

# THE DIVIDED EXECUTIVE

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Article II's apparent provision for a unitary executive is at odds with a mature understanding of what makes the separation of powers constitutionally valuable. From Montesquieu to Brandeis, jurists theorizing separation of powers have characterized its purpose as primarily to promote liberty and the rule of law. Two centuries of constitutional experience lets us now see more clearly that liberty and the rule of law are promoted by checks and balances that prevent individual actors, including the President, from conclusively determining the reach of their own powers. Dividing the executive may further promote the liberty and rule-of-law goals of the Constitution's existing checks and balances. This article, written for a symposium at Duke University School of Law entitled *An Even More Perfect Union: Proposed Amendments to the Constitution*, further develops and deepens the case made in existing scholarship for dividing the American national executive, and in particular for constitutionally securing the independence of the Attorney General.

## I. THE TEXT OF THE PROPOSED AMENDMENT

1. The President of the United States shall nominate and, with the advice and consent of the Senate, appoint, an Attorney General of the United States. The Senate shall vote directly on the question whether to consent to the President's nominee within 30 days of nomination and no Senate rule may prevent resolution of the question by simple majority. The President's nominee shall serve as Acting Attorney General until the Senate vote. If the Senate does not consent to the President's nominee, the President shall withdraw the nomination and nominate another candidate in each 30-day period until such a nomination receives Senate consent.

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2. The Attorney General of the United States shall have exclusive power to prosecute crimes and misdemeanors under the laws of the United States and to act on behalf of the United States in other judicial proceedings, including power to delegate that discretion to subordinates. Congress may invest the Attorney General with oversight of investigative agencies that fulfill functions preliminary or ancillary to prosecutions or other judicial proceedings.

3. The Attorney General of the United States shall be removable only for good cause by two thirds vote of each House of Congress. The Attorney General's term of office shall otherwise be coextensive with that of the nominating President.

4. Subordinates of the Attorney General of the United States shall be removable only by impeachment and conviction in accordance with Article II, Section 4 or by the Attorney General of the United States. For removal of inferior officers, the Attorney General may delegate his removal power.

## II. INTRODUCTION: THE ATTORNEY GENERAL IN THE NATIONAL EXECUTIVE

When scholars discuss distributing the executive power of governing among multiple actors,<sup>1</sup> separating one particular executive office comes regularly to the fore: the Attorney General.<sup>2</sup> An English

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1. See, e.g., Daniel B. Rodriguez, *State Constitutional Failure*, 2011 U. ILL. L. REV. 1243 (2011); Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301 (2010); Vikram David Amar, *Lessons from California's Recent Experience with Its Non-Unitary (Divided) Executive: Of Mayors, Governors, Controllers, and Attorneys General*, 59 EMORY L.J. 469 (2009); Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696 (2009); Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008); Steven G. Calabresi & James Lindgren, *Commentary, The President: Lightning Rod or King?*, 115 YALE L.J. 2611 (2006); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506 (1989); Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627 (1989).

2. See, e.g., William R. Dailey, *Who Is the Attorney General's Client?*, 87 NOTRE DAME L. REV. 1113 (2012); Fran Quigley, *Torture, Impunity, and the Need for Independent Prosecutorial Oversight of the Executive Branch*, 20 CORNELL J.L. & PUB. POL'Y 271 (2010); Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931 (2008); William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446 (2006); Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005); Susan Low Bloch, *The Early Role of the*

import, at the time of the American Founding, the office had already been recognized in England to entail a degree of distance from other participants in executive government.<sup>3</sup> Charles Pratt (later Lord Camden), who became England's Attorney General in 1757, observed

that he felt himself responsible, in the office of Attorney General, to the public as well as to the Ministers, and that he never prosecuted, or countermanded prosecution, or signed a warrant, if it was not the act of his own advice and judgment, by which he was ready and willing to abide, instead of throwing it off, and shifting it upon the Government; that he interposed himself as a judicial officer between the executive Government and the subject; that he acted as a kind of referee, accountable to both parties, by a tacit compact, for a sound and virtuous exercise of discretion . . . .<sup>4</sup>

Pratt's characterization of the office as an adjunct to the judiciary rather than a fully integrated element of the executive was echoed in the draft Judiciary Bill introduced in the United States Senate on June 12, 1789.<sup>5</sup> The bill provided for the *Supreme Court* to appoint "a meet person learned in the law to act as Attorney General for the United States," whose duties would be to prosecute on behalf of the United States and to advise the President and the heads of departments on questions of law.<sup>6</sup> The bill that passed the Senate and went to the House of Representatives omitted the provision for Supreme Court appointment.<sup>7</sup> Though we have no record of the debate that led to the

*Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561 (1989); William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474 (1989); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275 (1989); Note, *Appointing State Attorneys General: Evaluating the Unbundled State Executive*, 127 HARV. L. REV. 973 (2014).

3. Cf. Bloch, *supra* note 2, at 607 n.155 ("In the course of his reasoning, [Justice] Iredell also noted that the Attorney General in England is the responsible Law Officer of the Crown who needed no special order from the Crown to represent the Crown . . . .").

4. 5 JOHN CAMPBELL, *LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND* 356 (3d. ed., London, John Murray 1848–50). On one occasion Pratt refused to follow an instruction from the Board of Treasury to desist from a prosecution.

He took the opportunity of reminding them, with spirit and with dignity, that he was answerable to the public, as well as to his conscience, for the due execution of a judicial trust imposed upon him by his patent. The Board, at first enraged, had the good sense and the manliness, after cool reflection, to confess themselves in the wrong, and to reclaim the letter, so that it should not appear against them.

*Id.* at 357.

5. See Charles Warren, *New Light on the History of the Judiciary Act of 1789*, 37 HARV. L. REV. 49, 108–09 (1923).

6. *Id.* at 109.

7. See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93.

change, Susan Low Bloch has identified correspondence that points to a reason for it.<sup>8</sup> “Robert R. Livingston, in a letter thought to have been addressed to [Oliver] Ellsworth, complimented the draft but wondered, *inter alia*, whether it ‘would not be better that the Attorney General be appointed by the executive to which department he necessarily belongs than to the judicial . . . ?’”<sup>9</sup>

Characterizing the office as executive did not dispel the established sense that an Attorney General should exercise independent judgment in discharging her duties. American state constitutional experience evidences this. The Attorney General’s independence is expressly entrenched in the constitutions of almost all American state governments.<sup>10</sup> In 43 states, the Attorney General is separately elected;<sup>11</sup> in one the Attorney General is chosen by the legislature;<sup>12</sup> in one the Attorney General is chosen by the Supreme Court;<sup>13</sup> and in the five where the Governor appoints the Attorney General,<sup>14</sup> only two give the Governor unfettered power to dismiss the Attorney General.<sup>15</sup>

Despite this history and experience, the United States Constitution’s vesting of “[t]he executive Power” in a President of the United States,<sup>16</sup> who is expressly empowered to appoint “Officers of the United States, whose Appointments are not herein otherwise provided for,”<sup>17</sup> has been understood to let the President dismiss the Attorney General at will.<sup>18</sup> Congress’s ability to constrain the President’s dismissal power has itself been held to be quite

8. Bloch, *supra* note 2, at 571 n.32.

9. *Id.* (quoting a June 24, 1789 letter from Robert R. Livingston).

10. COUNCIL OF STATE GOV’TS, THE BOOK OF THE STATES 226 (2017).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. ALASKA CONST. art. III, § 25; WYO. STAT. ANN. §§ 9-1-202, 9-1-601 (2017).

16. U.S. CONST. art. II, §1, cl. 1.

17. U.S. CONST. art. II, §2, cl. 2.

18. *Cf.* Calabresi & Prakash, *supra* note 1, at 598 (“We thus reject the idea that the President lacks a textually explicit power of removal, adopting instead the argument that the President may remove executive officers using his Vesting Clause grant of ‘executive Power.’”); Prakash, *supra* note 2, at 564 (“Despite the lack of the executive tag . . . the president and his immediate subordinates regarded [the official attorneys and the attorney general] as executive officers.”). *But cf.* Bloch, *supra* note 2, at 580 (“The most likely explanation for Congress’s failure to specify the removal of an Attorney General was that Congress was simply less sure about and less concerned with his removability.”); Lessig & Sunstein, *supra* note 1, at 18 n.74 (“[I]t is not at all clear that the framers believed they were vesting in the President removal authority over the Attorney General.”).

constrained,<sup>19</sup> notwithstanding the Senate’s veto over presidential appointments.<sup>20</sup> In the wake of President Nixon’s dismissal of his Attorney General during the Watergate imbroglio, the next elected President sought legal advice about insulating the Attorney General from peremptory presidential removal.<sup>21</sup> The advice of the Department of Justice’s Office of Legal Counsel (“OLC”) was “that legislation establishing a definite term of office for the Attorney General and restricting the President’s power to remove him only for cause probably would be held unconstitutional.”<sup>22</sup> OLC reasoned that “the President must have control over the country’s chief law enforcement official because of the President’s constitutional duty faithfully to execute the Nation’s laws. Having reached this conclusion, it follows that there is no method, short of a constitutional amendment, to separate the Attorney General from Presidential control.”<sup>23</sup>

In support of its conclusion, OLC quoted from the Supreme Court’s *Myers* decision:

Then there may be duties of a quasi-judicial character imposed on executive officers . . . , the discharge of which the President cannot in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.<sup>24</sup>

The *Myers* Court’s reference to dismissal “on the ground that the discretion regularly entrusted to that officer by statute has not been

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19. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 496–98 (2010) (holding that Congress’s insulation of Board members from Presidential control through two layers of tenure protection, whereby Board members could be removed only by the Securities and Exchange Commission for good cause, and the Commissioners could in turn be removed by the President only for good cause, violated the Constitution); *Myers v. United States*, 272 U.S. 52, 176 (1926) (holding invalid Congress’s attempt to restrict the President’s removal power over first-class postmasters with a requirement of Senate consent). *But see* *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935) (holding that Congress could restrict the President’s removal power over officers such as the Federal Trade Commissioners, whose roles the Court characterized as legislative and judicial rather than executive, by limiting the grounds on which those officers could be removed).

20. U.S. CONST. art. II, §2, cl. 2.

21. Marshall, *supra* note 2, at 2471.

22. *Proposals Regarding an Independent Attorney General*, 1 Op. O.L.C. 75, 77 (1977).

23. *Id.*

24. *Id.* (quoting *Myers*, 272 U.S. at 135).

on the whole intelligently or wisely exercised” exposes the tension between concluding that an official should exercise independent judgment in doing her job *and* that she should be subject to dismissal *at will*.<sup>25</sup> When the *Myers* Court sought to justify the President’s dismissal power, the Court posited a good *cause* for dismissal, namely, the dismissed officer’s unintelligent or unwise use of discretion.<sup>26</sup> That example would have supported a presidential power to dismiss for cause, but how did it support a power to dismiss at will, that is, even *without* cause? Dismissal for overall poor performance could be sustained on judicial review under a “good cause” standard if there were evidence to support it and no evidence of improper motive. To claim that certain officials should exercise independent judgment yet should be subject to dismissal at will by the chief executive is to sound like someone living in seventeenth century England, when and where even judges served at royal pleasure.<sup>27</sup> The great reform achieved by the Act of Settlement of 1701 was to guarantee judicial tenure during good behavior.<sup>28</sup> Good behavior tenure for judges became recognized in the eighteenth century as a momentous constitutional advance, and was appropriated by the American Founders,<sup>29</sup> precisely because it helps its recipients behave independently.<sup>30</sup>

If exercising independent judgment matters to good governance, then constitutional designers should introduce constitutional protections for the exercise of that judgment to help keep it independent. Taking care that the laws are faithfully executed no more requires an unlimited presidential power to dismiss the Attorney General than it requires an unlimited presidential power to dismiss judges, whose decisions are just as integral to the law’s faithful execution.<sup>31</sup> This contribution to the symposium argues that having an

25. *Myers*, 272 U.S. at 135.

26. *Id.*

27. *Cf.* 1 WILLIAM BLACKSTONE, COMMENTARIES \*260 (praising modern changes “to remove all judicial power out of the hands of the king’s privy council,” who were previously “inclined to pronounce that for law, which was most agreeable to the prince”).

28. *See id.* at \*258 (describing good behavior tenure as helping to “maintain both the dignity and the independence of the judges in the superior courts”). *Cf.* Constitutional Reform Act, 2005, c. 4, § 33 (UK) (“A judge of the Supreme Court holds that office during good behaviour, but may be removed from it on the address of both Houses of Parliament.”).

29. U.S. CONST. art. III, §1.

30. *Cf.* ALEXANDER HAMILTON, THE POLITICAL WRITINGS OF ALEXANDER HAMILTON: VOL. 1 365 (Carson Hollway & Bradford P. Wilson eds., Cambridge Univ. Press 2017) (1788) (“[T]he judicial [authority] is still reserved for an independent body, who hold their office during good behavior.”).

31. *See* Prakash, *supra* note 2, at 568 (“[A]t one time the broad category of law execution

Attorney General whose independent judgment is constitutionally protected matters to good governance as surely as having courts whose independent judgment is constitutionally protected.

This article examines the theoretical foundations of the American Founders' choice to write Article II of the Constitution as they did. We will explore the support for their choice supplied by Montesquieu's seminal account of power separation. Accepting for purposes of the argument that the current Article II contemplates an executive that is sufficiently unitary to subject the Attorney General to presidential control, this article elaborates a case for concluding that the constitutionally valuable principle behind the separation of powers may be vindicated and advanced, not compromised and diminished, by dividing the executive, and that it certainly would be advanced by a well crafted separation of the Attorney General from the rest of the executive.

### III. MONTESQUIEU AND THE FOUNDING VISION OF SEPARATED POWERS

In presenting and arguing for the Philadelphia Convention's draft constitution during the ratification debates, James Madison observed of the document's tripartite power distribution: "The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind."<sup>32</sup> Emphasizing that Montesquieu's famous account was a purported description of the English constitution, Madison contended that Montesquieu

did not mean that these departments ought to have no *partial agency* in, or no *control* over the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye [namely, England], can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of

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generally encompassed both prosecution and judging. But by 1789, even though judging was still part of the overall task of law execution, Americans viewed judging, in part, as a check on the executive's law enforcement. This was a legacy of English law, and it was reinforced by Montesquieu's maxim.").

32. THE FEDERALIST NO. 47 (James Madison), in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 499 (John P. Kaminski et al. eds. 2009), <http://rotunda.upress.virginia.edu/founders/RNCN-03-15-02-0136>.

another department, the fundamental principles of a free constitution, are subverted.<sup>33</sup>

Three features of the picture emerging from Madison's reading of Montesquieu are crucial for present purposes. First, the distinctive virtue of power separation was that it promoted what Montesquieu called "political liberty," to which Madison adverted in his reference to the "principles of a free constitution."<sup>34</sup> In *The Spirit of the Laws*, Montesquieu's abstract account of the system of government that he had witnessed on his long visit to England<sup>35</sup> appeared in a chapter entitled "Of the Constitution of England" and asserted that the "direct end" of that constitution was, uniquely, "political liberty." What did such liberty entail? A freedom from the fear that power will be abused.<sup>36</sup> "The political liberty of the subject," said Montesquieu, "is a tranquility of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man needs not be afraid of another."<sup>37</sup> Justice Louis Brandeis reprised that characterization of separation's structural purpose when arguing in his *Myers* dissent that Congress should be able to add checks to the President's power to dismiss officials: "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power."<sup>38</sup>

Second, Montesquieu understood the structural accomplishment of the English constitution to be a separation of essentially distinguishable *kinds* of power.<sup>39</sup> Madison seemed to share this understanding. He proposed to the first Congress that among the amendments that would become the bill of rights there should be a provision that

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33. *Id.* at 500.

34. *Id.*

35. His account was focused on the legal system that operated in England, which differed in some relevant respects from that of Scotland, with which a political union had been more fully achieved not long before Montesquieu's visit. For example, Montesquieu's account of the separated "power of judging" made clear that he was focused on the jury system as he had observed it in England. See 1 CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS*, bk. 11, ch. 6, 175–76 (Thomas Nugent trans., rev'd ed., Cincinnati, R. Clark & Co. 1873) (1748); see also *id.* bk. 6 ch. 3, 85–86.

36. *Id.* at bk. 11, ch. 5, 173–74; see also *id.* at bk. 11, ch. 6, 185.

37. *Id.* at bk. 11, ch. 5, 174.

38. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

39. MONTESQUIEU, *supra* note 35, at bk. 11, ch. 6.



[t]he powers delegated by this constitution, are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial; nor the executive exercise the powers vested in the legislative or judicial; nor the judicial exercise the powers vested in the legislative or executive departments.<sup>40</sup>

This resembled the famous “government of laws and not of men” article of the Massachusetts state constitution.<sup>41</sup> It was not quite so emphatically essentialist as its state-level precursor, but would have been hard to read in some non-essentialist, institutional way, because the Constitution’s three great institutional establishments in Articles I, II, and III each opened in essentialist terms. Congress was given “[a]ll legislative Powers herein granted,” the President was given “[t]he executive Power,” and the federal courts were given “[t]he judicial Power.” Yet the variation in Madison’s proposed amendment from the Massachusetts language perhaps reflected reflection on the Constitution’s extensive provision for inter-branch checks and balances.

Third, Montesquieu acknowledged checks and balances among the separated institutions of English government, by which those institutions were actually involved in the exercise of each other’s powers.<sup>42</sup> But he saw this checking and balancing as serving the limited purpose of protecting the primary separation.<sup>43</sup> He considered that primary separation to be necessary to preserve political liberty. If, for example, the executive power were “committed to a certain number of persons selected from the legislative body,” Montesquieu predicted “there would be an end then of liberty.”<sup>44</sup>

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40. 12 THE PAPERS OF JAMES MADISON 202 (William T. Hutchinson et al. eds., Univ. of Va. Press 1979); see 1 THOMAS LLOYD, THE CONGRESSIONAL REGISTER 429 (Book on Demand Ltd. 2013) (Madison in the House of Representatives, June 8, 1789).

41. See MASS. CONST. Part the First, art. 30 (1780) (“In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.”).

42. MONTESQUIEU, *supra* note 35, at bk. 11, ch. 6.

43. *Id.* at bk. 11, ch. 6, 183 (“The executive power . . . ought to have a share in the legislature by the power of rejecting, otherwise it would soon be stripped of its prerogative.”).

44. *Id.* at bk. 11, ch. 6, 179.

### A. Montesquieu's Mistake

The American Founders adopted a structure of government that replicated much of what Montesquieu had said about the English system. “All legislative Powers herein granted” were vested in a bicameral representative body,<sup>45</sup> as Montesquieu had advocated.<sup>46</sup> And “[t]he executive Power” was vested in an individual, as Montesquieu had urged, with a president substituted for a monarch.<sup>47</sup> In Montesquieu’s words: “The executive power ought to be in the hands of a monarch, because this branch of government, having need of dispatch, is better administered by one than by many.”<sup>48</sup> These institutional arrangements were adopted in expressly essentialist terms, as if differing kinds of power could cleanly be assigned into separate hands. Yet in claiming that they could be, and had been in England, Montesquieu was mistaken.

What was really going on in the English system was not power *separation*, but power *sharing*. The monarch’s power to say no to legislation made him a third chamber of the legislature, with more voting clout than any other member of that body. He was the biggest legislator on the block, because he could trade his right to reject laws that other legislators wanted for their support of whatever laws he wanted.<sup>49</sup> The same was true of the American President, thanks to his power to veto acts of Congress, which could be overridden only by a supermajority vote in each House.<sup>50</sup> Meanwhile, Parliament’s power to vote no confidence in the monarch’s officials<sup>51</sup> and the American Senate’s power to refuse consent to the President’s appointments in each case served an executive, managerial function, like that of a corporate board of directors.<sup>52</sup> And the powers of Parliament and

45. U.S. CONST. art. I, § 1.

46. MONTESQUIEU, *supra* note 35, at bk. 11, ch. 6, 176–79.

47. U.S. CONST. art. II, § 1.

48. MONTESQUIEU, *supra* note 35, at bk. 11, ch. 6, 179.

49. What eventually made that less true was the convention of responsible or cabinet government, which was only beginning to emerge at the time of Montesquieu’s visit (and which Montesquieu elliptically condemned as a mortal threat to liberty). See MONTESQUIEU, *supra* note 35, at bk. 11 ch. 6, 179. At that time, the monarch had refused assent as recently as 1996 is now, and the power to do so would likely have influenced the fate of many proposed laws that never passed in Parliament. Laurence Claus, *Montesquieu’s Mistakes and the True Meaning of Separation*, 25 OXFORD J. LEGAL STUDIES 419, 428 n.57 (2005).

50. U.S. CONST. art. I, § 7.

51. See, e.g., ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 449–51 (10th ed. 1965) (first edition published 1885).

52. U.S. CONST. art. II, § 2.

Congress to impeach, try, convict, and remove officials were judicial.<sup>53</sup> These checks and balances were not preserving a primary separation of kinds of power. They were controverting that separation even as they served the very goal that separation was alleged to accomplish, namely, establishing a government of laws and not of men, a system that sustained political liberty by making the rule of law feel real. How were checks and balances achieving that result? Not by hermetically sealing essentially different kinds of power in separate institutional silos, but by ensuring that no individual participant in the system could *conclusively determine the reach of her own powers*.

The virtue of “separation of powers” lies not in separating powers but in multiplying minds who must concur before government intrudes into the lives of its people, and adding others who review *ex post* the rightness of what those in government have done.<sup>54</sup> How those minds are labeled is substantively beside the point; having the people who decide whether to prosecute be different from the people who adjudicate that prosecution is a deeply valuable institutional feature, but so, *a fortiori*, is having both of those decisionmakers differ, in any given instance, from others in government (however labeled) who might deserve to be prosecuted and convicted for wrongful acts.

Why did Montesquieu not see this? Why his contagious fixation on separating kinds of power? Because he was grappling with how to explain the English system’s success when that system seemed to violate a cardinal principle of Enlightenment orthodoxy: *sovereignty* was supposed to be indivisible. So had said Montesquieu’s famous French predecessor, Jean Bodin.<sup>55</sup> Montesquieu had two copies<sup>56</sup> of *Les Six Livres de la République*, first published in 1576, which emphasized the point. The indivisibility of sovereignty was affirmed in the scholarship of Johannes Althusius,<sup>57</sup> Hugo Grotius,<sup>58</sup> Thomas

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53. U.S. CONST. art. II, § 3; see WILLIAM SEARLE HOLDSWORTH, 1 A HISTORY OF ENGLISH LAW 379–385 (3d ed. 1922) (on the English history of impeachment).

54. “[T]he more minds that must concur in the constitutionality and virtue of a proposed exercise of power, the more likely that exercise is to be constitutional and virtuous.” Claus, *supra* note 49, at 425. Cf. CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE (2006); CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS (2009); Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1 (2009).

55. See JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 52–55 (M.J. Tooley trans., Basil Blackwell Oxford 1955) (1576) (“[S]overeignty is, of its very nature, indivisible . . .”).

56. ROBERT SHACKLETON, MONTESQUIEU: A CRITICAL BIOGRAPHY 306–07 (1st ed. 1961).

57. See generally JOHANNES ALTHUSIUS, POLITICA METHODICE DIGESTA (Frederick Carney ed., Liberty Fund, Inc. 1995) (1603).

Hobbes,<sup>59</sup> Ludolph Hugo<sup>60</sup> and Samuel von Pufendorf.<sup>61</sup> It underlay Pufendorf's claim that the Habsburg Holy Roman Empire was an "irregular," unsustainable system of government because it purported to divide sovereignty between the emperor and the German princes.<sup>62</sup>

In the separation of powers, Montesquieu identified a way to reconcile the indivisibility of sovereignty with the success and sustainability of the English system.<sup>63</sup> Sovereign powers could be separated from one another, so long as the ultimate exercise of each kind of power was undivided.<sup>64</sup> One ultimate lawgiver could supply a coherent body of law even though that lawgiver was separated from those who would implement that law.<sup>65</sup> One chief executive could keep government nimble and consistent in bringing the law into people's lives. But in Montesquieu's eyes, the sustainability of dividing power depended on the separated powers differing in kind.<sup>66</sup>

The Philadelphia Convention's attempt to divide *legislative* power between the new nation and existing state governments violated

58. See generally HUGO GROTIUS, DE JURE BELLI AC PACIS, bk. I, ch. 3 § 7 (Knud Haakon ed., Liberty Fund, Inc. 2005) (1625).

59. THOMAS HOBBS, LEVIATHAN ch. 18, para. 16 (Oxford: University Press 1965) (1651) (noting that "the rights, which make the essence of sovereignty . . . are incommunicable and inseparable").

60. See generally LUDOLPH HUGO, DE STATU REGIONUM GERMANIAE (Helmstedt, University of Helmstedt 1661).

61. See generally SAMUEL VON PUFENDORF, INTRODUCTION TO THE HISTORY OF THE PRINCIPAL KINGDOMS AND STATES OF EUROPE (Michael Seidler ed., Liberty Fund, Inc. 2013) (8th ed. 1719).

62. *Id.* at 282.

Its irregular Constitution of Government is one of the chief Causes of its Infirmity; it being neither one entire Kingdom, neither properly a Confederacy, but participating of both kinds: For the Emperour has not the entire Sovereignty over the whole Empire, nor each Prince in particular over his Territories; and tho' the former is more than a bare Administrator, yet the latter have a greater share in the Sovereignty than can be attributed to any Subjects or Citizens whatever, tho' never so great.

*Id.* Pufendorf drew an analogy to a building designed in disregard of the "Rules of Architecture" or which had suffered from "some great Fault" that had "been cur'd and made up after a strange and unseemly manner." SAMUEL VON PUFENDORF, OF THE LAW OF NATURE AND NATIONS: EIGHT BOOKS IN 1 VOLUME 679 (4th ed., The Lawbook Exchange, Ltd. 2005) (4th ed. 1729).

63. Montesquieu condemned only insufficiently nuanced theories of indivisibility. See Robert Shackleton, *Montesquieu, Bolingbroke, and the Separation of Powers*, 3 FRENCH STUD. 25, 26 (1949).

64. See *id.* at 26 ("If the three powers are rigidly separated, the constitution can be said to promote liberty.").

65. *Id.*

66. See *id.* at 28 ("[L]iberty can be secured only by dividing political authority . . . into its three constituent functions, and by assigning these functions to different bodies or individuals . . .").

Montesquieu's nuanced vision of how sovereign power could durably be divided. Yet in constructing their national government, the American Founders followed Montesquieu's lead. They did not just create differently configured institutions to perform distinguishable institutional tasks. They chose to characterize the respective powers of the institutions they created as different *in kind*. Perhaps some ambivalence about this choice, some recognition that it was deeply in tension with the checks and balances that they had expressly created, prompted the first Congress not to pass Madison's proposed "separation of powers" amendment. Yet Montesquieu's premise about the character of sovereignty may still help explain their choice to invest "the executive Power" in one person.

### *B. The Impossible Separation*

There are two deep difficulties with seeing *separation of kinds* of power as a source of liberty and the rule of law. First, we can all see that lawmaking and law-executing both happen inside each branch of the United States Government. Each executes existing law (including the law of the Constitution) when acting, and each acts in ways that both make and apply law. If we were to quantify the volume of law made by each branch, we would have to acknowledge that the largest lawmaker is the so-called Executive, followed by the so-called Judiciary, with Congress bringing up the rear. And we can see that what *is* so probably *has* to be so. Applying the words of existing law often requires elaboration, requires adding to the words that count, that guide law's community going forward. How else can law fulfill its function of "stabilizing expectations,"<sup>67</sup> of enabling our shared understanding of how we are to live together? Even Justice Scalia conceded that "a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be."<sup>68</sup>

Second, in any human community, there is only one kind of human action that distinctively deserves to be called governing, and that is *lawmaking*, issuing words that guide conduct and shape expectation. We all do law *applying*, at least to ourselves. Our so-called "private"

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67. See JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 201 (William H. Rehg trans., MIT Press 1996).

68. *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting).

institutions apply law to us as much as our “public” ones do. Just compare the complex miscellany of laws that a “private” university or a “private” bank applies in its relations with us to the much smaller set that are applied by the DMV. And dispute resolving is often done by “private” persons too. A leading consideration in our choice to call only some of our law-applying institutions “governmental” is the extent to which those institutions engage in lawmaking for our wider community (not just for their own internal lives) and so help *govern* our community. Hence the complaint that private arbitration robs the community of valuable precedent, of *added law*.<sup>69</sup> In that sense, then, there are not really three kinds of power, just one—the ability through one’s words to affect what others in one’s community will likely do and expect.<sup>70</sup> That one kind of power can be distributed among three branches, or six, or twelve, or however many more we decide optimally achieves the goals we set for government, both in helping us do things together and in protecting us from one another.

Notice that all three branches of the United States Government can issue orders in the exercise of power that existing law delegates to them.<sup>71</sup> We can recognize those orders as exercises of power particularly when they are not rote applications of existing law, but exercises of judgment about what order to issue within a zone of discretion. And those orders are obviously instances of lawmaking when Congress passes statutes and courts issue opinionated judgments and executives issue regulations. But each branch is also capable of issuing orders to particular persons without adding to the words that guide later conduct of others; we could say that such person-specific orders are virtual laws for their recipients but do not add to the laws of the wider community, do not add to the words that

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69. See, e.g., Ank Santens & Romain Zamour, *Dreaded Dearth of Precedent in the Wake of International Arbitration - Could the Cause also Bring the Cure?*, 7 Y.B. ARB. & MEDIATION 73, 82 (2015) (“Beverley McLachlin, the former Chief Justice of Canada, with specific reference to the construction industry, warns: ‘court decisions, over the years, build up a settled legal framework against which contracts can be drawn and disputes settled, whatever the forum.’ Talking of ADR, she asserts in a striking metaphor: ‘The living tree of the law finds little nourishment in such arid soil. The age-old fruits of the law – helping people predict the probable outcomes of their actions and to modify their behavior intelligently – do not grow.’”) (quoting Beverley McLachlin, *Judging the “Vanishing Trial” in the Construction Industry*, 2 FAULKNER L. REV. 315, 321, 322 (2011)).

70. See generally LAURENCE CLAUS, *LAW’S EVOLUTION AND HUMAN UNDERSTANDING*, ch. 7 (2012).

71. See, e.g., *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984) (discussing Congressional ability to delegate power to the Executive Branch and the Court’s task of construing those delegations).

guide our group's future life together. For example, Congress can issue one-off declarations of war and authorizations of force that effectively order the President to fight,<sup>72</sup> courts can issue unreported judgments, with or without unpublished opinions, that order particular parties to comply,<sup>73</sup> and executives can order individual persons to behave in all manner of ways ("step out of the car, please"), without creating law that guides others' conduct on future occasions. In each of these instances, the one-off order, though it does not add words to the law of its community, does operate like a law for its recipient on the occasion of its issuance. On those occasions, the person issuing the order participates in a kind of micro-lawgiving that we recognize as an exercise of power, in a way that our daily rote application of existing law is not. Calling the three branches legislative, executive, and judicial does not help illuminate the commonality in character of these one-off actions, and their distinction from the transparently lawmaking actions that all three branches do too.

*Separating* power, then, is nothing other than involving more minds in leadership, distributing the ability to affect other's lives through lawmaking and other law-like order issuing. It is this sharing of power that holds the best prospect of reducing the risk that law's letting us live together will also let us mistreat one another. This accomplishment comes, when it does, through the way power sharing prevents any one of us from conclusively determining the reach of our own powers. In other words, the accomplishment of political liberty and a rule of law comes through checks and balances. Those checks and balances may be participatory, requiring that more than one of us concur before action can be done, or expository, requiring that our scope for action be defined and policed by others, *ex ante* or *ex post*.

When we see that promoting liberty and the rule of law is all about checks and balances, we can see that intra-institutional checks and balances matter as much as inter-institutional ones. Our legal system has always implicitly acknowledged this in its provision for its hierarchically highest lawmaking body to be multi-member and multi-chamber, and for its ultimate dispute resolvers to sit as multi-member benches. Intra-institutional checking and balancing does not cease to

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72. See U.S. CONST. art. I, § 8, cl. 11 ("Congress shall have power to . . . declare War.").

73. See, e.g., William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Court of Appeals*, 78 COLUM. L. REV. 1168, 1174 (1978) ("A key characteristic of decisions without opinions is their failure to provide the parties or the court below with any hint as to the court's reasoning.").

be valuable when we reach the executive, but the Founders acknowledged Montesquieu's efficiency point that executives might need to make quick decisions in day-to-day administration.<sup>74</sup> As others have recognized, that efficiency concern was mostly met just by the Philadelphia Convention's choice to provide for one chief executive rather than an executive board collectively deciding how to govern day to day.<sup>75</sup> Having a single chief executive make many major time-sensitive decisions was a sensible concession to efficiency, but did not settle whether *some* decisions would best be shifted from that single chief executive to other individual officials or groups of officials and made by those officials independently of the chief executive. That dividing of the executive may add intra-institutional checks and balances, as it does when it brings independent prosecutorial scrutiny to executive action through a separated Attorney General. And dividing the executive may also enhance the effectiveness of the Constitution's existing *inter*-institutional checks on the executive, both by delineating more precisely *who* within the executive should be held accountable for particular action, and by supplying support from within the executive for Congressional or judicial action against other elements of the executive.

#### IV. WHEN AND HOW TO SEPARATE

Having noticed the incoherence and impossibility of separating power by kind, is there any comparable conceptual or practical problem with trying to separate executive decision making by subject matter? There is not, because the decisions are distinguished from one another by the *institutional relations among persons* that those decisions involve. It is easy to distinguish and separate decisions to deploy the army from decisions to prosecute—they are as readily separable as any items on a human person's to-do list can be. It is perfectly plausible to give one executive ultimate judgment on military deployment and another ultimate judgment on interest rate policy and another ultimate judgment on prosecutions, and to insulate them from one another. In contrast, lawmaking and law implementing

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74. See THE FEDERALIST, NO. 70 (Alexander Hamilton), in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 398–99 (John P. Kaminski et al. eds. 2009), <http://rotunda.upress.virginia.edu/founders/RNCN-02-19-02-0002-007>.

75. See Berry & Gersen, *supra* note 1, at 1402 (“The most prominent critiques of the plural executive model target schemes in which several executives act in consort with overlapping authority. Such schemes may well produce government dysfunction, unaccountability, or trend towards tyranny, but the unbundled executive does not.”).



are often inextricably intertwined in particular governing actions. A divided executive is conceptually and practically possible.

Is a divided executive desirable? American state constitutional experience suggests that it can be. Categorically assigning distinguishable executive decisions to different persons need not unduly impede the efficiency of government,<sup>76</sup> and may even enhance it.<sup>77</sup> Dividing the executive may make government more effective, for example, by more reliably bringing specialist expertise to decision making where that is valuable, or by reducing the potential for conflicts of interest to affect decision making. And quite aside from its effects on effectiveness, dividing the executive may better protect liberty and promote the rule of law, because it may enhance the Constitution's existing system of checks and balances.

There are two ways in which dividing the executive may contribute to the Constitution's system of checks and balances. First, dividing the executive may add intra-institutional checks on executive officials. Well-designed checks and balances help keep us free and keep law real just as surely when those checks and balances operate inside institutions as when they operate between institutions. For example, a constitutionally independent Attorney General's powers to investigate and prosecute wrongdoing are a constitutional check on other executive officials. We might argue that the American constitutional tradition has already drawn from England and established by long practice a *convention* that the Attorney General exercise her investigative and prosecutorial discretion independently, and that this already serves to check other executive officials. But such a convention does not check as reliably and effectively as it would if it were backed up by constitutional protection for the investigators and prosecutors. Making checks and balances reliable and effective is, after all, why we constitutionally protect our judges against executive retribution for their rulings.

A second way in which dividing the executive may contribute to the Constitution's system of checks and balances is by helping the Constitution's existing *inter*-institutional checks and balances fulfill their function better. For example, the judiciary's ability to enforce the criminal law against executive officials depends on prosecutorial initiative to bring cases to court. And Congress's impeachment power

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76. See generally Marshall, *supra* note 2.

77. See generally Berry & Gersen, *supra* note 1.

can serve as a more effective deterrent against and remedy for maladministration if responsibility for particular administrative actions is clearly demarcated and not allowed to hide under a unitary executive umbrella. Impeachment is further facilitated as a check on the executive if the evidence that establishes grounds for its exercise is forthcoming from an independent source within the executive.

If we value political liberty and the rule of law, and recognize them to be our reasons for wanting a “separation of powers,” then we have reason to divide the executive in at least one way, namely, to separate the power to prosecute and litigate from presidential control. We have reason to make prosecuting and litigating wrongdoing a constitutionally protected intra-institutional check on executive government. The Constitution’s existing checks and balances are not up to the task of protecting against presidential abuse of those powers. For two centuries we have watched the power of the American Presidency grow. If the President can control those who decide whether to prosecute or sue for violations of American law, then the only constitutional protection against abuse of that control during a presidential term is the crude and inadequate instrument of presidential impeachment. That instrument is crude and inadequate because whether members of Congress choose to use it will depend on many factors other than whether the discretion to prosecute or litigate is in fact being abused. In deciding whether to impeach a President, members of Congress face a host of potential consequences that might outweigh the value of preventing perversions of justice. If the nation faces crises at home or abroad that pose risks of military conflict or economic calamity, members of Congress may judge that impeachment poses too much danger of destabilizing national leadership at a time when that leadership needs continuity to stay focused on the big picture. Members of Congress will also be influenced by their overall assessments of the person who would step into the Presidency in the event of successful impeachment, and whether they would be replacing someone they see is bad with someone they suspect is worse. In making those judgments, members of Congress will also be thinking about the effects of their decision-making upon their own vocational prospects, mostly mediated through impacts of Congress members’ actions on the electoral prospects of the factions to which they belong. The pessimistic premise of pervasive careerist self-service by participants in political

systems has been vindicated often enough in human history to deserve our attention when we are crafting checks and balances.

Separating the power to prosecute and litigate from the Presidency much improves the odds of keeping its exercise pure, by letting Congress supervise that exercise surgically. None of the factors that may well inhibit Congress from impeaching a President for abuse of the discretion to prosecute or litigate are likely to inhibit Congress from removing for cause an independent Attorney General who abuses such discretion. A President is needed for many crucial classes of decision, whereas an Attorney General is needed for just one. The identity of a President's successor will usually be out of Congress's hands, whereas the Senate can exercise quality control over who will be the next Attorney General. And members of Congress are far more likely to see a connection between a President's career prospects and their own than they are to see their fates tied to that of an Attorney General. Abuse of discretion by a constitutionally independent Attorney General is, *ceteris paribus*, more likely to result in Congressional removal of that Attorney General than abuse of such discretion by order of a controlling President is to result in Congressional removal of that President. And that fact, along with the Senate confirmation required for her appointment, increases the likelihood that a constitutionally independent Attorney General will do the job well. Competent assistance from a constitutionally independent Attorney General will, in turn, help build the case on any occasion when executive maladministration does call for exercise of Congress's impeachment power.

The Constitution seems to nod in the direction of a divided executive when it lets Congress impeach any civil officer, not just the President.<sup>78</sup> A truly monolithic vision of the executive would focus accountability at the top and leave the removal of underlings to the accountable chief executive. Recognizing that it is good constitutional policy to let Congress hold other executive decision makers directly accountable points to the potential independence of their decision making. It would harmonize with the impeachment aspect of the constitutional scheme for the Constitution to insulate, or to let Congress insulate, some of those other executive decision makers from presidential control. OLC's conclusion that the President's duty to take care that the laws be faithfully executed makes the President

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78. U.S. CONST. art. II, § 4.

accountable for the Attorney General's actions is at odds with the Constitution's provision for Congress to hold the Attorney General directly accountable and to impeach and remove the Attorney General for misconduct without necessarily going after the President too. And the President's power to grant reprieves and pardons<sup>79</sup> for offenses prosecuted under her own administration as surely as for those prosecuted under previous administrations fits well with presidential separation from decisions to prosecute.

The Constitution's provision for only *inter*-institutional checks on the President need not be irrebuttably presumed to establish an optimal and unalterable accommodation of liberty and efficiency interests; rather, those checks could be recognized as minimum requirements, subject to supplementation by the multi-member multi-chamber Congress with further devices to check the President more. Separate election of the President helps prevent a faction leader in the legislature from becoming substantive prime minister by controlling the appointment of executive officials. The President's direct mandate contrasts with the British monarch's lack thereof, and creates a separate power center in the system. But ultimately all of the institutions of government comprise persons checking and balancing one another, inside institutions as much as among them, and the Presidency as a power center poses a uniquely great danger to liberty in lacking intra-institutional checks, because it comprises only one person. This strengthens the case for letting the co-equal, multi-person branches add checks and balances, including by dividing the executive by reference to discrete decision making responsibilities for which there are real public policy reasons to favor independent decision making. We have express constitutional limitations on power, and checks and balances to help uphold those limitations, precisely because our choice of leaders is always an all-things-considered, holistic judgment made with limited options; we may decide that a candidate is the best on offer even though we cannot trust him to govern well in all respects. Constitutional limitations and checks and balances are the way we try to maximize our overall odds of being governed well.

It was quite right of eighteenth century jurists to recognize the judicial and executive aspects of what both prosecutors and judges were doing, and reasonable to see both prosecutors and professional

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79. U.S. CONST. art. II, § 2, cl. 1.

judges as part of the executive.<sup>80</sup> What made the eighteenth century's conception of separation of powers lively and valuable was its departing from notions of indivisible sovereignty and its opening up the world of checks and balances as the true source of liberty and the rule of law. Along with explicitly insulating the Attorney General from presidential control, a constitutional amendment could resolve the current text's ambiguity in favor of allowing further Congressional supplementation of inter- and intra-institutional checks and balances. But regardless of whether Congress is given such capacity to redistribute power, there is a robust case for a direct constitutional division of the executive to establish an independent Attorney General.

An independent Attorney General and Department of Justice is likely to prove a better vehicle for investigating government action, including presidential conduct, than is the makeshift mechanism of *ad hoc* appointed independent investigators. That is so even if we posit that those independent investigators are comparably protected from unjustified dismissal.<sup>81</sup> An independent counsel hired to pursue specific investigations may be at risk of seeing success in the role as dependent on finding something, on identifying and proving wrongdoing, and this may put a psychological thumb on the scale for pursuing an investigation further than truly serves the interests of justice. An independent Attorney General is less at risk of this, because no particular investigation is her *raison d'être*. She is an unambiguous success if she upholds law and justice, whatever that requires.

## V. THE PROPOSED AMENDMENT

What is the optimal form for a separated office of the Attorney General? Most states separately elect theirs.<sup>82</sup> This creates a greater danger of unconstructive checking. Partisan sniping and obstruction might escalate amid the high stakes of national politics enough to undermine effective governing. A separately elected Attorney General might be hostile to the President to a degree that actually compromises the Attorney General's standing as an impartial

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80. See Claus, *supra* note 49, at 422–23.

81. Cf. Morrison v. Olson, 487 U.S. 654 (1988) (upholding legislation that let the Attorney General remove an independent counsel only for “good cause”).

82. See Marshall, *supra* note 2, at 2452 (“As a result of this trend, at present, forty-three state attorneys general are elected and forty-eight are free from gubernatorial control.”).

upholder of the law. William Marshall offers grounds for optimism based on state government experience, but notes that “the powers of the Federal Attorney General are far greater, particularly in her centralized authority over criminal matters, than in any of the State Attorney General offices because, in most states, prosecutorial authority is localized and not under attorney general control.”<sup>83</sup>

In the particular case of the national Attorney General and her senior subordinates in the Department of Justice, we might conclude that the Constitution’s current provision for presidential appointment subject to Senate confirmation is best. Having an Attorney General who was acceptable to the President *ex ante* could be optimal for constructive governance, provided that the Attorney General cannot be removed by the President for doing the job right. There is a case for requiring that the President choose the Attorney General, just as there is a case for letting the President choose judges rather than electing them. Protecting independence does not require separate selection, it just requires job security.

What form should that security take? Congress already has power to impeach and remove the Attorney General, as a civil officer of the United States within the meaning of Article II § 4. Insulating the Attorney General from presidential removal would afford the requisite independence, but the reach of the role arguably calls for a way to hold the incumbent accountable for poor performance, not just outright wrongdoing. At the Philadelphia Convention, the Founders debated whether to emulate the English Act of Settlement’s provision for removal of judges on address of both Houses. James Wilson opined that “[t]he Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Govt.” and the Convention decided against the legislative address mechanism for removal.<sup>84</sup> Such a mechanism might work well, however, to police the tenure of an Attorney General, and Wilson’s factionalism concern could be met by setting the threshold for a vote to remove at two-thirds, borrowing from the 25<sup>th</sup> Amendment’s provision for Congressional confirmation of presidential inability.

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83. *Id.*

84. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 429 (Max Farrand ed., 1911).

Amending the Constitution to create this independent office is a step that could, under Article V, be triggered and accomplished by representatives of the 48 states that have already chosen to establish their own independent Attorneys General.<sup>85</sup>

## VI. FURTHER FUTURE CHANGES

When we apportion power, whether inter- or intra-institutionally, we should ask not whether our institutional configurations *separate powers*, but whether they *situate people* in ways that promote good government. Good government may call for separating the power of one person from the power of another by reference to the relations among persons that their respective exercises of power will involve. We can readily distinguish prosecuting from judging from declaring war simply by the differing configuration of human relations that each distinctively involves. The separation of powers is coherently relational among persons.

In too many of its decisions, ranging from *Humphrey's Executor v. United States*<sup>86</sup> to *INS v. Chadha*,<sup>87</sup> the Supreme Court has clung to characterizing governing actions as executive, legislative, or judicial when in truth those actions were chameleons that could be characterized in more than one of those ways. That characterizing was not a coherent basis for drawing distinctions and allocating power the way the Court did, allowing and disallowing as it did. In the process, the Court has too often lost sight of what the separation of powers exists to accomplish. Constitutional reform could, in recognition of this, go beyond creating an independent Attorney General, and give Congress power to divide the executive further, such as by identifying other categories of decision making (for example, interest rate policy<sup>88</sup>) that would optimally be assigned to independent persons and providing for those persons' true independence from presidential control or removal.

Constitutional reform could also give Congress more tools to supervise the executive. Reform could restore a one-House veto over

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85. See Marshall, *supra* note 2, at 2452.

86. 295 U.S. 602 (1935).

87. 462 U.S. 919 (1983).

88. The Federal Reserve Act § 10 conforms to the *Humphrey's Executor* principle in providing that Federal Reserve Board members may be removed by the President during their terms, albeit only for cause. See 12 U.S.C. § 242 (2010) (“[A]nd thereafter each member shall hold office for a term of fourteen years from the expiration of the term of his predecessor, unless removed sooner for cause by the President.”) (emphasis added).

executive lawmaking, nullifying the conceptually confused *Chadha* decision on the constitutionally compelling ground that as it takes concurrence of two Houses plus the President to make the higher law we call statutes, any of those three institutions should be able to say no to lesser, supposedly derivative laws that come out of the executive. Once we recognize that the executive makes law without bicameralism and presentment, we can see that a one-House veto actually protects the principle of bicameralism and presentment by preventing the executive from making law that could not pass Congress with bicameralism and presentment.<sup>89</sup> This article's proposals for dividing the executive may, of course, enable executive lawmaking that is immune to presidential veto; discrete instances of this may be justified by the same principles truly underlying separation of powers theory that support the power of a sufficiently united Congress to override presidential vetoes.<sup>90</sup> Sometimes effective government depends on decision making by a sole chief executive, but often it does not, and as this article has elaborated, liberty and the rule of law may be better served by letting other minds prevail.

## VII. CONCLUSION

The national Attorney General's current constitutional status is a loose thread that, when pulled upon, unravels the whole tapestry of essentialist separation of powers. For the reasons that this article has elaborated, separating *kinds* of power is neither possible nor desirable. Checks and balances among those who govern are what truly serve the interests that separation of powers theory emerged to protect. Well-designed checks and balances promote liberty and the rule of law as surely when those checks and balances operate inside institutions as when they operate between institutions. If we can identify categories of executive decision-making that would better be made discretely by discrete persons, whether because doing so introduces an additional check on other executive actors or because the decisions are best made with specialist expertise or because their segregation reduces risks of conflicts of interest or for a combination of reasons that may include these and others, then separation of powers theory should not be thought to stand in our way. We should

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89. "Absent the veto, the agencies receiving delegations of legislative or quasi-legislative power may issue regulations having the force of law without bicameral approval and without the President's signature." *Chadha*, 462 U.S. at 986–87 (1983) (White, J., dissenting).

90. U.S. CONST. art. I, § 7, cl. 3.



make those persons independent of the chief executive, rather than reposing all ultimate responsibility in an omnibus CEO.

As this article has explained, dividing the executive may add valuable intra-institutional checks and balances, as it does when an independent Attorney General polices the conduct of her executive counterparts. Dividing the executive may also enhance the value of the Constitution's existing inter-institutional checks on the executive. Congress's power of impeachment would better protect liberty and the rule of law if it were complemented by intra-institutional separations of power within the so-called executive branch of government, including provision for a constitutionally independent chief prosecutor and litigator. Insulating the Attorney General from the President fits with the Constitution's empowering Congress to remove the Attorney General, not just the President, and makes Congress's power to remove executive officials more effective as a check on the executive. Congress's power to remove executive officials better serves to deter and punish bad behavior where it can be used surgically, rather than as a shotgun blast against a whole administration. Failure to do one aspect of administration right is less likely to occasion a responsible President's downfall than it would be to bring down a responsible separated official. There are more likely to be strong countervailing considerations against removing a President, such as other areas of presidential decision-making that Congress does not wish to unsettle, linked electoral fortunes of a President and members of Congress, or just plain dislike of the Vice President. An independent Attorney General can in turn serve as a resource to Congress in building the case for impeachment of other executive officials, including the President, when such cases deserve to be built.

Even in England, from which the office of Attorney General came and where separation of powers has never been a governing principle, reform of the office to enhance its independence has recently been considered.<sup>91</sup> Changing the United States Constitution to establish an independent Attorney General could be a pivotal step in a process of

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91. See SELECT COMMITTEE ON THE CONSTITUTION, REFORM OF THE OFFICE OF ATTORNEY GENERAL, 2008, HL 93, *available at* <https://publications.parliament.uk/pa/ld200708/ldselect/ldconst/93/93.pdf>; CONSTITUTIONAL AFFAIRS COMMITTEE, FIFTH REPORT, 2007, HC 306, *available at* <https://publications.parliament.uk/pa/cm200607/cmselect/cmconst/306/30602.htm>.

constitutional reform that more fully realizes America's commitment to liberty and the rule of law.