

Regulating Presidential Powers

Saikrishna Prakash

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Saikrishna Prakash, *Regulating Presidential Powers*, 91 Cornell L. Rev. 215 (2005)
Available at: <http://scholarship.law.cornell.edu/clr/vol91/iss1/5>

This Book Review is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

BOOK REVIEW

REGULATING PRESIDENTIAL POWERS

PRESIDENTIAL POWERS. By *Harold J. Krent*.† New York and London: New York University Press, 2005. Pp. 279. \$45.00.

Saikrishna Prakash††

INTRODUCTION	215
I. <i>PRESIDENTIAL POWERS: A BRIEF REVIEW</i>	218
A. Describing <i>Presidential Powers</i>	219
B. Limitations of <i>Presidential Powers</i>	222
C. Regulating Presidential Powers	223
II. THE POSSIBILITY OF DEFEASIBLE PRESIDENTIAL POWERS . . .	225
III. REGULATING THE EXERCISE OF THE EXECUTIVE'S POWERS	231
A. Text & Structure	231
B. History	240
C. The Peculiar Case of the Law Execution Power	249
IV. (DE)FUNDING THE EXECUTIVE	251
A. Text & Structure	252
B. History	254
CONCLUSION	256

INTRODUCTION

Questions about the scope of the President's constitutional powers are in the news today like perhaps no time in recent memory. Splashed across the dailies and leading off the evening news are stories about executive power. Has the Senate invaded the President's power to appoint judges by permitting quasi-filibusters of nominees? Does the President have the right, as Commander-in-Chief, to order the torture of enemy prisoners? May the President instruct state courts to adhere to his reading of a treaty concerning the treatment of arrested foreign nationals?

† Dean and Professor of Law, Chicago-Kent College of Law.

†† Herzog Professor of Law, University of San Diego. Thanks to Michael Ramsey and Michael Rappaport for helpful discussions. Thanks to Jacob Evans for helpful comments and research. Finally, thanks to the University of San Diego School of Law for its always generous research support. Readers should be aware that I commented on an earlier and quite different version of Dean Krent's chapter on foreign affairs. I did not see any drafts of his other chapters.

Dean Harold Krent's lively and eminently readable book, *Presidential Powers*, is nothing if not timely. In 200-plus pages of text, Krent canvasses the President's constitutional powers, focusing on law execution authority, foreign affairs powers, emergency powers, privileges and immunities, and the pardon power. The result is a Corwinesque book that weaves together arguments about text, structure, history, and doctrine to make claims about the current and proper scope of presidential powers.¹ For those seeking a survey of the President's constitutional powers, the book amply fits the bill. It thoughtfully considers some classic questions, such as whether the President has a removal power and how the Constitution allocates foreign affairs authority between the President and Congress.

After first describing the book's contents, this Review considers a question that permeates *Presidential Powers* but never receives any systematic treatment:² To what extent, and in what way, are presidential powers really the President's? There will always be earnest disputes about whether the Constitution grants the President particular powers. But even as to acknowledged executive authorities, what, if anything, may Congress do to curb controversial exercises of presidential power?³ For example, some might think it advantageous if Congress could bar or at least erect a check on pardons of donors, administration personnel, and personal friends. Likewise, others might deem it desirable to deny the President the power to nominate judges with life tenure.

Notwithstanding the possible benefits of congressional regulation of executive powers, the Constitution's text, structure, and early history reveal that Congress lacks a generic right to reallocate or tamper

¹ See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957* (4th rev. ed. 1957).

² Dean Krent is hardly to be faulted for not exhaustively discussing this issue. A book-length treatment of presidential powers necessarily will omit thorough consideration of many matters. Moreover, a review of the literature suggests that Krent is hardly alone in this regard. It seems that no one has thoroughly examined whether Congress has the generic authority to regulate presidential powers. Instead, the issue of congressional regulation is typically addressed only in the context of a particular power. This narrow focus can lead to an underdeveloped and distorted treatment dominated by the traits of the particular power.

³ This Review sidesteps disputes about whether particular powers are in fact presidential powers. Instead, this Review hopes to show that whatever set of powers belongs to the President, such powers are generally not regulable by Congress. To that end, this Review discusses only those powers generally conceded to belong to the President. Nonetheless, if the reader comes across some power that she believes the President does not properly enjoy, the reader ought to substitute some other power that she regards as a presidential power.

This Review does not deny that congressional and presidential powers might overlap. Where Congress has authority in an area of overlap, Congress may enact statutes. So long as such statutes do not tell the President how to exercise his powers, they do not regulate the executive's power.

with presidential powers.⁴ To begin with, the vast majority of presidential powers read as if they are absolute grants not subject to congressional control or modification.⁵ Perhaps more importantly, the Constitution never grants Congress the generic authority to treat presidential powers as if they were default power, i.e., powers freely exercisable only so long as Congress does not regulate them. Tellingly, the Constitution conspicuously lacks language found in the revolutionary state constitutions that expressly made some or all executive powers subject to legislative regulation.⁶ Finally, there are few early assertions that Congress could regulate presidential powers.⁷ Considered together, these factors help establish that Congress lacks a sweeping authority to regulate presidential powers.⁸

Nonetheless, Congress can tinker with certain presidential powers, in limited ways, typically because the Constitution expressly grants Congress narrow regulatory authority.⁹ The presence of these limited exceptions, when considered in conjunction with the arguments mentioned in the previous paragraph, helps prove the rule that Congress lacks a generic authority to regulate powers vested with other entities. Though Congress can regulate commerce and the value of coins, it generally cannot regulate the President's constitutional powers.

⁴ While making claims that speak to textualists, intentionalists, and all who regard the original meaning as relevant to interpreting the Constitution, this Review never attempts to counter the obvious appeal of regulating presidential powers. Were we to write on a blank slate, we might conclude that there are good reasons to grant Congress a generic power to regulate executive powers. By the same token, there might be sound grounds for authorizing executive regulation of the legislature's powers, for legislatures can abuse their powers no less than executives.

⁵ See generally U.S. CONST. art. II (granting presidential powers).

⁶ See *infra* Part III.B.

⁷ See *id.*

⁸ By "regulate" this Review refers to the enactment of statutes that impose extraconstitutional restrictions or requirements on the exercise of presidential powers. A regulatory statute might permit pardons of only those who first confessed guilt, or require the concurrence of the Senate prior to the removal of executive officers. At the extreme, a statute might bar the exercise of a particular presidential power, say the President's power to make recess appointments.

Alternatively, statutes might seek to compel the President's exercise of his constitutional powers. For instance, a law might provide that the President must appoint a particular person to office or that he must negotiate and sign a particular treaty. Each of these statutes regulates or eliminates discretion that the Constitution grants the President.

The discussion here is unconcerned with statutes that are meant to reestablish or affirm constitutional limits on the executive power (assuming, for the moment, that Congress has the power to pass such declaratory statutes). For instance, a statute that precludes presidential pardon of *state* offenses does not regulate presidential power so much as it underscores first principles. Obviously, there will be disputes about whether a particular statute merely affirms underlying constitutional limits or instead erects new obstacles or constraints on presidential powers. Under the theory propounded in this Review, such disputes should turn solely on the substantive scope of the relevant presidential powers, for Congress lacks a generic ability to regulate constitutional powers.

⁹ See *infra* notes 114–19 and accompanying text.

1

PRESIDENTIAL POWERS: A BRIEF REVIEW

In his introduction, Krent embraces a familiar methodology of looking to constitutional text, structure, judicial precedent, and history.¹⁰ Beyond these traditional factors, he considers three “goals of our system,” which he describes as “potentially overlapping determinants of the president’s role within the Constitution’s separation of powers framework”: presidential initiative, accountability to Congress, and accountability to the public.¹¹ With respect to presidential initiative, Krent argues that the “need for vigorous presidential leadership . . . derives . . . from the history leading up to enactment of Article II [and] from the specific decision to vest the ‘executive’ power in a single executive.”¹² According to Krent, the public welcomes presidential initiative, which may be critical to both national protection and progress.¹³ Accountability to Congress, as Krent conceives it, consists of an obligation to “bow to Congress’s Article I lawmaking and appropriation authorities in executing the law” in order to preserve “Congress’s ability to set the framework for national policy and determine within broad constraints how that policy should be implemented.”¹⁴ Finally, the President must be accountable to the public. Presidential actions should be transparent, and the public should be able to “distinguish the roles of Congress and the executive branch” so that citizens can “assess the president’s leadership and track record in exercising presidential prerogatives and in carrying out congressional direction.”¹⁵

For Krent, the interactions among these three goals are vital determinants of the scope of presidential powers. Thus, “[w]hen the three goals coincide, the particular governmental action is almost assuredly constitutional.”¹⁶ When they conflict, as is typically the case, judging whether an action is constitutional is far more challenging.¹⁷ No formula exists for resolving the thorny issues that arise when the desire for presidential initiative—often historically associated with secrecy—clashes with principles of accountability. Hence, the three goals themselves do not necessarily deliver concrete answers to consti-

10 See HAROLD J. KRENT, *PRESIDENTIAL POWERS* 2–3 (2005). For a discussion of the six modalities of constitutional argument, see PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991).

11 See KRENT, *supra* note 10, at 4–5.

12 *Id.* at 4.

13 See *id.*

14 *Id.*

15 *Id.* at 5.

16 *Id.*

17 See *id.*

tutional questions.¹⁸ Nevertheless, Krent tells us that understanding these goals and the historical attitudes towards them “illuminate[s] the crosscurrents underlying [the] evolution of presidential powers.”¹⁹

The book’s introduction also provides some historical background, briefly discussing executive power in the English system and the revolutionary state constitutions.²⁰ Krent nicely highlights the problems with the Continental Congress’s flawed exercise of executive power, problems that led the Philadelphia Convention to centralize executive power in the hands of a single executive.²¹

A. Describing *Presidential Powers*

As noted earlier, the book considers five classes of presidential power: law execution, foreign affairs, the protective power, privileges and immunities, and the pardon power.²² Of necessity, what follows is only a sketch of each of these chapters, a sketch that does not capture all the niceties of Krent’s claims about presidential power.

The central theme of Krent’s chapter on law execution is the extent of the President’s right to control law execution. On the one hand, the Constitution’s text “seemingly embraces some form of the unitary executive by vesting ‘the executive Power’ in a president . . . [and] suggests that the president must exercise at least some hierarchical control” over law execution.²³ On the other hand, Congress may assign vast law enforcement discretion to officers independent of the President.²⁴

Given that the courts have concluded that the President “has only limited power to influence the authority delegated to other executive branch officials,” the President’s most important means of wielding control arises from his power to appoint and remove executive officials.²⁵ Krent proceeds to discuss appointment and removal, spending some time discussing a series of particular appointment issues, including congressional and recess appointments and the appointment of inferior officers.²⁶ In his section on removals, Krent primarily focuses on well-known removal disputes, such as President Andrew Johnson’s firing of War Secretary Edwin Stanton, and on the twists and turns of the Supreme Court’s removal jurisprudence (if one can so dignify

¹⁸ See *id.* at 6.

¹⁹ *Id.*

²⁰ See *id.* at 6–8.

²¹ See *id.* at 8–9.

²² See *id.* at 16.

²³ *Id.* at 20 (internal citations omitted).

²⁴ See *id.* at 20–21.

²⁵ See *id.* at 23.

²⁶ See *id.* at 24–36.

those cases).²⁷ He concludes that the President must have plenary removal authority over his cabinet and that somebody—either the President or a principal officer—must have removal authority over all inferior officers.²⁸

The law execution chapter concludes with analyses of presidential control over rulemaking and litigation, delegations of authority outside of the executive branch, and congressional power derived from Congress's control over appropriations.²⁹ In the end, Krent claims that the President "must have some supervisory authority over the tasks delegated by Congress," though presidential supervision need not be close.³⁰ The resulting tension between "presidential control over the administrative machinery of the state and Congress's power to ensure that delegated authority be carried out in ways responsive to Congress's concerns" guarantees that neither branch will assume "too much authority."³¹

The foreign affairs chapter discusses the treaty and war powers and the role of judicial oversight. Krent does a fine job discussing a series of treaty-related issues: the Senate's treaty role, executive agreements, interpretation, and termination.³² His discussion of presidential war making relies principally on an academic consensus that the President lacks the power to begin a war.³³ As for judicial oversight, Krent envisions some role for judicial policing of foreign affairs, but also understands that there are good reasons for judicial "skittishness" in this arena.³⁴

Krent next considers the President's protective power, including whether the executive has emergency powers. He criticizes the assertion that the Constitution grants the President the power to take war-like measures to protect the nation in a domestic crisis, drawing the crucial distinction between whether we ought to admire President Lincoln's wartime measures and whether Lincoln acted constitutionally.³⁵ Krent turns to the domestic war-making powers of the President, taking solace from *Youngstown Sheet & Tube Co. v. Sawyer's*³⁶ supposed conclusion that Congress can "channel" the president's war-

²⁷ See *id.* at 36–48.

²⁸ See *id.* at 46.

²⁹ See *id.* at 48–83.

³⁰ See *id.* at 82–83.

³¹ *Id.* at 83.

³² See *id.* at 91–110.

³³ See *id.* at 111.

³⁴ See *id.* at 124–32.

³⁵ See *id.* at 140 ("It may be no contradiction to praise Lincoln while acknowledging that he violated the constitutional restraints that originally had been set with an imperfect eye to the type of emergencies that could befall the nation.").

³⁶ 343 U.S. 579 (1952).

time authority by limiting his discretion.³⁷ Krent concludes his discussion of the protective power by criticizing the notion that the Constitution affords the President any particular emergency powers. He suggests instead that the President may only act pursuant to statutory authority or a specific grant of constitutional authority.³⁸ In Krent's view, "[U]pholding [emergency] initiatives may sacrifice the accountability to Congress and to the public that are woven into the constitutional framework. We may want presidents to take [potentially unconstitutional] risks, but there is no reason to cloak that political exercise of power in constitutional garb."³⁹

The subsequent chapter addresses immunity from suit and executive privilege. Although Krent expresses doubts about the textual provenance of both powers, he seems to agree that some such privileges are constitutional.⁴⁰ In so concluding, Krent principally relies on case law relating to both subjects.⁴¹ With respect to presidential immunity, he is further swayed by functional considerations, suggesting, for example, that suing the President in his official capacity is generally unnecessary, because the President typically relies upon executive officials to carry out his policies, and these officials can unquestionably be sued directly.⁴² Regarding privilege, Krent returns to his recurring theme that although the President has some authority to withhold documents and information, he must to a certain extent accommodate Congress's needs, and so Congress may regulate this privilege in various ways.⁴³

The book ends with an interesting chapter on the pardon power, a subject Krent has written about before.⁴⁴ This chapter has a ring of absolutism that seems out of step with the rest of the book's approval of some congressional regulation of presidential powers. In particular, Krent repeatedly and emphatically claims that Congress cannot regulate the President's pardon power.⁴⁵ In addition, although Krent argues that "limited judicial review at least in the context of conditional pardons may be necessary to check executive discretion,"⁴⁶ he ultimately concludes that judicial oversight in this area is only valid to ensure that pardons do not violate some other constitutional con-

³⁷ See KRENT, *supra* note 10, at 145–46.

³⁸ See *id.* at 158–59.

³⁹ *Id.* at 159.

⁴⁰ See *id.* at 164, 173.

⁴¹ See, e.g., *id.* at 165 (discussing *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), in the immunity context).

⁴² See *id.* at 170.

⁴³ See *id.* at 179.

⁴⁴ See Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CAL. L. REV. 1665 (2001).

⁴⁵ See KRENT, *supra* note 10, at 195–200, 205, 214.

⁴⁶ See *id.* at 190.

straint.⁴⁷ It seems that Krent has a soft spot in his heart for this merciful prerogative.

B. Limitations of *Presidential Powers*

Any book-length treatment of presidential powers will have its share of limitations. Given the number and complexity of presidential powers, and the thorny and contentious questions about how presidential powers interact with legislative and judicial powers, such limitations simply come with the territory. One shortcoming of *Presidential Powers* is its lack of any in-depth treatment of the President's power to interpret the Constitution. Krent discusses the issue briefly in the context of pardons, concluding that the President, given his oath to protect the Constitution, can issue pardons based on his own reading of the Constitution even if that reading contravenes judicial precedent.⁴⁸ But he never fully explores the contours of the President's power to interpret the Constitution. For instance, if the President believes that a federal statute has usurped or infringed upon some presidential power, may the President ignore that statute? Does he have a duty to do so, given his singular oath to "preserve, protect and defend the Constitution"?⁴⁹ Or must the President enforce all statutes (as some believe the Faithful Execution Clause requires⁵⁰), even when his predecessor, in order to secure some desperately needed sections, cravenly signed a law that contained an unconstitutional provision? The President's power to enforce his reading of the Constitution is a central question of presidential power that Krent largely ignores.

Relatedly, Krent says little about the President's relationship to the courts. Since the early 1990s, a number of scholars have considered the President's obligations with respect to opinions and judgments.⁵¹ Some argue that the President need not adhere to either

⁴⁷ See *id.* at 214.

⁴⁸ See *id.* at 200.

⁴⁹ U.S. CONST. art. II, § 1, cl. 8.

⁵⁰ See, e.g., CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS 16-17 (Contributions in Legal Studies, No. 86, 1998).

⁵¹ See Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347 (1994); Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123 (1999); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for his Critics*, 83 GEO. L.J. 373 (1994); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993); Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993) [hereinafter Paulsen, *Merryman Power*]; Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) [hereinafter Paulsen, *Most Dangerous*]; Michel Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15

judgments or opinions,⁵² while others maintain that the President must enforce judgments but need not adhere to opinions.⁵³ Still others might believe that the President must enforce judgments *and* honor opinions as establishing the content of the law.⁵⁴

Krent glosses over this debate. He does state that the President's "independent duty to examine the constitutional text . . . may not excuse complying with a court decree in a particular case."⁵⁵ But more often, he simply assumes that the President will (or perhaps must) enforce whatever judgments the courts might issue.⁵⁶ Having failed to make any case for this assumption, Krent gives the reader no reason to accept it. Given that he spends much time discussing the merits and demerits of judicial review of executive action, and given that Presidents (such as Andrew Jackson⁵⁷ and Abraham Lincoln⁵⁸) have ignored judgments in the past, he ought to have more fully discussed the consequences of judicial review—namely, what if anything, the President must do after the issuance of a judicial opinion and judgment.

C. Regulating Presidential Powers

This Review focuses on a subject that Krent largely skirts, namely whether and to what extent Congress may regulate presidential power.⁵⁹ Krent considers congressional regulation only in the context of the President's discrete powers (e.g., law execution, pardon, and foreign affairs), and as a result, he never articulates a generic theory about when Congress may (and may not) regulate presidential powers. At times, Krent seems to divide presidential powers into two categories: (1) enumerated powers, which are not regulable;⁶⁰ and (2) unenumerated powers, which are regulable.⁶¹ At other times, Krent

CARDOZO L. REV. 137 (1993); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113 (1993).

⁵² See, e.g., Paulsen, *Merryman Power*, *supra* note 51, at 105; Paulsen, *Most Dangerous*, *supra* note 51, at 283.

⁵³ See, e.g., Lawson & Moore, *supra* note 51, at 1270; Merrill, *supra* note 51, at 43–44.

⁵⁴ See Merrill, *supra* note 51, at 43 (discussing this possible view of judgments and opinions).

⁵⁵ KRENT, *supra* note 10, at 200.

⁵⁶ See, e.g., *id.* at 175.

⁵⁷ See *id.* at 13.

⁵⁸ See *id.* at 146.

⁵⁹ See *supra* note 2.

⁶⁰ See KRENT, *supra* note 10, at 189 ("[T]he pardon power is textually explicit and its lineage easily traced to the Crown."), 205 ("The only checks [on the pardon power] are the disaffection of the electorate and possible impeachment by the House.").

⁶¹ See *id.* at 37 ("The respective roles of Congress and the president are not specified [with respect to the removal power]; accordingly, . . . Congress may limit the president's ability to remove other executive officers . . .").

seems to accept some congressional regulation of law execution,⁶² foreign affairs,⁶³ the protective power,⁶⁴ and privileges and immunities,⁶⁵ but rejects any regulation of the pardon power.⁶⁶ And sometimes, Krent can be read as advancing the theory that Congress may reasonably regulate all presidential powers.⁶⁷

The lack of a systematic analysis leads to two problems. First, Krent never clearly advances any of these potential theories. For instance, he does not explain why the enumeration of a presidential power ought to matter. What might make unspecified powers derivable from the Article II Vesting Clause, such as the removal power⁶⁸ and the power to send envoys,⁶⁹ second-class powers that are regulable by Congress? Perhaps Krent believes that doubts about a power's provenance somehow implies that Congress can regulate it. But if so, to what extent may Congress regulate a power—e.g., to the point of elimination? Focusing on specific presidential powers ultimately obscures the real issue: What is the constitutional source of any congressional power to regulate presidential power?

Second, the lack of any methodical treatment leads Krent to adopt seemingly contradictory positions. For instance, Krent insists that Congress can regulate the exercise of the law execution power⁷⁰ but cannot regulate any aspect of the pardon power.⁷¹ Although Krent may believe that the pardon power is more secure because it is explicitly mentioned in the Constitution,⁷² the same could be said about the law execution power, which is mentioned in both the Vesting Clause⁷³ and in the Faithful Execution Clause.⁷⁴ Moreover, Krent asserts that Congress can regulate presidential appointments by specifying the qualifications for office,⁷⁵ yet the Constitution expressly grants the President the power to appoint.⁷⁶ On the other hand, if implied powers are subject to congressional regulation, why does Krent conclude that Congress cannot entirely eliminate presidential

⁶² See *id.* at 88.

⁶³ See *id.* at 112.

⁶⁴ See *id.* at 146–47.

⁶⁵ See *id.* at 164.

⁶⁶ See, e.g., *id.* at 205.

⁶⁷ See, e.g., *id.* at 32 (noting that “Congress presumably can impose reasonable restraints” on appointment power).

⁶⁸ See *id.* at 37.

⁶⁹ See *id.* at 86.

⁷⁰ See *id.* at 20–21.

⁷¹ See *id.* at 195–97, 199, 205.

⁷² See *id.* at 189.

⁷³ U.S. CONST. art. II, § 1, cl. 1.

⁷⁴ *Id.* art. II, § 3.

⁷⁵ See KRENT, *supra* note 10, at 27.

⁷⁶ U.S. CONST. art. II, § 2, cl. 2.

immunity for damage claims arising out of official actions?⁷⁷ Presidential immunity is not specifically mentioned in the Constitution, and Krent himself expresses reservations about its legitimacy.⁷⁸ Ultimately, although Krent suggests at various points that textual specificity is the key, his actual discussion does not support this distinction, leaving the reader with little idea of why Krent concludes that certain powers are regulable and others are not.

The failure to adopt a general theory of regulability also leads Krent to assert contradictory claims about a single power. Although he states at the end of the book that Congress cannot regulate the pardon power,⁷⁹ he suggests at the beginning of the book that Congress can require the President to publicly announce any pardon, which seems to be a regulation of the pardon power.⁸⁰ He reaches this latter conclusion because his three determinant factors—presidential initiative, accountability to Congress, and accountability to the public—all suggest that pardons should be public.⁸¹ The same transparency might be useful for treaties (no secret treaties or executive agreements), appointments (no secret agreements to abide by presidential instructions), and removals (no secret agreements to resign when told to do so by the President). Are all transparency requirements constitutional merely because Krent's three factors point in the same direction?

The end result is a somewhat unpredictable series of claims about when Congress may regulate presidential powers. Krent is not atypical in this respect, for as noted earlier, no one has systematically examined this matter. But because Krent makes a number of claims about regulability, the lack of a general theory is a rather glaring omission.

II

THE POSSIBILITY OF DEFEASIBLE PRESIDENTIAL POWERS

Almost all constitutional grants of presidential powers are written in such a way so as to suggest that the powers are indefeasibly the President's. For instance, the Constitution provides that the President "shall have Power to grant Reprieves and Pardons for Offenses against the United States."⁸² No part of this grant suggests that anyone else may either hinder or compel the issuance of reprieves or pardons.

⁷⁷ See KRENT, *supra* note 10, at 163–64 (“[T]here likely remains a core or floor of immunity for the president that Congress cannot take away in light of the overarching constitutional structure.”).

⁷⁸ See *id.* at 164.

⁷⁹ See *id.* at 214.

⁸⁰ See *id.* at 5.

⁸¹ See *id.*

⁸² U.S. CONST. art. II, § 2, cl. 1.

However much Congress, the courts, or the public might oppose (or demand) a pardon, and whatever laudable goals congressional regulation might advance, one might sensibly conclude that the decision to pardon is the President's alone. The same could be said for the veto power⁸³ and almost all other presidential powers.

Yet to focus on the President's powers is to see only half of the picture. Whatever powers the Constitution vests with the President, it might also empower another entity to regulate these powers. The most obvious candidate is Congress.⁸⁴ Given Congress's numerous legislative powers, one might infer that it has constitutional authority to regulate the President's powers. Perhaps Congress could enact legislation limiting the circumstances under which the President may pardon individuals, such as by limiting the offenses that may be pardoned. Maybe Congress could check the removal power by requiring that the President secure Senate approval for removals. Alternatively, Congress might force the President to exercise some presidential power, perhaps by requiring the President to negotiate and sign a treaty. Finally, the Constitution might even permit Congress to completely bar the exercise of a presidential power. For instance, Congress might prohibit recess appointments, believing that Presidents have abused their recess appointment authority.

One can imagine at least four possible answers to the question, "May Congress regulate presidential powers?" First, one might suppose that Congress has general authority to regulate constitutionally granted powers under the theory that the Necessary and Proper Clause grants Congress the sweeping power to determine how all federal powers, including presidential powers, shall be "carried into execution."⁸⁵ Under this reading, when Congress erects obstacles to the exercise of a presidential power, it has determined that this power will be "carried into execution" rather sparingly. For example, Congress could limit the manner and circumstances of granting pardons. Or Congress might decree that lame-duck Presidents cannot issue any pardons. Congress might dictate that a public justification accompany every pardon. Congress might even decide that the President cannot grant any pardons. In that case, Congress would have determined that the power should not be carried into execution at all. Alterna-

⁸³ See *id.* art. I, § 7, cl. 2.

⁸⁴ The federal judiciary seems an unlikely repository of a power to regulate presidential or other powers, and hence this Review does not seriously consider this possibility. Federal judges have the power to decide cases and controversies, not the power either to constrain or compel the exercise of presidential powers. When the courts declare that the President has acted unconstitutionally, they are not regulating presidential power so much as ensuring that presidential actions inconsistent with the Constitution do not receive judicial sanction.

⁸⁵ See U.S. CONST. art. I, § 8, cl. 18.

tively, Congress might decide that the pardon authority ought to be “carried into execution” quite vigorously. Acting on the impression that Presidents have been insufficiently merciful, Congress might require Presidents to issue a minimum number of pardons every year.

Sidney George Fisher, a nineteenth-century lawyer and political essayist, articulated this robust conception of congressional regulation: “Executive power, even in its primary and essential attributes, is subjected to legislative power. By our Constitution the subordination of Executive authority to the Legislature, is made even more complete than in the English model”⁸⁶ More recently, Larry Lessig and Cass Sunstein argued that the Necessary and Proper Clause vested Congress with the authority to determine how “all [federal] powers” will be carried into execution.⁸⁷ Although the scope of their claim is unclear, they seem to defend a generic congressional authority to regulate constitutional powers granted to other entities, including the President.

A second answer is that Congress may regulate only unspecified, peripheral presidential powers—those presidential powers that the Constitution does not expressly enumerate. Perhaps these powers, more shadowy and uncertain, are naturally subject to legislative regulation, a regulation that actually helps give them needed definition and content. Hence presidential powers derived from the Vesting Clause, such as the power to serve as the sole organ of communication in foreign affairs⁸⁸ and the power to remove executive officers,⁸⁹ would be on the regulable periphery. On the other hand, the Constitution explicitly mentions other core, or indispensable, presidential powers. Such powers are so vital that no one can regulate them. Those who subscribe to this theory (or variants of it) presumably believe that the Necessary and Proper Clause differentiates core or indispensable powers from fringe powers, permitting Congress to regulate only the latter.⁹⁰ As noted earlier, at times Krent seems to fall into this camp.⁹¹

⁸⁶ SIDNEY GEORGE FISHER, *THE TRIAL OF THE CONSTITUTION* 220 (1862), cited in CORWIN, *supra* note 1, at 451 n.12.

⁸⁷ See LAWRENCE LESSIG & CASS R. SUNSTEIN, *The President and the Administration*, 94 COLUM. L. REV. 1, 67 (1994).

⁸⁸ See CORWIN, *supra* note 1, at 225.

⁸⁹ See KRENT, *supra* note 10, at 39.

⁹⁰ See KATE STITH, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1350–51 (1988) (asserting that Congress may not withhold funds from constitutionally commanded presidential functions); WILLIAM W. VAN ALSTYNE, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, LAW & CONTEMP. PROBS., Spring 1976, at 102, 116–18 (stating that the legislature may limit “ancillary” presidential powers).

⁹¹ See *supra* notes 60–61 and accompanying text.

A third possibility is that Congress can regulate all presidential powers so long as such regulation is moderate and reasonable. Accordingly, although Congress can regulate presidential powers in a number of ways, Congress unconstitutionally interferes with presidential power when it leaves too little discretion with the President. Hence, while Congress might specify certain qualifications for executive offices (e.g., "appoint a commission divided equally between Democrats and Republicans") without running afoul of the President's power to nominate, perhaps Congress could not force the President to choose from among a handful of candidates. Likewise, perhaps Congress could permissibly require that a pardon recipient first admit her guilt, because the President would still be free to decide whether to grant the pardon. Under this framework of reasonable regulation, Congress clearly oversteps its authority when it attempts to exercise presidential powers itself. Krent arguably supports this theory at times.⁹²

Finally, the President's powers could be indefeasibly his such that he is always free to exercise them without the nod or assent of anyone else. The only exceptions to this rule would be those specific instances in which the Constitution grants Congress a measure of control. Under this view, neither the Necessary and Proper Clause nor any other constitutional provision confers upon Congress a generic power to limit, check, abridge, or compel the exercise of presidential powers. As discussed later, James Madison advocated this view of presidential powers during the 1789 House debates on removal.⁹³

On the question of regulability, the judiciary hardly inspires confidence, for it has not consistently articulated any theory. After the Civil War, the Supreme Court made the muscular claim that the pardon power "cannot be fettered by any legislative restrictions."⁹⁴ Although uttered in the context of the pardon power, there was no reason to suppose that the Court regarded the pardon power as particularly untouchable. More recently, however, the Supreme Court articulated a very forgiving, proregulatory, two-part test for policing congressional incursions into presidential powers.⁹⁵ First, a court

⁹² See *supra* notes 60–67 and accompanying text.

⁹³ See *infra* notes 176–77 and accompanying text.

⁹⁴ *Ex parte Garland*, 71 U.S. 333, 380 (1866); see also *United States v. Klein*, 80 U.S. 128, 141 (1871) (stating that Congress may not alter the effect of a pardon).

⁹⁵ See *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977); see also *Morrison v. Olson*, 487 U.S. 654, 695–96 (1988) (upholding legislation that restricts the executive removal power). Despite the general trend of modern cases, some cases hold to the contrary. In *Buckley v. Valeo*, 424 U.S. 1 (1976), for example, the Court decided that Congress could not make appointments itself. The difference between *Buckley* and *Morrison* may stem from the sense that in the former case, Congress was usurping a power granted to the President, while in the latter, Congress was regulating presidential powers in a less extreme and obvious way. See *Morrison*, 487 U.S. at 692 (noting that modest diminution of power to

must decide whether the congressional action “prevents the Executive Branch from accomplishing its constitutionally assigned functions.”⁹⁶ Second, where such disruption is present, the court must then determine “whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.”⁹⁷ The postbellum pardon cases would have been decided quite differently had the postbellum Supreme Court adopted its successor’s relatively laissez-faire attitude towards congressional regulation of executive power.

One might expect more consistency from Attorneys General and the Office of Legal Counsel, but one would be disappointed. Generally, the President’s lawyers take the view that Congress cannot regulate presidential powers.⁹⁸ At the same time, they have long accepted the constitutionality of congressional regulation of qualifications for executive officers, claiming that Congress’s power to set qualifications stems from its power to create the office.⁹⁹ But such logic would seem to likewise permit Congress to regulate presidential removals and to create independent executive officers, regulations that executive branch lawyers have been loath to accept. It may be that some congressional regulation is so innocuous that the executive’s lawyers generally have regarded it as a sort of constitutional *damnum absque injuria*, and thus not worth fighting.

As noted earlier, scholars tend not to make systematic arguments about congressional regulation of executive power. Instead, they make comments in passing, typically in the context of discussing a particular power. One scholar has argued that “Congress can revise and even eliminate the President’s [foreign] policy at any time,” perhaps hinting at a broad authority to regulate all presidential powers.¹⁰⁰ On the other hand, Professor Van Alstyne long ago implied that Congress

control prosecutions does not prevent the President from exercising his duties). In other words, one dividing line might be whether, via statute, Congress attempts to usurp executive power as opposed to merely regulating its exercise. This Review argues that the Constitution does not draw this distinction.

⁹⁶ *Nixon*, 433 U.S. at 443.

⁹⁷ *Id.*

⁹⁸ See, e.g., 20 Op. Off. Legal Counsel 246, 246 (1996) (“Congress may not hamper or curtail the prerogatives that the Constitution commits exclusively to the executive branch.”).

⁹⁹ See 13 Op. Att’y Gen. 516, 520 (1871) (“The argument has been made that the unquestioned right of Congress to create offices implies a right to prescribe qualifications for them. This is admitted.”). For a more recent opinion, see 20 Op. Off. Legal Counsel 279, 280 (1996) (admitting that Congress can set qualifications so long as a balance is maintained between the power to set qualifications and the President’s power to appoint).

¹⁰⁰ Louis Fisher, *A Constitutional Structure for Foreign Affairs*, 19 GA. ST. U. L. REV. 1059, 1070 (2003) (reviewing H. JEFFERSON POWELL, *THE PRESIDENT’S AUTHORITY OVER FOREIGN AFFAIRS* (2002), in which Powell, according to Fisher, claims that Congress can regulate the President through its appropriations power).

had to supply funds and officers for "indispensable" presidential powers.¹⁰¹ Professor Stith has made a similar argument, claiming that Congress could not refrain from appropriating money for such vital tasks as treaty negotiation and receiving ambassadors.¹⁰² Van Alstyne and Stith could be read as suggesting that where indispensable duties and powers are concerned, Congress must not only supply funds and personnel to help assist the President, but also must refrain from regulating the exercise of such powers.

The next two Parts of this Review attempt to refute the first three theories above—those in favor of regulability—and to defend the last proposition that Congress lacks a generic power to regulate all presidential powers. Part III maintains that the Constitution never grants Congress a general authority to regulate the executive's various powers. None of Congress's substantive lawmaking powers (e.g., regulating commerce and creating bankruptcy rules) permit it to regulate all presidential powers. Furthermore, the most plausible source of a generic power—the Necessary and Proper Clause—does not empower Congress to hinder or compel the exercise of presidential powers. Instead, the Clause grants Congress authority merely to assist the President's exercise of ("carrying into execution"¹⁰³) his constitutional powers.

Part III also advances the parallel claim that Congress lacks sweeping authority to regulate the powers granted by the Constitution to other entities, such as the federal judiciary. Once again, the Necessary and Proper Clause does not authorize Congress to hinder or compel the exercise of powers granted to the judiciary, state legislatures, or presidential electors. The only time Congress may regulate a power granted to another entity is when the Constitution specifically grants Congress such authority.

Part IV makes a related argument with respect to Congress's crucial power of the purse. The appropriations power is the power to decide what to fund and, perhaps more importantly, what not to fund. While Congress can undoubtedly wield its power over the purse to affect the President's exercise of his powers, Congress cannot go further and use the appropriations power to regulate presidential powers. The power to decide whether and how to assist the President does not subsume an authority to hinder or compel the President's exercise of his constitutional powers.

¹⁰¹ See Van Alstyne, *supra* note 90, at 119.

¹⁰² See Stith, *supra* note 90, at 1351.

¹⁰³ U.S. CONST. art. 1, § 8, cl. 18.

III

REGULATING THE EXERCISE OF THE EXECUTIVE'S POWERS

The idea that Congress has the authority to curtail the President's powers has obvious appeal. Rather than trying to impeach and remove a President who has abused his power, it might be preferable simply to regulate the misused power. Frustrated by a defiant President who recess-appoints individuals previously rejected by the Senate? Bar such appointments in all but the most extreme situations. Facing an obstructionist President who has vetoed too much legislation? Limit his use of the veto power to classes of trivial legislation.

Despite the allure of trimming the President's powers, Congress lacks generic authority to regulate constitutionally assigned powers.¹⁰⁴ The Constitution nowhere authorizes Congress to regulate or modify all such powers. Instead, where the Constitution means for Congress to have a power to regulate authority granted to another entity, it expressly conveys that power. Buttressing the conclusion against congressional regulability is the conspicuous absence of provisions found in state revolutionary constitutions expressly authorizing state legislatures to regulate executive power. Taken together, these arguments suggest that Congress generally cannot regulate constitutionally granted powers, whether they be presidential, judicial, or otherwise.

A. Text & Structure

Recall Part II's account of four theories of congressional regulability. The first supposed that Congress had a generic authority to regulate all constitutionally granted powers, the second advanced the claim that Congress could regulate some, but not all, presidential powers, and the third suggested the authority to regulate presidential powers in moderate and reasonable ways. This section considers the textual and structural underpinnings of each of these theories and argues that none of them has much support. The better view is that of the fourth theory—that Congress utterly lacks power to regulate constitutionally granted powers, save for the few instances where the Constitution expressly grants a limited regulatory power.

Almost all of Congress's constitutionally granted powers are extremely unlikely candidates for anything resembling a generic authority to regulate powers the Constitution grants to other entities. Most

¹⁰⁴ The argument here is limited to powers granted by the Constitution. Where Congress permits officers to exercise powers not conveyed by the Constitution itself, the argument does not apply. For instance, if Congress granted the President the power to suspend or dispense with a statute, Congress certainly could regulate its statutory grant of authority. Likewise, Congress generally can regulate the functions undertaken by executive officers (other than the President), because executive officers generally do not have constitutionally granted authorities.

of the enumerated powers in Article I, section 8, for example, such as the ability to raise taxes, to grant patents, and to regulate commerce,¹⁰⁵ are improbable sources of any right to regulate authorities such as the pardon power or the judicial power. The same is true of congressional powers found in other parts of the Constitution, such as the power to make rules for U.S. territory and property.¹⁰⁶

If Congress may generally regulate powers the Constitution grants to other entities, the Necessary and Proper Clause seems the best source of such authority. The Clause enables Congress to enact all laws "necessary and proper for carrying into execution" the powers of the federal government.¹⁰⁷ One might regard a statute that limits or modifies a presidential power (or any other constitutional grant of authority) as a necessary and proper law meant to better carry into execution the entirety of federal powers. Under this view, should Congress conclude that federal powers, as a whole, are better implemented when the President lacks a pardon power during the last three months of a lame-duck administration, it may enact laws so limiting the pardon power. Or Congress might determine that federal powers are better executed when the Senate must consent to the exercise of the President's removal power. In the extreme, Congress might even be able to completely bar the exercise of a presidential power. For instance, Congress might forbid presidential nomination of federal judges if it concluded that the judicial power would be better served by allocating that power to someone else.

Although the Necessary and Proper Clause may be the best candidate for a source of generic authority to regulate powers granted to others, it is nonetheless an extremely weak candidate. To begin with, it is paradoxical to conclude that a clause intended to help "carry into execution" federal powers could be exploited to erect obstacles to the execution of those powers. For instance, would Congress be carrying into execution the pardon power if it limited the exercise of that power? Does a statute that precludes presidential veto of appropriations help carry the veto power into execution? Needless to say, these are difficult arguments to make.

The argument becomes slightly less implausible if we suppose that the Clause permits the regulation of one or more powers only in order to better implement the remainder of federal powers. Indeed, it is easy to imagine a constitution that vests certain powers in one entity but then grants another entity the authority to limit, curb, or withdraw some of those powers in the furtherance of the overall constitutional scheme. For instance, a constitution might permit the leg-

¹⁰⁵ U.S. CONST. art. I, § 8, cls. 1 (taxes), 3 (commerce), 8 (patents).

¹⁰⁶ *See id.* art. IV, § 3, cl. 2.

¹⁰⁷ *Id.* art. I, § 8, cl. 18.

islative branch to trim the sails of the executive or judiciary should either become too powerful. Still, the Necessary and Proper Clause would be a decidedly unartful means of conveying such a power. Someone intent on introducing a principle of defeasibility into a constitution would presumably have it explicitly provide that notwithstanding the constitution's grant of certain powers, the legislature may regulate or reallocate such powers. Or perhaps such a constitution would declare that the executive's powers (or the judiciary's) were subject to statutory regulation.¹⁰⁸

Consistent with this argument, Gary Lawson and Patricia Granger have concluded that the Necessary and Proper Clause does not authorize Congress to reorganize or revamp the Constitution's structural provisions.¹⁰⁹ To begin with, any such statute would be an improper attempt to reallocate powers already granted to the executive by the Constitution.¹¹⁰ Such a statute would also be unnecessary. Given that the Constitution already allocates presidential powers subject to certain checks, it can hardly be necessary for Congress to further regulate these powers, creating still more constraints.

Those unmoved by such arguments against sweeping congressional power face a dilemma: If one supposes that the Necessary and Proper Clause permits Congress to regulate presidential powers, all presidential powers—the powers to veto, pardon, direct foreign affairs, etc.—come within the sway of Congress. The text of the Necessary and Proper Clause does not support the proposition that the Clause permits regulation of certain presidential powers but simultaneously forbids regulation of others. Indeed, the Clause does not even single out presidential powers as a class, let alone segregate such powers into regulable and nonregulable categories. Therefore, if the Clause sanctions congressional regulation of the President's ability to direct our nation's diplomats, for example, the Clause must equally sanction congressional statutes that hinder the President's exercise of the pardon and veto powers.

Perhaps more importantly, if the Necessary and Proper Clause authorizes regulation of presidential powers, the Clause must likewise sanction regulation of constitutional powers vested with other entities. There is no reason to suppose that the Clause, which speaks of federal powers only in general terms and never singles out the presidency, grants Congress greater regulatory powers over the presidency as compared to other constitutionally empowered entities. Recall that the text of the Clause grants Congress the power to carry all federal pow-

¹⁰⁸ Some state constitutions apparently contained such provisions. See *infra* Part III.B.

¹⁰⁹ See Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 333–34 (1993).

¹¹⁰ See *id.* at 297.

ers into execution. Hence, under a "regulatory" reading of the Necessary and Proper Clause, Congress could tell courts how to decide particular cases or subject their decisions to the check of some third party. Likewise, Congress could instruct the Electoral College that it could not choose certain candidates as President or that it must select a particular candidate. Or Congress could, via statute, narrow (or expand) the circumstances in which the House could impeach officers of the United States. A reading of the Necessary and Proper Clause that not only makes regulation of all presidential powers permissible, but also necessarily authorizes regulation of all powers the Constitution grants, is a reading too fantastic to be maintained.

A related reason to doubt the claim that the Necessary and Proper Clause grants Congress the authority to regulate presidential and other powers is that such a reading permits Congress to make a hash of the Constitution's separation of powers. By passing legislation, Congress could grant itself authority to exercise all the powers granted to other entities.¹¹¹ To be sure, Congress would likely face a veto of legislation that seizes authority constitutionally granted to other entities (at least until Congress barred the use of such vetoes). Nonetheless, Congress could assume the executive and judicial powers, thereby commingling fundamental powers in a manner that makes tyranny all the more likely. To paraphrase Montesquieu, tyrannical legislation would be executed and judged tyrannically, with no check.¹¹² It seems unlikely that the Constitution permits congressional aggrandizement on this scale.¹¹³

Finally, the Constitution's text strongly implies that Congress lacks a generic authority to regulate constitutionally granted power. The Constitution contains specific provisions that expressly enable Congress to regulate certain powers granted to other entities. The Constitution grants states the power to regulate federal elections, but

¹¹¹ Nothing here precludes the possibility that Congress can augment the President's constitutional powers by granting necessary and proper authority to the President. Professor Van Alstyne long ago argued that powers merely useful or appropriate to the executive or judicial branch may have to be delegated by Congress. See Van Alstyne, *supra* note 90, at 118. This is a far cry from the claim that Congress may regulate powers that the Constitution grants to the President.

¹¹² See BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151-52 (Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748).

¹¹³ Some might respond that perhaps Congress can regulate presidential and other powers, but cannot assume them itself. This anti-aggrandizement principle might be an implied restraint on congressional regulation arising from the understood principle that Congress could not undo the separation of powers. Yet even if this implied principle forbade certain types of regulation (regulation that directly strengthened Congress), it would not forbid the creation of an alternative, statutory chief executive capable of exercising some or all of the President's powers. If Congress chose to do this, it would have incapacitated the constitutional executive and created an ersatz, statutory one in its place.

also authorizes Congress to make its own superseding rules.¹¹⁴ Likewise, the Constitution grants the Supreme Court appellate jurisdiction over certain cases but allows Congress to make exceptions to that jurisdiction.¹¹⁵ There may also be other provisions that implicitly authorize Congress to regulate the exercise of constitutional powers, such as Congress's ability to establish inferior courts.¹¹⁶

In at least two instances, the Constitution grants Congress the power to regulate, in limited ways, a presidential power. First, though the President has the power to appoint all officers, by and with the Senate's advice and consent, the Constitution also provides that Congress may vest the power to appoint inferior officers with the President, the department heads, and the courts.¹¹⁷ Second, the President is the Commander-in-Chief of the armed forces and the militia,¹¹⁸ but Congress has the authority to regulate the armed forces and to organize and arm the militia.¹¹⁹

The presence of specific provisions authorizing narrow congressional regulation of presidential powers reinforces the conclusion that Congress lacks generic authority to regulate constitutionally granted powers. A generic regulatory power would make these provisions superfluous, for Congress would have had these powers even in the absence of their specification. Furthermore, structural limitations found in these provisions would be of no consequence if Congress enjoyed a generic power to regulate all federal powers. For instance, Congress could not only delegate the power to appoint inferior officers to the President, department heads, and the courts of law,¹²⁰ it also could assume this appointment power itself. Even more troubling, Congress could assume or convey to others the far more important power to

¹¹⁴ See U.S. CONST. art. 1, § 4, cl. 1.

¹¹⁵ See *id.* art. III, § 2, cl. 2.

¹¹⁶ Unlike its authority to regulate the Supreme Court's appellate jurisdiction, Congress lacks express authority to regulate the jurisdiction of the inferior federal courts. See *id.* art. III, § 1. Nonetheless, because the Constitution empowers Congress to create courts inferior to the Supreme Court, and because the Constitution does not specify the jurisdiction of inferior courts, Congress must have the authority to decide what jurisdiction each of these inferior courts will enjoy. Thus, the generic power to create inferior courts necessarily encompasses the power to specify the jurisdiction of these courts. See *Sheldon v. Sill*, 49 U.S. 441, 448–49 (1850).

¹¹⁷ See U.S. CONST. art. II, § 2, cl. 2.

¹¹⁸ See *id.* art. II, § 2, cl. 1.

¹¹⁹ See *id.* art. I, § 8, cls. 14 (armed forces), 16 (militia). Perhaps the best way to read the three provisions together is that in the absence of congressional regulation, the President may establish his own rules of conduct and discipline for the armed forces and militia. When Congress creates regulations, however, they trump whatever rules the President had adopted in the absence of congressional regulation.

There is also the separate question of where the Congress's regulatory authority ends, for it is unlikely that the President's Commander-in-Chief authority is entirely defeasible.

¹²⁰ *Id.* art. II, § 2, cl. 2.

appoint non-inferior officers, such as federal judges and the secretaries of the various departments.

The second, and more modest, theory of congressional regulability—that Congress can regulate some, but not all, presidential powers—similarly fails to persuade. This theory requires some basis for sorting presidential powers into an indispensable core and a regulable periphery. To be sure, one can segregate presidential powers in a number of ways. One might distinguish powers specifically expressed (such as the pardon power) from those derived from the general grant of executive power (such as the President's residual foreign affairs powers), with the former constituting the core and the latter the periphery powers. Alternatively, one might divide presidential powers into those typically exercised by the state executives versus those that are more uniquely the federal President's.

However one might segregate presidential powers, none of the potential groupings help justify congressional regulation of particular presidential powers. For instance, whether a power is explicitly listed or part of the general grant of executive power does not matter for purposes of regulability. Nothing in the Constitution suggests that Congress has a power to regulate in one circumstance but not in the other. As we have seen, the Necessary and Proper Clause certainly does not draw any such distinctions; it speaks of a power to help carry into execution *all* federal powers and does not suggest that Congress has greater power to carry into execution particular powers, presidential or otherwise. A fortiori, nothing in the Clause even hints that executive powers derived from the general grant are more susceptible of congressional regulation.

Nor can one separate executive powers into core and periphery by attempting to ascertain which powers are (and are not) inherently regulable. None of the President's powers are by their nature regulable.¹²¹ Nothing about the power to pardon, veto, appoint, or make treaties suggests that they are naturally subject to legislative modification. On the other hand, in theory any power—presidential or otherwise—could be regulated. One can imagine a constitution that expressly permitted legislative regulation of powers that no one has ever thought regulable, such as an elector's power to select the President or the President's power to veto bills. The point is that a constitution certainly can ordain that the legislative branch may regulate any of the powers that constitution grants to some other entity. If no presidential power is inherently unregulable and yet all presidential powers are capable of being regulated, regulability cannot be a reason for dividing up presidential—or other—powers.

¹²¹ Part III.C discusses a possible "exception."

All these classification efforts ignore the most obvious categories of presidential power. Recall that the Constitution expressly authorizes regulation of certain presidential powers.¹²² That being the case, if we were to divide presidential powers into a regulable periphery and an unregulable core, it seems natural that the only regulable powers are those the Constitution expressly makes so. Having explicitly marked a few presidential powers that Congress may regulate, it seems unlikely that the Constitution also tacitly empowers Congress to regulate all other presidential authorities.

In the abstract, the project of dividing presidential powers into an unregulable core and a regulable periphery has some appeal. Yet besides the most obvious categories discussed in the preceding paragraph, there is no basis in the Constitution's text or structure for any other division. As a result, any other classification of presidential powers into regulable and nonregulable categories will ultimately reflect nothing more than the taxonomist's estimation of the relative importance and value of the various powers and of the benefits and drawbacks of congressional regulation.

Finally, the third theory, which advocates only reasonable or modest regulation of presidential powers, cannot withstand scrutiny. At first blush, modest congressional regulation of presidential power—regulation that still leaves the President a good measure of discretion—seems less likely to be “improper” within the context of the Necessary and Proper Clause. For instance, perhaps Congress could create reasonable qualifications for offices so long as the President decides whom to appoint.¹²³ Such modest regulation seems less like an infringement and more like a harmless adjustment of presidential power.

Three difficulties bedevil this claim. First, this theory mistakenly treats reasonable regulation of constitutional powers as if it were authorized by virtue of its supposed reasonableness. The principle problem remains: Such regulation would not carry into execution any power of the federal government. For instance, a law imposing reasonable restraints on the pardon power (e.g., no pardon of presidential relatives or donors without Senate consent) does not carry into execution any federal power. Rather, such a law makes it impossible, in some circumstances, to carry into execution the pardon power. The same is true of a reasonable law that precludes the ratification of trade treaties lacking labor and environmental standards. Because the Necessary and Proper Clause does not authorize moderate regulation of constitutional powers granted to other entities, reasonableness can-

¹²² See *supra* notes 114–19 and accompanying text.

¹²³ See 13 Op. Att’y Gen. 516 (1871).

not be the touchstone. A statute regulating executive power can be viewed as reasonable by all but still be utterly unconstitutional.

Second, the claim that Congress can narrow the President's discretion without interfering with his executive powers misconceives the nature of almost all presidential powers. Take the nominating power: The President has the constitutional right to select whomever he pleases, with the Senate enjoying a vital check to ensure that only fit people ultimately occupy offices.¹²⁴ When a statute purports to narrow the field of candidates, it usurps discretion that the Constitution grants to the President. Likewise, a statute that requires pardon recipients to admit their guilt also snatches away discretion that the Constitution grants to the executive, for the Constitution authorizes the President to pardon anyone who commits a federal offense.¹²⁵ In short, the claim that narrowing or channeling the President's discretion in the exercise of his constitutional powers does not abridge his constitutional authority is based on an erroneous conception of the scope of most of his constitutional powers.¹²⁶

Third, if the Necessary and Proper Clause permits reasonable regulation of presidential powers, it must likewise sanction reasonable regulation of other constitutional powers. To continue a theme expressed earlier, there is no reason to believe that the Clause authorizes reasonable congressional regulation of presidential powers, but somehow precludes reasonable congressional regulation of judicial power or the Electoral College's power. The Clause might then sanction congressional statutes that require the courts to defer to the reasonable constitutional readings of the political branches, surely a modest regulation of a branch that many believe has lost its constitutional moorings. Likewise, the Clause might sanction congressional attempts to narrow the field of possible presidential candidates, perhaps by requiring that all presidential candidates considered by the Electoral College have a college degree or military experience. If the Clause authorizes reasonable regulation of all federal powers, we live under a very different Constitution than many suppose.

Given that constitutional text does little to advance the notion that Congress can regulate presidential powers, some might wish to switch tacks and make arguments sounding in constitutional structure. At least two structural arguments come to mind. First, some might suppose that the veto is the only means of defending presidential prerogatives. If that is the case, congressional regulation of presi-

¹²⁴ See U.S. CONST. art. II, § 2, cl. 2.

¹²⁵ See *id.* art. II, § 2, cl. 1.

¹²⁶ Part III.C discusses the law execution power, an "exception" to the principle that when Congress narrows presidential discretion in the exercise of a constitutional power, it abridges that power.

dential power might be tolerable once enacted into law. In other words, once Congress enacts laws, even over the President's veto, the President must heed and enforce them. He must take care to enforce statutes regulating his presidential powers, even if he regards these statutes as unconstitutional.¹²⁷

This argument confuses the question of whether the President must enforce a statute he believes to be unconstitutional with the question of whether a statute is in fact unconstitutional. Here we discuss whether the Constitution authorizes congressional regulation of presidential and other powers. The answer to that question is independent of whether the President can engage in self-help as a means of thwarting unconstitutional statutes. When we turn to the actual question in dispute, we recognize that the extent of congressional power depends upon affirmative grants to Congress, not on the presence or absence of defensive mechanisms for particular branches. The veto power has absolutely no bearing on the extent of congressional authority to regulate powers granted to other entities, including the President. Similarly, the presence of judicial review does not affect the scope of congressional authority over the judicial power. Even if the President was unquestionably required to enforce unconstitutional statutes, the question remains whether Congress exceeds its constitutional authority when it regulates powers granted to other entities.

A second structural argument might attempt to draw support for congressional regulation of presidential powers from the oft-stated proposition that Congress was meant to be the most powerful and important branch.¹²⁸ Congress, mentioned first in the Constitution, was simply meant to be *primus inter pares*. This preeminence, some might argue, suggests that Congress can dominate its counterparts, including regulating the exercise of their constitutional powers.

Yet being first among equals is hardly the same as enjoying supremacy over others. Furthermore, that a particular branch was meant to be the most powerful and important (assuming there was some consensus on this) has no obvious implications for the more precise question of whether that branch may regulate powers granted to other entities. We might all agree that Congress was expected to be the dominant branch and yet still conclude that it lacks generic authority to regulate the powers of other constitutionally created entities.

As a matter of text and structure, there are numerous reasons for doubting the claim that the Constitution permits Congress to regulate

¹²⁷ See U.S. CONST. art. II, § 2, cl. 3.

¹²⁸ See, e.g., Van Alstyne, *supra* note 90, at 116.

constitutionally granted powers. The claim is dubious even in its more modest iterations. No provision authorizes such generic regulation. Moreover, the presence of specific, narrow congressional authorities to modify presidential and other powers suggests that there is no across-the-board regulatory authority. Finally, constitutional structure militates against the claim that Congress can treat the Constitution's allocations of power as if they were merely deck chairs to be rearranged and remodeled at its pleasure.

B. History

One might suppose that the lessons of history support the notion that Congress may regulate the executive's powers. English history is littered with celebrated acts of parliament that restrained, modified, and abridged executive powers.¹²⁹ Likewise, early state constitutions granted the legislature authority to regulate constitutionally granted executive powers.¹³⁰ If Congress's forerunners could regulate executive powers, why would Congress not have the same power?

Neither the English nor the state experiences are apposite. In England, no fixed constitutional constraints hemmed in the legislature. Rather, the English Constitution merely reflected extant traditions and laws.¹³¹ Parliament could create new constitutional rights and abolish them at will.¹³² In the same way, Parliament could regulate the ancient powers of the Crown. When Parliament enacted a statute that modified or abridged the Crown's powers, the statute created a new custom that automatically became part of the English Constitution.¹³³ For all these reasons, no executive powers were outside the regulatory purview of Parliament.¹³⁴

¹²⁹ See, e.g., Act of Settlement, 1701, 12 & 13 W. & M. 3, c. 2 (Eng.), available at http://www.agh-attorneys.com/4_act_of_settlement.htm; Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.), available at <http://www1.umn.edu/humanrts/education/engbillofrights.html>.

¹³⁰ See *infra* notes 136–39 and accompanying text.

¹³¹ See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888–89 (1985).

¹³² See Robert C. Byrd, *Remarks by U.S. Senator Robert C. Byrd: The Constitution in Peril*, 101 W. VA. L. REV. 385, 393 (1988).

¹³³ See *id.*

¹³⁴ The Crown was a third chamber of Parliament and hence had a formal power to thwart any legislation that impinged upon the Crown's powers. See Matthew P. Harrington, *Judicial Review Before John Marshall*, 72 GEO. WASH. L. REV. 51, 58 (2003). Yet there were many occasions when the Crown agreed to a diminution of executive powers in exchange for something else from the Parliament. See, e.g., Lee J. Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition*, 28 HARV. J.L. & PUB. POL'Y 909, 938 n.78 (2005) (citing William and Mary's acceptance of greater rights for the people in exchange for the crown itself). Once the Crown agreed to some diminution of executive power, future Kings and Queens either had to accept the regulation or convince Parliament to repeal it.

Parliament's supremacy was not a template for Congress. Under our Constitution, Congress is not supreme, and it can neither modify the Constitution nor pass whatever laws it wishes. Instead, the Constitution is supreme and unalterable by ordinary legislation. A necessary corollary (and one that leaps from the Constitution) is that Congress is limited to its enumerated powers.¹³⁵ Hence, if the Constitution never authorizes Congress to regulate the powers of others, Congress is powerless to do so.

The state experiences are inapposite for a different reason. In many of the state constitutions, legislatures were given express power to regulate the executive's powers. Some constitutions went so far as to grant the legislature the power to regulate all of the executive's powers. For instance, under the Virginia Constitution of 1776 the Governor could "exercise the executive powers of government, according to the laws of this Commonwealth."¹³⁶ This language fairly invited the legislature to dictate how and when the Governor would exercise all the executive powers. Many more state constitutions granted authority to regulate only the nonitemized executive powers. The North Carolina Constitution of 1776 granted the Governor specific executive powers, but also vested "all the other executive powers of government, limited and restrained as by this Constitution is mentioned, and according to the laws of the State."¹³⁷ Such language suggests that the state legislature could regulate all executive powers not specifically enumerated in the Constitution. Finally, some constitutions contained nothing resembling a generic regulatory provision, but instead expressly sanctioned legislative alteration of the executive's power only in limited situations. The Pennsylvania Constitution of 1776, for example, provided that the executive council could appoint and commission various officers "except such as are chosen by the general assembly or the people, agreeable to this frame of government, and the laws that may be made hereafter."¹³⁸ Hence, the Pennsylvania Constitution established a default rule of appointment by the executive council subject to statutes that might vest appointment authority with the general assembly or the people. Other constitutions

¹³⁵ See, e.g., *Myers v. United States*, 272 U.S. 52, 128 (1926).

¹³⁶ VA. CONST. of 1776, available at <http://www.yale.edu/lawweb/avalon/states/va05.htm>; see also GA. CONST. of 1777, art. XIX (similar), available at <http://www.yale.edu/lawweb/avalon/states/ga02.htm>.

¹³⁷ N.C. CONST. of 1776, art. XIX, available at <http://www.yale.edu/lawweb/avalon/states/nc07.htm>; see also DEL. CONST. of 1776, art. 7 (similar), available at <http://www.yale.edu/lawweb/avalon/states/de02.htm>; MD. CONST. of 1776, art. XXXIII (similar), available at <http://www.yale.edu/lawweb/avalon/states/ma02.htm>.

¹³⁸ PA. CONST. of 1776, § 20, available at <http://www.yale.edu/lawweb/avalon/states/pa08.htm>.

had similar provisions, narrowly authorizing legislative regulation of specific executive powers.¹³⁹

Rather than furthering the case that Congress has the generic power to treat constitutional grants of power as default grants alterable by Congress, the state constitutions help emasculate that argument. Notwithstanding general grants of legislative power, the state constitutions seem to have assumed that the legislature did not have the default power to alter constitutional grants of powers. This explains the need for specific authorization to regulate the executive's powers. Moreover, the differences among the states' constitutions further confirm that there was no background understanding that the state legislatures had default authority to regulate other constitutional grants of power. Some constitutions treated all executive powers as alterable by statute, others treated only unspecified executive powers as alterable, and still others treated only a select few as alterable. The varied nature of these grants of regulatory authority undermines any notion that state legislatures were generally regarded as enjoying an implicit Constitutional power to regulate all of the executive's powers.¹⁴⁰ Finally, the fact that our Constitution has particular provisions that permit Congress to regulate only certain powers indicates that the federal Constitution is most similar to those in the last category of state constitutions—i.e., the federal Constitution only authorizes narrow statutory regulation of certain executive powers.

The same picture emerges from the commentary on the state constitutions. Legislatures that regulated (or sought to regulate) executive powers in unauthorized ways were condemned as violating their constitutions. When the Pennsylvania Assembly intruded upon the executive's powers, the state executive council complained that "it was never supposed that any House of Assembly would by special laws . . . assume the Executive powers."¹⁴¹ Later, when the Assembly hired special officers to withdraw funds from the treasury, the executive council protested that "giving this power to any other persons, by a

¹³⁹ See, e.g., S.C. CONST. of 1776, art. XXXII (granting the Governor the authority to appoint certain officers until otherwise directed by law), available at <http://www.yale.edu/lawweb/avalon/states/sc02.htm>; VT. CONST. of 1777, ch. 2, § XVIII (similar), available at <http://www.yale.edu/lawweb/avalon/states/vt01.htm>.

¹⁴⁰ Some of the state constitutions were enacted by the state legislatures. See James E. Viator, *Give Me that Old-Time Historiography: Charles Beard and the Study of the Constitution, Part II*, 43 LOY. L. REV. 311, 360 n.238 (1997). This begs the question whether such constitutions were really superior to any other act of the state legislators. In such circumstances, any law that regulated the executive's powers might very well have been valid under the principle that subsequent legislation trumps earlier inconsistent legislation. Nonetheless, the state constitutions themselves did not implicitly authorize the generic regulation of executive power.

¹⁴¹ CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY 1775-1789*, at 32 (2d prtg. 1969).

special law, is a violation of the Constitutional privileges of the Council."¹⁴² The Pennsylvania Council of Censors also made similar claims about the legislature's unconstitutional usurpation of executive powers.¹⁴³

Similar complaints were heard in New York when the state legislature sought to create a council that would superintend the executive.¹⁴⁴ The Council of Revision objected that because the Constitution granted the Governor the supreme executive powers of government, placing the Governor under the control of someone else unconstitutionally elevated the other entity to the supreme executive.¹⁴⁵ Neither the New York¹⁴⁶ nor the Pennsylvania¹⁴⁷ state constitutions generally authorized the legislature to regulate the executive powers; hence, the complaints voiced against the legislature were on a solid footing.

The difficulties with legislative regulation of executive power were such that people complained about the phenomenon even in those states that authorized such regulation. Thomas Jefferson famously complained that the Virginia legislature had assumed executive and judicial powers and could not be checked because the legislature had embodied its usurpations in statutes, requiring the other entities to honor the usurpation.¹⁴⁸ Because the Virginia Constitution expressly made the state executive subject to statutory regulation, the legislature's assumption of executive power was constitutionally authorized.¹⁴⁹ Nonetheless, Jefferson's complaint, along with protests from Pennsylvania and New York, reveal the general disquiet with legislative regulation of executive power, whether authorized or not.

Turning to the Philadelphia Convention of 1787, records suggest that the delegates did not believe they were authorizing statutory regulation of the executive when they drafted the Constitution. First, apparently no one ever proposed that the President's powers generally

¹⁴² See *id.* at 33.

¹⁴³ See Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 763 & nn.336-37.

¹⁴⁴ See THACH, *supra* note 141, at 41.

¹⁴⁵ See *id.* at 42.

¹⁴⁶ See N.Y. CONST. of 1777, art. XVII (stating that "the supreme executive power and authority of this State shall be vested in a governor"), available at <http://www.yale.edu/lawweb/avalon/states/ny01.htm>.

¹⁴⁷ See *supra* note 138 and accompanying text.

¹⁴⁸ See THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1782), reprinted in THE COMPLETE JEFFERSON 567, 648-49 (Saul K. Padover ed., 1943) (complaining about convergence of powers in the legislative body).

¹⁴⁹ See *supra* note 136 and accompanying text.

should be subject to congressional regulation.¹⁵⁰ This is somewhat astounding given the presence of such provisions in the state constitutions.¹⁵¹ Second, rather than extolling the possible benefits of legislative regulation of the executive, delegates worried about encroachment.¹⁵² Had legislative regulation somehow been authorized, there would have been no opportunity for encroachment. The legislature does not encroach on the executive when the legislature acts pursuant to constitutional authority. Thus, if the legislature had the general authority to regulate executive power, then such regulation could not be considered encroachment. Delegates voiced their worries about legislative encroachment and usurpation of executive power precisely because they understood that Congress had no constitutional authority to regulate presidential powers. Third, when delegates added a provision that permits Congress to regulate a presidential power (the Appointments Clause¹⁵³), it passed only after a proponent insisted that the provision was “too necessary . . . to be omitted”¹⁵⁴—precisely the opposite of what one would expect had there been some general understanding that all presidential powers were subject to congressional regulation. Fourth, decisions on the veto, executive appointment, executive terms, etc.¹⁵⁵ all militate against the notion that the delegates wished to make the executive’s powers subject to legislative modification. In each case, the delegates made the executive more powerful and less subject to the whims of the legislature. Finally, given the variability of the state constitutional provisions, it is hard to suppose that there was some sort of consensus about the proposed national legislature’s power to regulate the executive. After all, there was no focal point for consensus. The states were all over the map, adopting varying approaches to the question of when and to what extent the legislature could regulate executive powers.¹⁵⁶

The ratification debates point to nonregulability as well. To my knowledge, no one argued that the Constitution permitted Congress to regulate the executive. Indeed, when Anti-Federalists repeatedly

¹⁵⁰ See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20 (Virginia Plan), 228 (Amended Virginia Plan), 242 (New Jersey Plan) (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS]; 3 *id.* app. D at 595 (Pinckney Plan), app. F at 617 (Hamilton Plan).

¹⁵¹ Perhaps the delegates had learned from the states’ mistakes. See *supra* notes 141–49 and accompanying text.

¹⁵² 2 RECORDS, *supra* note 150, at 74, 299–300, 407, 429, 551.

¹⁵³ U.S. CONST. art. II, § 2, cl. 2.

¹⁵⁴ 2 RECORDS, *supra* note 150, at 627–28. I have argued elsewhere that the provision was necessary as a means of circumventing the burdensome requirement that all officers of the United States be appointed by the President and confirmed by the Senate. See Prakash, *supra* note 143, at 734.

¹⁵⁵ See U.S. CONST. art. II.

¹⁵⁶ See *supra* notes 136–39 and accompanying text.

complained that the Constitution created an executive who would be king-in-fact, no Federalist ever claimed that Congress could solve this problem by stripping or curbing the President's powers.¹⁵⁷ Federalists undoubtedly would have made this argument had the Constitution actually granted Congress the authority to regulate the executive's powers.

Likewise, there was once again talk of legislative encroachment and usurpation. Madison spoke of these problems at great length in a number of Federalist Papers.¹⁵⁸ Citing experiences in Virginia and Pennsylvania, Madison claimed that examples of legislative usurpation were plentiful and well-known.¹⁵⁹ Had the Constitution authorized legislative regulation, however, Madison would have had no occasion to worry about encroachment or usurpation. Instead, as an advocate of the Constitution, he would have been in the awkward position of defending legislative regulation and assumption of executive power. Madison predicates his entire discussion on the understanding that, like the Pennsylvania Assembly, Congress might transgress the Constitution by usurping or regulating presidential powers.¹⁶⁰ In other words, Madison assumed that Congress could not regulate presidential powers.

After the Constitution's ratification, President George Washington doubted that Congress could regulate his powers. In 1796, when the House sought the treaty instructions that Washington had given to John Jay, the President refused to produce them on the ground that the House had no role in the treaty process and hence had no right to the papers.¹⁶¹ "[I]t is essential to the due administration of the government, that the boundaries fixed by the constitution between the different departments should be preserved," Washington wrote the House.¹⁶² To be sure, the House's request was in the form of a resolution and not a bill.¹⁶³ Nonetheless, had the House's request been in the form of a bill, Washington's answer would have been the

¹⁵⁷ See generally THE FEDERALIST NO. 69 (Alexander Hamilton) (comparing powers of King and President).

¹⁵⁸ See THE FEDERALIST NOS. 48, 49, 51 (James Madison).

¹⁵⁹ See THE FEDERALIST NO. 48 (James Madison).

¹⁶⁰ See *id.*

¹⁶¹ See Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1181-82 (1999).

¹⁶² Letter from George Washington, President of the United States, to the House of Representatives (Mar. 30, 1796), in 35 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745-1799, at 2, 5 (John C. Fitzpatrick ed., 1940) [hereinafter Letter from Washington].

¹⁶³ See *id.* at 2.

same.¹⁶⁴ Washington regarded the House's request as an unconstitutional encroachment upon the executive power to make treaties.

A 1792 episode points to the same conclusion. The President sought Thomas Jefferson's view on a House resolution requesting that the President convey the House's congratulations to France on its new constitution.¹⁶⁵ According to Jefferson, Washington "apprehended the legislature would be endeavoring to invade the executive."¹⁶⁶ This House resolution would be an invasion of the executive's powers, because the Constitution, via the grant of executive power, made the President the sole organ of communication between the United States and other nations, and because the executive enjoyed the sole power to decide the content of these communications.¹⁶⁷ Once again, Washington's fears would not have been alleviated had the House somehow convinced the Senate to pass a bill ordering Washington to convey the House's sentiments. Washington understood that when Congress usurps or regulates powers granted to the executive, Congress transgresses "boundaries fixed by the constitution."¹⁶⁸

The evidence from Congress is, not surprisingly, mixed. In the Judiciary Act of 1789, Congress stipulated that district attorneys and the attorney general had to be persons "learned in the law."¹⁶⁹ Here Congress arguably regulated the President's power to nominate, because it limited his nomination discretion. There is no evidence that this innocuous regulation ever triggered any debate. Admittedly, as Professor David Currie notes, it is possible to read the lack of controversy as reflecting a consensus that Congress could regulate the President's power to nominate.¹⁷⁰ Yet it seems more likely that the provision generated no heat because no one ever focused on the con-

¹⁶⁴ I have previously suggested that Washington might have acquiesced had the House made it clear that it sought the papers in relation to a potential impeachment and had the House had statutory authority to request the Jay instructions. See Prakash, *supra* note 161, at 1182–83. Upon reflection, I very much doubt that Washington would have acquiesced to the request merely had the House and Senate passed a statute, because Washington would still have concluded that the House was trespassing upon a power committed to the President and Senate.

¹⁶⁵ See THOMAS JEFFERSON, *THE ANAS: 1791–1806* (1818), reprinted in *THE COMPLETE JEFFERSON*, *supra* note 148, at 1204, 1220–21.

¹⁶⁶ *Id.* at 1221.

¹⁶⁷ See CORWIN, *supra* note 1, at 225.

¹⁶⁸ Letter from Washington, *supra* note 162, at 5. Admittedly, there appears to have been no incident when Washington objected to a statute on the grounds that it interfered with executive authority, but this likely simply reflects the relative lack of such statutes. Given Washington's views about executive power and the Constitution's separation of powers, there can be little doubt that he would have regarded legislative regulation of executive power as a violation of the Constitution.

¹⁶⁹ An Act to Establish the Judicial Courts of the United States, ch. 20, § 35, 1 Stat. 73, 92 (1789).

¹⁷⁰ See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801*, at 43 (1997).

stitutional question. It is easy to see why, for the requirement was certainly inconsequential. It seems obvious that the President naturally would nominate only those learned in the law to offices representing the United States in the courts. The provision was not too far removed from one stipulating that any appointee must have a pulse.

Consistent with this reading, when the issue of the constitutionality of setting qualifications for other offices was raised and considered, members of the House objected that the qualifications infringed upon the President's appointments power.¹⁷¹ On two occasions, the House considered bills setting qualifications for other officers. In both instances, the House deleted the qualifications.¹⁷² Thus, the regulation of qualifications in the Judiciary Act may have been a relatively harmless anomaly that was subsequently (albeit implicitly) rejected as an unconstitutional encroachment on the appointment power.¹⁷³

During the famous removal debate, a few members spoke specifically to the question of whether Congress could "modify" constitutionally granted powers. Elias Boudinot reportedly argued that "in the legislature, and in them alone was vested the right of modifying and explaining the powers of the constitution, when there were any doubts respecting the organization of the government."¹⁷⁴ The *Annals of Congress* reports that Boudinot said:

I do not agree with the gentlemen, that congress have no right to modify principles established by the Constitution A Supreme

¹⁷¹ See *id.* at 43 n.255.

¹⁷² See *id.* Currie relates that in April 1790, less than a year after the passage of the Judiciary Act, the House considered a bill requiring the Superintendent of Indian Affairs to be a military officer. See *id.* Among other objections made was that the bill "infringe[d] the power of the President." *Id.* Although someone apparently cited the precedent of the Judiciary Act of 1789, the language setting a qualification for office was deleted before the bill became law. See *id.* Although Professor Currie suggests that policy considerations motivated the change, see *id.*, it seems more likely that policy considerations actually cut in favor of the qualification. It made sense to require that the Superintendent be a military officer. Hence, constitutional concerns likely led to the deletion of congressionally set qualifications for the Superintendent.

Currie also relates that in June 1790, Elbridge Gerry and John Laurance objected to a bill that would have made the Secretary of the Treasury and the Comptroller members of a commission to settle accounts between the states and the United States. See *id.* One of the strongly pressed objections was that the statute "invaded the prerogative" of the executive by choosing who ought to be commissioners. See *id.* The objectors successfully struck out the proposed language, which would have appointed existing officers to the new commission posts instead leaving the appointments to the President. See *id.*

¹⁷³ In the Judiciary Act of 1789, Congress might have regulated the federal judiciary. Since this Review's focus is on the Presidency, I have not thoroughly examined this potential aspect of the Judiciary Act of 1789. It is worth noting that the Constitution arguably authorized any such regulation, particularly regulation of the inferior federal courts.

¹⁷⁴ THE DAILY ADVERTISER (New York), June 23, 1789, reprinted in DEBATES IN THE HOUSE OF REPRESENTATIVES, FIRST SESSION: JUNE-SEPTEMBER 1789, 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 947 (Charlene Bangs Bickford et al. eds., 1992) [hereinafter DEBATES].

Court is established by the Constitution; but do gentlemen contend, that we cannot modify that court, direct the manner in which its functions shall be performed, and assign and limit its jurisdiction?¹⁷⁵

Madison forcefully denied that Congress could make modifications or exceptions to the President's executive powers. His analysis is worth quoting in full:

The Constitution affirms, that the Executive power shall be vested in the President: Are there exceptions to this proposition? Yes, there are. The Constitution says, that in appointing to office, the Senate shall be associated with the President, unless in the case of inferior officers, when the law shall otherwise direct. Have we a right to extend this exception? I believe not. If the Constitution has invested all Executive power in the President, I venture to assert that the Legislature has no right to diminish or modify his Executive authority. . . . [I]t is incontrovertible, if neither the Legislative nor Judicial powers are subjected to qualifications, other than those demanded in the Constitution, that the Executive powers are equally unabateable as either of the others; and inasmuch as the power of removal is of an Executive nature, and not affected by any Constitutional exception, *it is beyond the reach of the Legislative body.*¹⁷⁶

Madison's speech was a ringing refutation of the idea of regulable executive powers. Though the Constitution contains certain exceptions and inroads into executive power, it does not permit the congressional imposition of still further exceptions and inroads. If there was a dominant view in Congress on the subject of regulation and modification, it is far more likely that Madison voiced it.¹⁷⁷ Boudinot's speech about congressional authority to modify powers granted to the President and Supreme Court seems an ill-advised, sloppy argument made in the zeal of battle.¹⁷⁸

Early American history supplies little reason to suppose that Congress enjoys the authority to regulate presidential power. A supreme English Parliament, which enacted numerous regulatory statutes, is an

¹⁷⁵ 1 ANNALS OF CONG. 526 (Joseph Gales ed., 1834).

¹⁷⁶ *Id.* at 463–64 (emphasis added).

¹⁷⁷ In *New Light on the Decision of 1789*, 91 CORNELL L. REV. (forthcoming July 2006), I argue that the removal debates do not reveal the existence of any majority clearly opposed to congressional regulation of the removal power. Given what transpired with respect to the attempts to create qualifications for offices in 1790, however, it seems that Madison's views were more likely dominant. See *supra* notes 171–73 and accompanying text.

¹⁷⁸ Boudinot's immediate aim was to bolster the argument that Congress could grant a power to remove through the Necessary and Proper Clause. He did not make this claim in the context of a bill that purported to modify how the Supreme Court or the President should exercise some constitutional grant of power. See DEBATES, *supra* note 174, at 947. Later, Boudinot seemed to support the notion that the Constitution itself granted the President a removal power and said nothing about whether Congress could "modify" presidential powers. See 1 ANNALS OF CONG. *supra* note 175, at 583.

inapt model for a Congress limited to enumerated powers and wholly subordinate to a Constitution. State legislatures in the Revolutionary Era often had a generic regulatory power, but only when the state constitutions expressly conveyed this power to the legislatures. The federal Constitution clearly lacks any such feature. When people discussed the federal Constitution in their conventions and in the press, they addressed the possibility that Congress might usurp power. Such discussions must have been premised on the notion that Congress lacked a generic regulatory power, else there would have been no occasion to worry about legislative encroachments. Finally, while early history after the Constitution's ratification contains some support for congressional regulation, in the main it stands opposed to such regulation. There was an early statute that specified qualifications for officers, arguably a regulation of the President's ability to nominate and appoint. Yet subsequent attempts to set similar qualifications were denounced as attempts to unconstitutionally regulate presidential power. Moreover, James Madison famously denounced legislative regulation of presidential power as inconsistent with the separation of powers.

C. The Peculiar Case of the Law Execution Power

Congress's ability to specify the means and manner of law execution merits separate discussion. Congress not only makes the laws that require persons and entities to do some things and to refrain from doing others, but it also decides whether there shall be governmental (executive) enforcement of particular laws and, importantly, how the executive must go about executing the laws. For instance, Congress might dictate that the executive ordinarily cannot use the military to enforce federal law.¹⁷⁹

In the absence of such legislative instructions, the President can decide these executive details himself. The President has the constitu-

¹⁷⁹ See *Posse Comitatus Act*, 18 U.S.C. § 1385 (2000) (prohibiting the use of armed forces to execute the laws). Of course, one could deny that Congress may dictate the means and manner in which the executive branch enforces the law. Presumably this understanding of congressional power envisions a sphere of executive discretion that Congress cannot invade or usurp. In other words, one might suppose that there is an irreducible core of executive discretion in law execution that Congress cannot regulate. This might mean that Congress could not "micromanage" via statute the executive branch's execution of federal laws.

As attractive as this conception might seem, it suffers from a couple of problems. First, as argued in the text, it seems that Congress can regulate executive enforcement as part of its substantive powers over taxation, commerce, patents, etc. When Congress requires the executive branch to investigate all potential tax cheats, it is exercising its powers over taxation. Second, from the beginning, Congress has regulated how the executive must execute federal law. It does not appear as if such regulation ever caused anybody to deny that (much less express doubts about whether) Congress may dictate the means and manner of federal law execution.

tional power to determine which laws ought to be enforced vigorously and which ought to be enforced more sparingly.¹⁸⁰ Moreover, the President can decide the best means of investigating and prosecuting lawbreakers.¹⁸¹ Given that Congress can preclude the President from making these decisions by drafting more detailed executive instructions in its statutes, it may seem as if Congress clearly can regulate the President's law execution power.

But this misconceives the nature of both Congress's lawmaking power and the President's law execution power. Congress's legislative authority encompasses the power to dictate the means of execution. The power to regulate commerce encompasses not only the authority to enact commercial rules, but also the ability to decide how the executive will enforce those rules. Legislating that a particular commercial statute should be enforced only on the rarest of occasions is a regulation of commerce. Similarly, providing that individuals should be prosecuted for tax evasion only upon first ceding them an opportunity to pay their back taxes (plus interest and penalties) is justifiable under Congress's power to raise taxes.

Congress's ability to specify the means and methods of law execution makes the law execution power a defeasible residual power, meaning that the President, as the wielder of the executive power, has the sole right to control whatever execution discretion Congress leaves in a statute. He does not have the absolute right to make particular law execution decisions, because Congress always can use its legislative authority to make those decisions itself. While the President can object on policy grounds (e.g., Congress should permit ample enforcement discretion), he has no grounds for constitutional complaint.

In contrast, none of Congress's substantive legislative powers permit Congress to specify the means and methods of exercising the other presidential powers. For instance, regulating the issuance of pardons or the appointment of officers can in no way be regarded as a regulation of commerce or the creation of a uniform rule of naturalization. Moreover, whereas the law execution power relies upon the existence of a law that specifies what must be executed and how, other presidential powers are not so circumstanced. The President can exercise the treaty power even in the absence of a statute. Accordingly, other presidential powers are not residual in the way the law execution power necessarily is.

Hence, congressional specification of the means and methods of law enforcement does not undermine the view that Congress gener-

¹⁸⁰ See U.S. CONST. art. II, § 1, cl. 1; *Allen v. Wright*, 468 U.S. 737, 793 (1984).

¹⁸¹ See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-90 (1999).

ally lacks the ability to regulate the President's powers. Congress does not have the right to regulate the President's law execution authority so much as it has the authority to use its grant of legislative power to dictate the means of execution. Because the President has but a defeasible residual power to execute the law, when Congress decides the means and methods of law execution, it does not encroach upon constitutionally designated presidential power at all.¹⁸²

Text, structure, and history indicate that Congress lacks a generic power to regulate presidential or other constitutional authorities. While the Constitution authorizes Congress to regulate particular powers in important ways, Congress lacks a wide-ranging power to treat the Constitution's allocations of powers as if they were merely default rules that are modifiable via statute. Accordingly, the President's powers are generally his to exercise as he wishes, subject to his critical need of funds and personnel from Congress, his ongoing need of public support, and the possibility of impeachment.

IV

(DE)FUNDING THE EXECUTIVE

As is well known, Congress funds the federal government. It establishes salaries and provides the funds that enable executive officers to execute their functions. Given this funding control, one might believe that Congress may exploit this power as a means of regulating the executive. For example, if Congress legislates that no funds can be used to pardon offenders, one might conclude that Congress has wholly precluded presidential pardons.

While Congress likely can decide which presidential powers it will help facilitate, it cannot go further and actually bar the exercise of any presidential powers.¹⁸³ A statute that bars the use of funds to pardon offenders cannot go further and completely bar the presidential issuance of pardons. Likewise, Congress cannot, in the guise of defunding the executive, bar vetoes of congressional bills.

Borrowing from Isaiah Berlin's taxonomy of rights might clarify this point.¹⁸⁴ The Constitution grants the President various "negative

¹⁸² Can Congress also decide whether laws may be executed independently of the President? Given the Constitution's grant of executive power to the President and the substantial evidence that the Constitution meant to create a single chief executive empowered to control law execution, there can be no reason to suppose that the President's role as chief executive can be stripped away from him. Though Congress can decide how the law ought to be executed, it cannot decide to oust the constitutionally designated chief executive.

¹⁸³ See *United States v. Klein*, 80 U.S. 128, 147-48 (1871).

¹⁸⁴ See ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 118-34 (1969).

rights," which neither Congress nor anyone else may limit or abridge, such as the rights to pardon individuals, to veto legislation, and to nominate officers. Yet, save for an irreducible salary, the Constitution does not grant the President any "positive rights" to the means necessary to vigorously utilize his constitutional powers. Concluding that Congress can curtail the generous support it voluntarily provides the executive does not mean, however, that Congress can go further and actually curtail presidential powers.

A. Text & Structure

The appropriations power is the power to authorize the expenditure of government funds.¹⁸⁵ Using its appropriations power, Congress establishes what funds will be available to help carry into execution the executive's various powers. Congress can grant funds to vet the qualifications and qualities of potential nominees and thereby facilitate the salutary exercise of the President's nomination power. Likewise, Congress can support the President's exercise of his treaty power by funding treaty negotiation expenses.

Although some have argued that Congress must fund "indispensable" presidential functions,¹⁸⁶ the better view is that Congress is under no obligation to use its appropriation power to fund the exercise of the President's constitutional powers. The Constitution nowhere compels Congress to do so. The Constitution generally does not require Congress to appropriate any funds. The conspicuous exceptions to this principle are the provisions obliging Congress to appropriate funds necessary to ensure a steady salary for each President¹⁸⁷ and nondiminishing salaries for federal judges.¹⁸⁸ Less-conspicuous exceptions include the obligation to hold a census every ten years¹⁸⁹ and the guarantee of state republican governments,¹⁹⁰ duties that arguably necessitate a congressional appropriation. There

¹⁸⁵ See U.S. CONST. art. I, § 9, cl. 7; *United States v. Lovett*, 328 U.S. 303, 306 (1946).

¹⁸⁶ Professor Stith, for example, specifically mentions the power to negotiate treaties and the power to receive ambassadors. See Stith, *supra* note 90, at 1351.

¹⁸⁷ See U.S. CONST. art. II, § 1, cl. 7.

¹⁸⁸ See *id.* art. III, § 1. The history of those provisions also suggests that they are exceptions to the general rule of legislative control of the fisc. Originally, colonial legislatures withheld salaries of both executive and judicial officers. If colonial legislatures could do this, it is hard to believe that they were obliged to fund the exercise of executive and judicial power. In the colonies, the general rule seems to have been that the legislatures were not obligated to fund anything, hence the perceived need for specific provision for executive and judicial salaries in the state and federal constitutions.

¹⁸⁹ See *id.* art. I, § 2, cl. 3; see Stith, *supra* note 90, at 1351 n.31.

¹⁹⁰ U.S. CONST. art. IV, § 4.

may be still other exceptions based on the Constitution's imposition of duties on Congress.¹⁹¹

Because the Constitution imposes no affirmative obligation on Congress to fund the exercise of presidential powers, Congress may refuse to appropriate funds that the President deems useful or even necessary to the exercise of presidential powers.¹⁹² Upset by the submission of unpopular treaties to the Senate, Congress can elect not to fund those who negotiate treaties on behalf of the President. By funding certain presidential powers and not others, Congress can undoubtedly affect the President's exercise of his powers. *Ceteris paribus*, the President will more likely vigorously exercise those powers that Congress has funded well.¹⁹³

Congress lacks the very different power to affirmatively bar the exercise of presidential powers. Because the appropriations power is an aspect of the Necessary and Proper Clause,¹⁹⁴ it is subject to the Clause's general constraints. If, as argued earlier, the Necessary and Proper Clause does not grant Congress the ability to regulate other governmental powers, the analysis does not change merely because Congress appropriates under the auspices of the Necessary and

¹⁹¹ For example, another such exception might be Congress's obligation to meet once a year. *See id.* art. I, § 4, cl. 2. If money is necessary to meet this obligation, Congress must try to appropriate funds for these expenses.

¹⁹² As mentioned earlier, some have noted that Congress must fund the President's exercise of certain indispensable presidential functions (e.g., negotiating treaties and receiving ambassadors). *See supra* note 186 and accompanying text. Others might argue that whenever the Constitution imposes a duty on the President (e.g., "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, and "preserve, protect and defend the Constitution," *id.* art. II, § 1, cl. 8), Congress must make sure the President has the means of fulfilling the duty.

That certain presidential powers might be indispensable—i.e., important, crucial, vital—does not mean that the President must have all the funds objectively necessary for their full exercise. While we might condemn Congress for failing to fully fund concededly indispensable powers, it does not follow that the Constitution obliges Congress to do so. Congress would not violate the Constitution if it failed to fund the Office of Pardon Attorney, for example.

The duties that the Constitution imposes upon the President do not impose funding obligations on Congress. Congress is under no duty to take care that its laws are faithfully executed; nor is it under a duty to assist the President to preserve, protect, and defend the Constitution. These clauses merely require the President to use whatever resources at his disposal to fulfill his duties. They do not require others to assist the President in the fulfillment of his duties. In other words, the President is to carry out his duties the best he can given the constraints of time, resources, and funding. When he does this, he fulfills his constitutional obligations.

¹⁹³ Even if the argument about the funding obligations of Congress is wrong (i.e., Congress must fund the exercise of some or all presidential powers), that error would not undermine the overall conclusion. If Congress must provide some affirmative funding to help carry into execution the executive power, that hardly strengthens the case that Congress may regulate the exercise of presidential powers.

¹⁹⁴ *See* Suth, *supra* note 90, at 1350 n.27.

Proper Clause. The appropriations power is not a backdoor means of regulating the executive.

If all this is true, what are we to make of appropriation statutes that seemingly regulate presidential powers? A statute that says, "No funds granted herein can be used to veto legislation" is best read to mean that the President cannot use the appropriated funds to veto. It does not actually forbid the exercise of the veto. A provision in an appropriations statute that more clearly provides, "Henceforth, the President may not veto legislation" is not a regulation of the use of funds, but instead an unconstitutional regulation of the President's veto power. Its location in an appropriations statute does not change its character.

Hence, there is a great difference between defunding the exercise of presidential powers and barring the exercise of presidential powers. While Congress might be able to refrain from funding the exercise of presidential powers, Congress cannot go further and statutorily forbid the President's personal exercise of his constitutional powers.¹⁹⁵

B. History

Early congressional appropriations undoubtedly affected the executive's exercise of his powers. For instance, the first appropriations act limited the monies available to fund civil executive personnel.¹⁹⁶ This obviously influenced the number of employees that each department might hire. Likewise, Congress set limits to the salaries that the

¹⁹⁵ Consistent with this analysis, all of the President's powers are exercisable without the use of appropriated funds. As a matter of text, none of the President's powers expressly turn on the availability of appropriations. The President can nominate individuals by merely notifying the Senate. Equipped with a pen and paper, a President can issue pardons, vetoes, and commissions. A learned President could draft a state of the union as well as proposed legislation. A tactful President could formulate and communicate the foreign policy of the United States. To fund the incidental expenses of employing his constitutional powers, the President may use his salary. It is less clear whether the President also may rely upon his personal wealth.

Of course, some of the President's most important powers do require funding for them to have much practical effect. The President could execute federal law himself, but he would not accomplish much. A solitary executive is a feckless law-enforcement executive. The same difficulties will afflict the President's foreign affairs powers. The President may be able to negotiate a treaty or two and correspond with some foreign courts, but he cannot represent the United States in all the capitals where it has vital interests.

In any event, the point is that none of the President's powers formally require any appropriation prior to their exercise. The President can exercise each of them, however incompletely, without the benefit of an appropriation. Hence, even though the appropriations power grants Congress influence over the executive's exercise of his powers, it does not permit Congress to actually regulate presidential powers.

¹⁹⁶ An Act Making Appropriations for the Service of the Present Year, ch. 23, § 1, 1 Stat. 95, 95 (1789).

President could pay his overseas diplomats,¹⁹⁷ thereby potentially making the postings less attractive to candidates. Both statutes affected who would serve in the executive branch and therefore influenced the President's exercise of his powers.

Yet early Congresses apparently never sought to regulate presidential powers through appropriations. While providing funds in general terms, they apparently never told the President what not to veto or what to tell other countries.¹⁹⁸ The lack of regulation in appropriation statutes is wholly consistent with the general (although not universal) absence of attempts to regulate the exercise of presidential powers. Early Congresses perhaps understood the difference between lawfully checking the executive by failing to provide means of support and unconstitutionally regulating the executive's exercise of powers.¹⁹⁹

The power of the purse gives Congress a check on presidential power. When Congress declines to fund the President's exercise of his constitutional powers, Congress expresses its discontent with his exercise of some presidential power and makes the future exercise of that power more difficult. Yet this ability to withhold funds is not the same as an authority to regulate presidential power. Not funding the Pardon Attorney or the Office of Management and Budget's Legislative Reference Division is most emphatically not the same as regulating the pardon or the veto power. In the guise of defunding the

¹⁹⁷ An Act Providing the Means of Intercourse Between the United States and Foreign Nations, ch. 22, § 1, 1 Stat. 128, 128 (1790).

¹⁹⁸ During the House debates, many Representatives denied that they were obliged to fund the implementation of the Jay Treaty. See CURRIE, *supra* note 170, at 213 n.62. In the course of the debate, Representative William Giles specifically claimed that the appropriations power permitted Congress to check the other branches. See *id.* at 213 n.59. The ability to deny funds necessary to implement a treaty was not an ability to regulate the treaty power. The denial of funds, by itself, could not impose any limit on what treaties might be negotiated and ratified. Rather, the House's chokehold on funds meant that any treaty requiring extensive funding would have to meet with the House's approval lest the House deny funding. Knowing this *ex ante*, the executive would make sure that the Treaty met with the House's approval. See *id.* at 213 (quoting Jefferson, who noted that prudence required advance consultation with the House when funding was required).

¹⁹⁹ There is the separate question of whether Congress may condition the receipt of funds on the exercise of some presidential power—e.g., “No funds for Executive Office of the President salaries unless the President grants a pardon to X.” For now, I sidestep whether Congress may induce the President to exercise his powers in a particular manner. Such statutes do not regulate presidential powers so much as they incentivize the executive to take particular actions. Such statutes are typical of the arrangements one expects between the branches, the only difference being that they are embodied in statutes rather than accomplished through informal agreements. For an argument that delegations of power statutorily conditioned upon particular exercises of presidential powers are unconstitutional, see Michael B. Rappaport, *Veto Burdens and the Line Item Veto Act*, 91 Nw. U. L. Rev. 771 (1997).

President, Congress cannot go further and actually regulate the President's exercise of his powers.

CONCLUSION

Presidential Powers is a great book for those who wish a survey of the current state of executive power. It covers all the basic issues: law execution, foreign affairs, privileges and immunities, the protective power, and the pardon power. Although one inevitably will disagree with some of Krent's conclusions, this does not detract from the book's ability to sift through vast amounts of material and make sense of it all. Scholars and students of presidential power should add this book to their collections.

This Review has focused on one shortcoming feature of *Presidential Powers*. Despite its discussion of congressional regulation of executive powers in specific contexts, the book never attempts a systematic analysis of the issue. This shortcoming is not unique to *Presidential Powers*, however. There do not appear to be any sustained analyses of whether and how the Constitution authorizes congressional regulation of presidential power.

Turning to this hitherto unexamined question, it is tempting to suppose that Congress can rein in an imperial or rogue President by regulating any and all presidential powers. Believe that the President has too much power over law execution? Grant someone else the power to superintend the execution of some set of laws. Suppose that the President has abused his pardoning authority? Regulate his pardon power by granting some third party a check on its use.

We should resist this temptation when the underlying authority derives from the Constitution. The Constitution nowhere specifically grants Congress the generic power to regulate constitutional powers. To the contrary, the Constitution grants Congress specific, enumerated powers that permit Congress to regulate the powers of other entities in rather limited circumstances. Moreover, the Necessary and Proper Clause, the only possible candidate for a generic power to regulate other constitutionally granted powers, is an unlikely source of such authority. When one limits, checks, or abridges some power, one does not help "carry into execution" that power.

These conclusions seem even more solid when looking to history for answers. Had the Constitution's makers sought to grant Congress a generic power to regulate the executive's powers, they had ready examples from the state constitutions. Many (but not all) state constitutions made their executive's powers subject to general regulation. The conspicuous failure to adopt such language coupled with the discussions of usurpation in the Constitution's drafting and ratification

debates suggest that people understood that Congress lacked a generic power to regulate the President's constitutional powers.

The appropriations power gives Congress a great deal of influence over the exercise of presidential powers. In particular, Congress decides whether and how to fund the exercise of these powers. For instance, Congress can make it easier for the President to prosecute criminals by providing district attorneys, or it can make naval deployments impossible by eliminating the Navy. What Congress cannot do is use the appropriations power as a means of regulating the president's constitutionally granted powers. Even though Congress might provide that no appropriated money will be spent reviewing pardon applications or issuing pardons, it cannot limit or bar presidential issuance of pardons. The power to decide whether to financially assist the President—the power to enact necessary and proper laws for carrying into execution the president's powers—should not be regarded as the equivalent of a power to regulate the exercise of constitutionally granted presidential powers.

To be clear, the argument is not that authorizing congressional regulation of executive power is so foolish or unheard of that no one would ever favor it. The state constitutions clearly prove otherwise. Nor is the claim that the Constitution hermetically seals the branches. In numerous ways, the Constitution clearly provides otherwise. Sometimes the Constitution creates exceptions to powers.²⁰⁰ Other times the Constitution permits Congress to regulate in limited ways.²⁰¹ And still other times, the Constitution requires the Senate's consent before the President takes action.²⁰² Instead, the claim is that Congress does not have a generic power to regulate the President's powers any more than the President has the generic authority to regulate the exercise of Congress's legislative powers.

This conclusion implies nothing about the actual scope of presidential powers. That is where far more vexing questions arise. Does the President have a right to remove executive officers? May the President make international agreements short of actual treaties? May the President wage war without first securing a congressional declaration? Whatever the answers to these questions, once one accepts that the Constitution lodges some power in the President, that power generally is indefeasibly his.

²⁰⁰ See, e.g., U.S. CONST. art. II, § 2, cl. 1 (stating that the President cannot grant pardons in impeachment cases).

²⁰¹ See, e.g., *id.* art. II, § 2, cl. 2 (indicating that Congress may vest the power to appoint inferior officers with the President, heads of department, and courts).

²⁰² See, e.g., *id.* (requiring that before ratifying a treaty or appointing a principal officer, the President must seek the Senate's advice and consent).

