40 (1997).

46. *Id.* at 40.

47. For a detailed treatment, see CHARLES A. MILLER, THE S

their political opponents to brand them monarchists.[54] It is somewhat surprising, therefore, to find that in the details of governmental organization Federalist Congresses opted for divergent models in the statutes creating various departments and offices, and provided clear directive authority for the President only as concerned military and foreign affairs.

Similar cross-currents are evident in the practices of Jeffersonian Republicans. Republican ideology was, of course, almost the opposite of Federalist commitments. Republicans viewed the legitimate sphere of the national government as limited mostly to war and foreign affairs. They thought the Army and Navy, commanded by the President, were a threat to democracy. For them, democratic

1800 and 1830, public civilian employment quadrupled from slightly less than 3,000 in 1801,[58] to nearly 11,500 when Jackson took office in 1831.[59]

Compromises with Republican ideology were demanded of all the Republican Presidents. Thomas Jefferson purchased Louisiana from Napoleon without effective statutory authorization and notwithstanding his belief that the annexation of foreign territory could not be accomplished without an amendment to the Constitution.[60] As we shall see in more detail below, the statutes implementing Jefferson's embargo policy provided the national government, and particularly the President, coercive powers of extraordinary scope and stringency. Henry Adams concluded that "the embargo and the Louisiana Purchase taken together were more destructive to the theory and practice of a Virginia republic than any foreign war was likely to be."[61]

In a similar vein, Garry Wills describes James Madison's presidency as "carried by events toward a modernity [in terms of the exercise of national authority] he neither anticipated nor desired."[62]

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Assertions of national power are not necessarily assertions of presidential authority over administration.[65] But, there is a certain affinity between the two in practice. Many of the claims of modern Presidents have been predicated on the need for unified control of an otherwise fragmented and sprawling national administrative establishment. The enactment and implementation of the Embargo of 1807–1809 provides a dramatic example of how novel exertions of national power and presumptions of presidential control of administration go hand in hand.

The Embargo of 1807–1809 was a response to the constant harassment of American commerce by British and French naval forces.[66] These actions would have justified a declaration of war, but the United States was in no position to fight either the British or the French, and certainly not both at once. If war was unthinkable, doing nothing was insufferable. Jefferson, and James Madison his Secretary of State, proposed instead an embargo on the transfer of all goods from the United States to foreign destinations. The basic idea was "to keep our seamen and property from capture, and to starve the offending nations."[67] Jefferson's plan may or may not have had a reasonable chance of coercing the French and the British,[68] but, to be

state terrorism that made the Alien and Sedition prosecutions under Adams look minor by comparison."e6-0.0Nr79

forming his opinion.[86] (Explicit authority was later provided in the Enforcement Act of 1809.) Johnson's decision seemed to presume that the President had no inherent authority to direct lower level officials in the exercise of their statutory discretion—at least when, as here, the statute's text suggested that the lower level officer would form his own opinion based on the facts and circumstances of a particular case.

Jefferson did not take this judicial rebuff lying down. He

America's longest serving Attorney General (1817–1829), provided Presidents James Monroe and John Quincy Adams with several opinions that support the Stack view.

For example, President Monroe ordered a new trial for a military officer on the ground that the court martial had improperly excluded evidence that would have been beneficial to the defense.[98] The court martial, however, declined to retry the officer because the statute creating its jurisdiction explicitly prevented officers from being tried twice for the same offense.[99] The question of the propriety of the court martial's refusal of the presidential order was referred to Wirt.

Wirt began his opinion[100] by noting that under the Constitution the President was the Commander in Chief of the Army and therefore "the national and proper depositary of the final appellate power, in all judicial matters touching the police of the Army."[101] But, rather than rely on the constitutional designation of the President as Commander in Chief, Wirt finishes the sentence, "but let us not claim this power for him, unless it has been communicated to him by some specific grant from Congress."[102]

Wirt then turned to the statute to find some specific grant from Congress. He found it in the provision that required presidential approval before any severe sentence by courts martial could be implemented.[103]

Under the statute, the President had the authority to approve the sentence or to act "otherwise as he should judge proper."[104] In Wirt's view, that broad authority certainly gave the President the power to require a retrial based on an improper exclusion of exculpatory evidence. Nor was the military tribunal barred from complying by a provision that prohibited trying officers twice for the same offense. Wirt concluded, convincingly, that the provision was there to protect officers from double jeopardy, not to prevent a retrial requested by the defendant because of legal error.[105] As was his practice in many of his opinions, Wirt went on to buttress his legal arguments with a survey of historical practice in England and under the Articles of

98. New Trials Before Courts Martial, 1 Op. Att'y Gen. 233, 233 (1818).
99. *Id.*
100. *Id.*
101. *Id.* at 234.
102. *Id.*
103. *Id.* at 235.
104. *Id.*
105. *Id.* at 240.

Confederation and by policy arguments based upon the unfairness of treating courts martial verdicts, which were not subject to judicial review, as subject to no appeal whatsoever.[106]

Did Wirt mean to imply that the President had no directive power with respect to courts martial as Commander in Chief unless Congress had specifically provided the authority? If so, this would be a pretty radical view. After all the Commander in Chief Clause of the Constitution by its very language gives the President a power to direct. The difficult constitutional question, which seemed to be implicit in the courts martial case, was the degree to which that directive power could be channeled or restricted by Congress in the exercise of the undoubtedly broad congressional authority to raise, support and regulate the armed forces.[107] But, obviously, Wirt need not have reached that question, or the question of the President's independent constitutional authority, because he found sufficient authority in the statute itself to justify the President's actions.

To be sure, as a good Republican, Wirt did not take an expansive view of the President's constitutional authority standing alone. He denied, for example, that the President had any inherent authority to extradite to Great Britain those American citizens who were accused in that country of piracy.[108] Wirt first alones93acludd that qteren as tnoB-0.001 Tc0.2666 WILo

> persons, it might very often be *expedient* to do it. . . . [T]he lack of such authority might be corrected by] an Act of Congress providing for the punishment of our own citizens, who, having committed offenses abroad, come home for refuge; and for the delivery of foreign culprits who flew to us for shelter.[110]

Only the next year Wirt changed his mind concerning whether the President was bound by the law of nations when asked whether the President was required to order the return of a Danish slave to his owners in St. Croix. Without even mentioning his contrary dictum with respect to the Law of Nations in the extradition case Wirt said:

> The President is the executive officer of the laws of the country; these laws are not merely the Constitution, statutes, and treaties of the United States, but those general laws of nations which govern the intercourse between the United States and foreign nations; which impose on them, in common with other nations, the strict observance of a respect for their natural rights and sovereignties, and thus tend to preserve their peace and harmony.[111]

The President's authority to act to implement the law of nations seems to have been based, in Wirt's opinion, on the Vesting Clause which makes the President "the Executive Officer of the laws of the country." And, doubtless Wirt did not imagine that the President would deliver up the slave himself, but would, instead, order a federal marshal to do so. Hence, Wirt must, at the least, have concluded that where the law (here international law) required an act, but provided no implementing authority, it was the President's responsibility to see that the law was obeyed.

Yet, where Congress had vested authority to execute the law in others, Wirt also seemed to believe that the President had no right to

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Yet, Wirt's opinions in the accounting officer cases might well be limited by their particular context. The Treasury statutes clearly presumed that these officers were to act independently of the Secretary of the Treasury in settling individual claims. Moreover, they acted in an adjudicatory capacity. Indeed, in the debates concerning the provisions allowing an appeal to the Comptroller from an Auditor's settlement of an account, James Madison suggested that the Comptroller was exercising powers that "partake of a judiciary quality as well as executive."[113] Although he ultimately withdrew his suggestion, Madison initially argued that the Comptroller should therefore not hold office subject to presidential removal. While Congress did not provide the Comptroller with a fixed term of office, it did specify by statute that his decisions would be "final and conclusive to all concerned."[114]

But, it is far from clear how Wirt viewed officers other than those dealing with accounts. For the latter's independence in making particular decisions was supported by reasons of fairness to individuals, fiscal integrity and practical necessity.

True, Wirt also declined to advise individual District Attorneys in the conduct of prosecutions, stating that Congress gave individual District Attorneys, but not the Attorney General, the authority to "prosecute in [their] districts."[116] Did Wirt believe that this bare statutory language prohibited their being subject to direction from the A.G. or the President? Perhaps. On the other hand, much of Wirt's opinion is really a defense of the Attorney General's refusal to become involved in lower court cases. With no staff other than a clerk, Wirt was not about to take on the responsibility of answering questions from District Attorneys who wanted him to do their work for them.

Yet, on another occasion, Wirt seemed to recognize the President's authority to direct the activities of District Attorneys in prosecuting suits on behalf of the United States. President John Quincy Adams questioned Wirt concerning his authority to order the discontinuance of a suit concerning a sale of a plot of contested land in New Orleans. Wirt confirmed the President's authority. But, again, his opinion is a model of cautious legal advice. Wirt said:

> I entertain no doubt of the constitutional power of the President to order the discontinuance of a suit commenced in the name of the United States in a case proper for such an order. Were a District Attorney, for example, of his own mere motion, to commence a suit in the name of the United States, in a case wholly unfounded in law, the only effect of which would be to expose the defendant to needless . . . expense, I should consider the act not only authorized, but required by his duty, to order a discontinuance of such vexation; for it is one of his highest duties to take care that the law be executed, and, consequently, to take care that they not be abused by any officer acting under his authority . . . . But this power is a high and delicate one, and requires the utmost care and circumspection when is exercised; I could never advise its exercise in any case in which a court of the United States, free from all suspicion of impurity, had taken cognizance of the case.[117]

Wirt goes on to conclude that because the court had issued a preliminary injunction in the case, thus giving credence to the validity

116. Attorney General and District Attorneys, 1 Op. Att'y Gen. 608 (1823).

117. The Power of President to Discontinue a Suit, 2 Op. Att'y Gen. 53, 53–54 (1827).

of the claim, a presidential order to discontinue the suit would be an unwarranted interference with the judiciary.[118]

It is unclear, of course, whether Wirt's confident assertion of constitutional authority meant to claim an inherent presidential directive power, or to assert that as the chief agent of the client, the United States, the President could order that a suit in its name be dropped. And, even if he meant the former, there is instinct in Wirt's example of when the President might discontinue a suit; the idea that such an order should be based on the faithlessness of the District

sometimes just "the Democracy." Like their Jeffersonian Republican predecessors, the Jacksonian Democrats emphasized strict construction of the constitutional powers of the national government, states rights, and a small and frugal government. But, like the Federalists, Jacksonian Democrats believed in presidential leadership. While Federalists supported an energetic executive because they thought it necessary to an effective national government, Jacksonians premised the legitimacy of executive power on its democratic pedigree.[121]

The President's claim to a strong democratic pedigree was a function of radical changes in the electoral processes by which Presidents were selected. By the time of Jackson's election, the states were shifting rapidly from restrictive, property-based voting regimes to eligibility rules that promoted universal white male suffrage.[122] In most states this broad electorate, rather than the state legislature, chose delegates to the Electoral College, and the latter were pledged to particular candidates.[123] From Jackson forward, Presidents could claim with some considerable justification that they were the representatives of the people.[124] On this theory the people had put the President in office to run the government, and Andrew Jackson and his Democratic successors tended to act on this premise.

The Whigs resisted Jacksonian assertions of presidential authority, but they were almost always in a relatively weak position. Between 1828 and 1860, the Whigs won only two presidential elections and actually controlled the presidency for only four years. The victorious Whig, William Henry Harrison, died a month into his first term, and the Vice-President who succeeded him, John Tyler, was actually a Jeffersonian Republican in recently acquired Whig clothing. The Whigs had some greater success in maintaining control

121. *See generally* RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM; THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES (1969); LEONARD D. WHITE, THE JACKSONIAN'S: THE STUDY IN ADMINISTRATIVE HISTORY 1829–1861, at 6–7 (1954). Further general studies include RICHARD P. MCCORMICK, THE SECOND AMERICAN PARTY SYSTEM: PARTY FORMATION IN THE JACKSONIAN ERA (1966); ROBERT V. REMINI, MARTIN VAN BURREN AND THE MAKING OF A DEMOCRATIC PARTY (1959); and ARTHUR M. SCHLESSINGER, JR., THE AGE OF JACKSON (1945).

122. On the changes in state electoral rules see SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 181–217 (2005).

123. *Id.* at 308–09.

124. For development of these shifting ideas of democracy and executive powS9n0.0nF9(8–09)7.92 144 209.0401 Tm(S)T9Ir

control of the Senate, the Senate censure resolutions were expunged from the record, and the Bank's charter was allowed to expire. Jackson had won the Bank War. But what exactly had he won?

To begin to answer that question we need to understand the complaints that were lodged against Jackson in the Senate's censure resolutions. The first was that in removing the deposits Roger Taney willfully misconstrued the banking statute. Henry Clay, Daniel Webster and John C. Calhoun all argued in the Senate that the general purpose of the statute was to ensure safe and faithful custody of government funds. Because Taney had conceded that the money was safe and the Bank faithful, these senators concluded that he lacked any authority to remove the deposits.[134] Taney instead relied on the plain text of the statute, which placed no restriction on the Secretary's authority other than the requirement to report his reasons to Congress.[135] And, while Taney conceded that the money had been

not in the President. Jackson, of course, hardly denied this. He removed Duane for refusing to follow his instructions; he did not

Secretary Levi Woodbury issued a circular (Jackson's so-called "specie circular") in 1836 that required Land Offices to accept only specie in payment for public land purchases.[149] Congress annulled the circular's effects in 1838 by passing a joint resolution making it unlawful for the Secretary of the Treasury to create any difference between payments that were to be received for the various branches of federal revenue (i.e., land sales, taxes, fees, etc.).[150]

Finally, the accepted idea that presidential direction can only be enforced ultimately by presidential removal has important consequences. Jackson's removal of Duane gave practical effect to his constitutional claims of removal authority, but prudent Presidents will not pick fights like that with Congress very often. Nor is the formal power to appoint or remove necessarily a guarantee that officers will be free from powerful congressional influence. Commenting on the degree to which Congress had come to control the appointments process by the end of the Jacksonian era, Leonard White concluded, "in this aspect of the struggle for power, the legislative branch emerged relatively a victor in 1861 even though the executive still held high [i.e., constitutional] ground."[151] With the exceptions of Jackson and Polk, Presidents in the Jacksonian era were forced to yield substantial control over appointments to Congress.[152]

The battles between Presidents and Congresses over appointments and removals would continue throughout the 19th century and beyond.[153] In this never-ending struggle, Jackson's successes were perhaps a high water mark from which presidential power and authority over administration ebbed almost continuously (Abraham Lincoln's tenure excepted) until world wars and major depressions re-energized presidential leadership.[154] But nothing in the

149. Circular from the Treasury, No. 1548 (July 11, 1836), *reprinted in* AMERICAN STATE PAPERS, PUBLIC LANDS 910 (1861).

150. A Resolution Relating to the Public Revenue and Dues to the Government, res. 4, 5 Stat. 310 (May 31, 1838).

151. WHITE, THE JACKSONIAN'S, *supra* note 121, at 124.

152. JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 55–71 (1953).

153. *See* LEONARD V. WHITE, THE REPUBLICAN ERA, 1869–1901: A STUDY IN ADMINISTRATIVE HISTORY 20–67 (1958).

154. While Woodrow Wilson overstated his case 1885, he had this to say about the presidency:

> The business of the president, occasionally great, is usually not much above routine. Most of the time it is *mere* administration, mere obedience to directions from the masters of policy, the standing committees [of Congress]. Except as far as his power of veto constitutes him as part of the legislature, the President might, not

Bank War or Specie Circular episodes provided significant new authority for the proposition that the President had a discretionary and inherent power of political direction over other officers that must remain free from congressional regulation—or for the proposition that Congress could limit presidential powers of direction in any way that

Yet, practice has its uses. At the very least, I believe it can guard against making serious mistakes of overgeneralization. Justice Scalia's dissenting opinion in *Morrison v. Olsen*[155] provides an apt example. Justice Scalia asserts, quite correctly it seems to me, that prosecution—if conducted by government rather than by a private party—has always been conducted by the executive branch, not by the legislature or by the courts.[156] But Justice Scalia derives from that the notion that any statute that reduces the Attorney General's power over a prosecutor is unconstitutional. On Scalia's account, this is because (1) the President exercises authority over the Attorney General and (2) the Vesting Clause provides "the Executive power shall be vested in a President of the United States."[157]

A serious look at the practices of the antebellum Republic would surely have given Justice Scalia pause. First, Justice Scalia's exception of private prosecutions from his sweeping statement was surely prudent. Actions by private "relators" pursuing the interests of the Crown had a long history in England. Such actions were available in the colonies and by statute under federal law after the ratification of the Constitution.[158] Although the record is sketchy, there is no evidence that anyone in the government exercised any authority to direct, control or terminate these lawsuits.[159]

While private prosecution might be distinguished in a number of ways from public prosecution, the early and continual practice of private prosecution tends to undercut the idea that the Vesting Clause has been understood historically as lodging ultimate prosecutorial authority over all lawsuits to enforce federal law in the President. One might surely argue that the Vesting Clause should be understood

Similarly, the idea that congressional interference with the Attorney General's control our public prosecutors is unconstitutional must contend with even more substantial evidence that centralized control of legal enforcement was a post-Civil War development and that centralization has never been complete.

Almost from the beginning, Attorneys General lamented their lack of authority over U.S. Attorneys in the various districts.[161] Perhaps the most elaborate statement is that of Caleb Cushing in 1854.[162] Nor were the Attorneys General alone in calling for reform. President Jackson requested consolidation of authority over U.S. Marshals and U.S. Attorneys early in his tenure.[163] Congress responded, not by giving the Attorney General more authority, but by reorganizing the Treasury Department to provide for a Solicitor of the Treasury who was to have authority over U.S. Attorneys and Marshals with respect to the collection of debts owed to the United States. The Solicitor was merely to be advised by the Attorney General on request.[164] A similar authority of direction was also given to the Auditor of the O02 T68022 Tcfint Tp2 Tcfinwei4l'finwei4l'finwei4l'finw request.a159 Twque

a judicial or a legislative function did not answer the more focused question of how that executive authority should be organized.

Justice Scalia would have been on firmer ground had he instead attended to the early presidential practice of directing both U.S. Attorneys and Attorneys General concerning the performance of their duties. As Professor Prakash demonstrates,[169] early Presidents gave both general and specific directions to federal prosecutors without any statutory authority and with the tacit approval of Congress (sometimes at its request). This authority seems to have been uncontested and could only have had its source in the Constitution itself—as Presidents sometimes asserted.

But what exactly does this practice demonstrate? It certainly seems to confirm what I earlier took to be the fair implication of the constitutional text, that is, that absent contrary statutory provision, the default rule should be that Presidents have authority to direct other executive officers in the execution of the law. Nor do I believe that this is a *mere* default rule, that is, that Congress can dispose of the President's directive authority—by limiting removals or otherwise—by the simple invocation of the Necessary and Proper Clause. The *Myers* case alone tells us that there are limits, and case law confirms that those limits go beyond situations like *Myers* in which Congress inserts itself directly and extra-constitutionally into the process of presidential appointment or removal.[170]

But pursuit of precisely where those further limits might be goes much beyond the modest focus of this article. My claim is only this, attention to past practices in the exercise and limitation of presidential directive authority should give us pause when we are tempted to give general answers to particular questions. The early practitioners of the art of governance in the United States seem to have taken a more fine-grained view.

Our early practices seem to tell us that the question, "Does the President have the authority to direct administrative action?" is the wrong question. We should ask instead, "Direct what action; by whom; with what legal consequences; under what statutory language;

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for what reasons?"[171] On those questions the conflicting and nuanced practices of the early Republic yield some insights. They offer up, however, no unified theory upon which to premise presumptive resolution of most difficult cases.

171. For a similar call to more specific argumentation about separation of power issues, see Peter M. Shane, *The Separation of Powers and the Rule of Law: The Virtues of "Seeing the Trees,"* 30 WM. & MARY L. REV. 375 (1989).