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## A TAXONOMY OF PRESIDENTIAL POWERS

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### INTRODUCTION

Presidential powers are in the news like perhaps no other time in our nation's history.<sup>1</sup> As anyone following the headlines is well aware, the debate centers on the scope and features of various presidential powers, real and imagined. May the Commander-in-Chief start a war?<sup>2</sup> May the President intercept overseas communications in contravention of a statutory scheme that

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\* Thanks to Thomas J. McIntosh, Michael Ramsey, and Steven Smith for extremely helpful comments.

<sup>1</sup> See, e.g., Scott Shane & Adam Liptak, *Shifting Power to a President*, N.Y. TIMES, Sept. 30, 2006, at A1.

<sup>2</sup> See, e.g., Michael Powell, *Appeals Court Weighs Bush's War Power; Act of Congress Needed for Iraq Invasion, Suit Says*, WASH. POST, Mar. 12, 2003, at A14.

regulates such interceptions?<sup>3</sup> May the President (or, perhaps, *must* the President) ignore statutes he or she regards as unconstitutional?<sup>4</sup>

This short Essay adds nothing of substance to these recent debates. Instead, this Essay has a much less ambitious, but hopefully useful, object: introducing new descriptive terms and phrases in a bid to improve how scholars discuss presidential powers. The goal is to make it easier to express and to understand the claims and counterclaims often made about the sources and features of various presidential powers. Too often, scholars and politicians use somewhat confusing terminology, obscuring their assertions and arguments.<sup>5</sup> By supplying a taxonomy that scholars can use to clarify their claims, the Essay seeks to dispel the confusion that seems endemic to arguments about presidential power.

The proposed taxonomy reflects three general inquiries. First, what is the source of the presidential power: does the Constitution specifically grant the power; is the power part of the general grant of the executive power; or, does the power arise from other sources? The four categories envisioned and described in Part I are “specific powers,” “vesting clause powers,” “structural powers,” and “extra-textual powers.” Second, what are the potential checks on the presidential power: may statutes restrain the exercise of the power and, if so, in what way? The three categories, described in Part II, are “regulable powers,” “residual powers,” and “absolute powers.” Third, is the presidential power exclusive: may either Congress or the states exercise the same authority? The three proposed categories, described in Part III, are “horizontally concurrent powers,” “vertically concurrent powers,” and “exclusive powers.”

As noted, the Essay’s aim is not descriptive, much less normative, but reformative. In particular, the introduction of these various categories is not meant to promote or reflect any theory of presidential powers. For instance, one can recognize the utility of the phrase “vesting clause powers,” even if one rejects the claim that the grant of “executive power” cedes any powers.<sup>6</sup> Indeed, one can use the phrase “vesting clause powers” to *deny* the existence of such powers. Both those who favor and those who oppose broad conceptions of presidential power have good reason to standardize the discussion, so that the sometimes-obscure differences become more apparent, and hidden agreement becomes perceptible.

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<sup>3</sup> See, e.g., Editorial, *Unauthorized Snooping*, WASH. POST, Dec. 20, 2005, at A30.

<sup>4</sup> See, e.g., Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, at A1.

<sup>5</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646-47 (1952) (Jackson, J., concurring) (“Loose and irresponsible use of adjectives colors all nonlegal and much legal discussion of presidential powers. ‘Inherent’ powers, ‘implied’ powers, ‘incidental’ powers, ‘plenary’ powers, ‘war’ powers and ‘emergency’ powers are used, often interchangeably and without fixed or ascertainable meanings.”).

<sup>6</sup> See U.S. CONST. art. II, § 1, cl. 1.

## I. THE SOURCES OF PRESIDENTIAL POWERS

There has long been a vigorous debate amongst politicians and scholars whether Article II, Section 1's grant of "executive power" actually vests any powers in the President separate from those specifically granted by the rest of the Constitution.<sup>7</sup> The debate is as old as the Constitution itself, extending from the first Congress to the pages of modern law reviews.<sup>8</sup> Whatever one's views about the merits, the terms of the debate are in need of reform. Both the advocates and opponents of broad readings of presidential powers are in the unfortunate habit of referring to "inherent" and "unenumerated" presidential powers even though these adjectives obscure more than they describe.

A. *The Inadequacy of Current Descriptors and Suggestions for New Ones*

Many participants in debates about presidential powers assert the President does (or does not) have some "inherent" power.<sup>9</sup> The difficulty with such claims lies in the uncertainty arising from the use of "inherent." For instance, when a legal scholar asserts the President has an inherent power over foreign affairs<sup>10</sup> or to remove officers,<sup>11</sup> the scholar's contention has a latent and confusing ambiguity. The claim could mean one of many things.

First, the scholar could be arguing that anyone who is a "President" or a "Chief Executive" enjoys certain powers, such as removal authority. In other words, "Presidents" or "Chief Executives" inherently have such powers because of the positions they hold. For example, Presidents might be said to have an inherent power to "preside" and therefore "control," "be in charge," and "supervise." Similarly, Chief Executives might be said to be "decision-makers" or "directors" and therefore naturally have some sort of managerial relationship over others.

Second, someone might say the President has an inherent power over foreign affairs because of longstanding custom and practice. If Presidents have long decided which nations to recognize, some might assert the power has become an inherent presidential power. Similarly, if Presidents always have exercised a removal power of some sort, one might say the removal power is inherent in the Presidency.

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<sup>7</sup> Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. REV. 289, 305 (2007).

<sup>8</sup> For a historical discussion of the "Vesting-Clause Thesis" contained in a modern law review, see generally Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004). For a defense of the claim that the vesting clause vests powers, see generally Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701.

<sup>9</sup> See generally David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155 (2002).

<sup>10</sup> See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

<sup>11</sup> See, e.g., Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 907 (1983).

Third, the scholar invoking “inherent” presidential powers could be asserting merely that the grant of “executive power” (or some other power found in the Constitution’s text) encompasses foreign-affairs and removal authority. Arguably, this claim is quite different from the previous two claims. It says nothing about whether something inheres in the offices of “President” or “Chief Executive.” Nor does the claim assert that some power rests with the President simply because prior practice suggests as much. Rather, this third claim is just a standard assertion about what it means to grant the “executive power” or some other power. The claim maintains that the President enjoys certain powers because of some textual grant of power, not because he or she holds a certain office or title. This is no different from asserting that the ability to regulate navigation derives from the grant of commerce authority to Congress,<sup>12</sup> or from the assertion that the power to issue binding judgments in cases comes from the grant of judicial power to courts.<sup>13</sup> When discussing what grants of power mean, no one need speak of these grants as conveying “inherent” powers. For good reason, few would speak of the commerce power as “inherently” including authority over navigation.<sup>14</sup> Likewise, no one need speak of the grant of executive power as “inherently” including powers over foreign affairs and law enforcement.

If the word “inherent” is beset with these ambiguities, why do people persist in using the word as an adjective to describe certain presidential powers? I suppose the use stems from the desire to convey that the power being discussed is somehow essential, and is almost inseparable from the President. In much the way water is inherently wet, perhaps some want to convey the sense a certain power is so central to the Presidency that it is an inherent power.

The claim scholars and politicians sometimes make of “unenumerated” presidential powers breeds a similar confusion.<sup>15</sup> Once again, this could refer to the claim that Presidents have certain powers by virtue of their office, such that these powers are theirs notwithstanding the lack of any tether to a particular constitutional provision. Alternatively, unenumerated powers could refer to powers that *derive* from actual constitutional text, although the powers themselves are not specifically mentioned in the Constitution.

To see the ambiguity more clearly, consider the question whether the pardon power includes the power to remit fines.<sup>16</sup> On the one hand, it is possible to characterize the power to remit fines as an “unenumerated power” because the

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<sup>12</sup> See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

<sup>13</sup> See *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803).

<sup>14</sup> Cf. *Gibbons*, 22 U.S. (9 Wheat.) at 189, 197 (stating that the scope of the commerce power is “given by the language of the instrument which confers [it], taken in connexion with the purposes for which [it was] conferred” and concluding by way of deduction that “[t]he power of Congress . . . comprehends navigation, within the limits of every State”).

<sup>15</sup> See generally Michael Fromkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994).

<sup>16</sup> See *The Laura*, 114 U.S. 411, 413-14 (1885).

Constitution does not specifically grant a remission power. On the other hand, one can characterize this as part of an “unenumerated pardon power” because one might suppose that the pardon power includes the authority to remit fines, even though the pardon power does not specify as much.

Take a more relevant example: When someone speaks of “unenumerated executive powers,” as an Office of Legal Counsel memo did,<sup>17</sup> does that mean there are certain presidential powers not traceable to any constitutional text, or does that mean there are certain presidential powers derivable from the grant of “executive power”? It is clear the memo meant to reference the grant of executive power.<sup>18</sup> But others use the phrase to refer to the idea that the President has broad and diffuse powers not tethered to any text in the Constitution. Typically, the latter use of the phrase has more ominous overtones.

Of course, this discussion about unenumerated presidential powers parallels inquiries into other powers. Does Congress have an unenumerated power to regulate navigation, not tethered to any constitutional text? Or does Congress have an unenumerated power to regulate navigation that flows from the enumerated commerce power?<sup>19</sup> Likewise, does the federal judiciary have a free-floating, unenumerated power to hold individuals in contempt of court, or does the unenumerated contempt power derive from the enumerated judicial power?<sup>20</sup>

Because discussions of “inherent” and “unenumerated” powers are shrouded in ambiguity, I urge presidential scholars to banish these adjectives from their scholarship. In their place, I propose categories meant to dispel the uncertainty. When discussing potential sources of the President’s constitutional powers, scholars should instead speak of “specific powers,” “vesting clause powers,” “structural powers,” and “extra-textual powers.”

### 1. Specific Powers

Article II, Section 2 and Article I, Section 7 grant the President various “specific powers,” including the veto, appointment, and treaty powers. These powers are specific not in the sense that they are precise or unambiguous; rather, these powers are specific in the sense that they are particularly listed. Calling the various powers found in Article I, Section 7 and Article II, Section 2 “specific powers” is merely a matter of labeling, for no normative consequences follow from this description. More generally, the phrase “specific powers” is not meant to either favor or disfavor particular conceptions of presidential powers. For instance, people can agree the

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<sup>17</sup> The President’s Constitutional Authority To Conduct Military Operations Against Terrorists and Nations Supporting Them, Op. Off. Legal Counsel (Sept. 25, 2001), available at <http://www.usdoj.gov/olc/warpowers925.htm>.

<sup>18</sup> See *id.*

<sup>19</sup> See *supra* note 14 and accompanying text.

<sup>20</sup> *Chambers v. NASCO*, 501 U.S. 32, 44 (1991).

Commander-in-Chief Clause grants a specific power,<sup>21</sup> even while agreeing to disagree about the scope of the power attached to the title.

## 2. Vesting Clause Powers

“Vesting clause powers” include all those powers said to arise from Article II, Section 1’s vesting of the “executive power.”<sup>22</sup> Powers sometimes said to flow from the vesting of executive power are the powers to remove executive officers,<sup>23</sup> to execute the law,<sup>24</sup> and to exercise certain authority in emergency situations.<sup>25</sup> Once again, nothing necessarily follows from the label. One can use the phrase “vesting clause powers” even while utterly denying the “executive power,” as used in Article II, actually grants anything.<sup>26</sup> In other words, one can sensibly deny that the President has any vesting clause powers on the grounds that the words “executive power” vest no power.

Furthermore, although the idea that the vesting clause grants powers is often associated with originalists, one need not be an originalist to believe there are vesting clause powers. One might believe the original Constitution’s Vesting Clause granted no powers. Nonetheless, one might endorse the idea of vesting clause powers if one concludes the Vesting Clause has been imbued with additional meaning over the course of the last 200 years. For instance, even if one thought the removal power was not a vesting clause power in 1789, one might suppose it has become so because of a long history of presidential removals. Indeed, Justice Felix Frankfurter’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* spoke of successive practices adding a “gloss” on Article II’s “executive power” language.<sup>27</sup> Justice Frankfurter clearly contemplated the possibility of vesting clause powers not grounded on originalist foundations.

## 3. Structural Powers

Inferences and intuitions about sound constitutional arrangements provide the basis for what we might call presidential “structural powers.” To be sure,

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<sup>21</sup> See U.S. CONST. art II, § 2, cl. 1.

<sup>22</sup> *Id.* art II, § 1, cl. 1.

<sup>23</sup> See, e.g., Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1816-17 (2006).

<sup>24</sup> See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 570-81 (1994).

<sup>25</sup> See, e.g., Lawson, *supra* note 7, at 304-10.

<sup>26</sup> See, e.g., Bradley & Flaherty, *supra* note 8, at 679-88.

<sup>27</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (Frankfurter, J., concurring) (1952) (“In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”).

the Constitution's text, broadly understood, constitutes the basis for claims of structural power, yet there is no assertion that a particular provision or provisions grant the power in question. The Supreme Court's conception of executive privilege in *United States v. Nixon*,<sup>28</sup> and Professors Akhil Amar's and Neal Katyal's idea of a temporary presidential immunity from private suits,<sup>29</sup> can be seen as structural powers. Neither seems to suggest the presidential privilege in question arose from any particular constitutional provision; rather, each suggests that the privilege arose from considerations of overall constitutional structure.

#### 4. Extra-Textual Powers

Certain presidential powers might be said to arise from sources outside the Constitution's text and structure. For instance, one might imagine the President has foreign affairs powers not derivable from anything in the Constitution. *United States v. Curtiss-Wright Export Corp.* famously suggested as much when it asserted the federal government's foreign affairs authority came not from the Constitution itself, but from the very nature of national sovereignty.<sup>30</sup> The opinion then concluded the President was the sole organ of communication with foreign nations.<sup>31</sup> Whether *Curtiss-Wright* offered a sound argument is beside the point; the point is that the Court claimed the President had an extra-textual power to serve as the nation's organ of communication with foreign nations, a power grounded neither in text nor structure.

#### B. *Reconsidering the Removal Power*

To see how the suggested terminology might clarify existing debates, consider the President's power to remove executive officials. Rather than talking about an inherent or unenumerated power to remove – claims that often obscure more than they reveal – scholars who discuss removal can discuss whether the removal power is a specific, vesting clause, structural, or an extra-textual power. A specific power argument might be that the power to appoint carries with it the power to remove, an assertion Chief Justice Taft made in *Myers v. United States*.<sup>32</sup> Alternatively, one might assert the removal power is a vesting clause power because one believes the grant of executive power

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<sup>28</sup> 418 U.S. 683, 711 (1974) (“Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.”).

<sup>29</sup> Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 713-15 (1995) (“The structural constitutional logic undergirding temporary immunity applies with even greater force to the President.”).

<sup>30</sup> See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319-20 (1936).

<sup>31</sup> *Id.*

<sup>32</sup> See 272 U.S. 52, 119-20 (1926).

includes the authority to remove executive officials. This claim dates back to the Decision of 1789.<sup>33</sup> Removal would be a structural power if one concluded that the President has (or ought to be regarded as having) the power to remove executive officers as a means of fulfilling his duties regarding law enforcement and defense of the Constitution. Finally, the removal power might be an extra-textual power insofar as the power is seen as resting on neither text nor structure, but on conceptions of national sovereignty of the sort that undergirded *Curtiss-Wright*.

Once again, nothing follows from discussing removal using these phrases. One may contend the removal power arises from one or more of these types of claims, as many have done for centuries. Alternatively, one can deny the President has any removal power by rejecting the specific, vesting clause, structural, and extra-textual power arguments that might be made on behalf of such authority.

## II. THE POTENTIAL FOR CONGRESSIONAL CHECKS ON PRESIDENTIAL POWERS

When speaking of presidential powers, there is always the question of when, if ever, Congress may check a presidential power. The possible relationships between Congress and the President suggest three categories of presidential power: regulable, residual, and absolute.

### A. *Regulable Powers*

Regulable powers are those presidential powers Congress may impede or constrain through legislation. For instance, though one might suppose that the Constitution grants the President a removal power, one also might conclude that Congress can enact a statute requiring the President to obtain Senate or House approval prior to removing any officer. Such a view regards the removal power as a regulable power. Indeed, Congresses in the early nineteenth century sometimes required the Senate's concurrence prior to presidential removals taking effect, perhaps evincing a view of the removal power as a regulable power.<sup>34</sup> Similarly, one might imagine that, though the President has the power to nominate, Congress can limit the power to nominate by requiring that nominees meet various education, experience, or partisanship qualifications. For example, the first Congress required the Attorney General

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<sup>33</sup> For a discussion of the Decision of 1789, see generally Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006).

<sup>34</sup> *But see Myers*, 272 U.S. at 164-77 (discussing nineteenth-century limitations on the removal power and ultimately finding the limits unconstitutional). It is also possible to regard statutes requiring Senate concurrence for removals as reflecting the very different view that the removal power was not regulable by statute but was already checked by the Constitution itself. In other words, those who passed statutes stating that removals could only occur with the Senate's concurrence may not have been checking the removal power as much as they were advocating the view that the Constitution itself granted the President a removal power only exercisable with the Senate's concurrence.

be “a meet person, learned in the law.”<sup>35</sup> This requirement perhaps reflected the view that the nomination power was a regulable power. Finally, one might imagine Congress could enact a statute providing that the President could not recognize governments or nations without some accompanying explanation. If one believed Congress could impose such constraints, one would have to suppose the recognition power was a regulable power.

### B. *Residual Powers*

In contrast to regulable powers, residual powers are those presidential powers that exist in the President’s hands until such time as Congress exercises them. The powers are residual in the sense that congressional statutes exercising the same power leave the President a residue of powers that the President may exercise.<sup>36</sup> If a power is a residual power, the President cannot act inconsistently with the relevant statutes because Congress has superseding constitutional authority over the area. In the federalism arena, state control over federal elections is a residual power because Congress can enact any rules it wishes.<sup>37</sup> Likewise, the rather limited state power to impose duties and imposes on imports and exports is a residual power because the power is subject to congressional control.<sup>38</sup>

Two presidential powers that some might regard as residual are the President’s power to specify the means of law enforcement and the President’s power as Commander-in-Chief. If federal statutes authorize and provide funds for a federal building’s construction, without specifying more, the Chief Executive might be thought to have authority to determine how the building ought to look, what functions it will serve, where it will be built, etc. On the other hand, if Congress makes those determinations by statute, the President must honor the details enacted by Congress. As Congress becomes more specific in its statutes, the President’s law enforcement/execution discretion becomes more circumscribed.

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<sup>35</sup> Judiciary Act of 1789 § 35, ch. 20, 1 Stat. 73, 93.

<sup>36</sup> My colleague Michael Ramsey and I previously described the President’s executive power over foreign affairs as a residual power because the President only had foreign affairs powers that were not otherwise ceded to Congress in Article I or were shared with the Senate in Article II. See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 253-54 (2001). I am using “residual power” in a different sense here to cover those powers the President can exercise at the sufferance of Congress. In other words, these are powers where the President has a generic power to do something, save for when Congress has exercised, and hence withdrawn from the President, some portion of the power.

<sup>37</sup> See U.S. CONST. art I, § 4, cl. 1.

<sup>38</sup> *Id.* art I, § 8, cl. 1.

Similarly, on some accounts, the President's power as Commander-in-Chief is subject to statutory constraints limiting his discretion.<sup>39</sup> If Congress provides that soldiers cannot fight overseas or that certain vessels can only be used for coastal defense, then the Commander-in-Chief must honor those constraints. This is true despite the President's ability to shift soldiers and deploy vessels as he sees fit in the absence of such limitations.

Saying a presidential power is residual necessarily implies Congress can exercise the same power and trump presidential authority in the area. Saying a presidential power is regulable carries no such necessary implication. To better see the difference between regulable and residual powers, consider various permutations.

For instance, if Congress could require the President to nominate individuals who meet particular qualifications, but could not itself nominate, the nomination power would be a regulable but not a residual power. The nomination power would be a residual power and not a regulable power if Congress could make certain nominations to federal office itself (say department heads), but could not impose constraints on presidential nominations to any offices left to the President. Finally, the nomination power would be a residual and regulable power if Congress could both choose to nominate and require the President to consider only nominees with certain qualifications.

### C. *Absolute Powers*

As the name suggests, absolute powers are those the President can exercise without any checks or constraints. Congress can neither exercise absolute powers itself nor can it regulate the President's exercise of them. Hence a power is an absolute power only if it is neither regulable nor residual. One plausible candidate for an absolute power is the President's pardon authority. In the wake of President Clinton's controversial pardons, scholars and politicians plausibly concluded that, short of a constitutional amendment, there was no way of constraining the President's ability to pardon.<sup>40</sup> If the pardon power is an absolute power, the President could grant the equivalent of a "get out of jail free" card to the entire federal prison populace and there would be nothing Congress could do, either before or after the fact, to regulate or constrain the President's ability to pardon.

Others have claimed the Commander-in-Chief power is absolute, arguing Congress cannot pass statutes limiting the President's ability to issue orders to

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<sup>39</sup> See Reid Skibell, *Separation-of-Powers and the Commander in Chief: Congress's Authority To Override Presidential Decisions in Crisis Situations*, 13 GEO. MASON L. REV. 183, 213-17 (2004).

<sup>40</sup> See, e.g., Gregory C. Sisk, *Suspending the Pardon Power During the Twilight of a Presidential Term*, 67 MO. L. REV. 13, 18-22 (2002).

the troops under his command.<sup>41</sup> One might similarly believe the President has the absolute ability to negotiate whatever treaties the President wishes, even as the Senate might reject some or all of them.

The phrase “absolute power” serves as a better substitute for the phrase “plenary power,” which has a rather uncertain meaning. Sometimes the adjective “plenary” is used to suggest a power is absolute; other times “plenary” is used to suggest a power is complete or sweeping in some way. Given this ambiguity, scholars ought to eschew “plenary,” and should use “absolute” on the theory that the latter is far less confusing.

#### D. *Implications*

Again, these categories do not support any particular normative view about the features of various presidential powers. Consider the President’s power to make treaties. One might imagine the power is regulable by statute. Indeed, a nineteenth-century Congress enacted a statute barring the President from making treaties with Indian tribes.<sup>42</sup> Moreover, one might suppose the treaty power is residual if Congress could make treaties by statute and thereby preclude the President from making treaties over the same subjects. Finally, one might argue the treaty power is absolute, suggesting that even though the Senate can reject a treaty and thereby prevent its ratification, Congress cannot enact additional checks or assume the treaty power itself. What is true for the treaty power is true for other presidential powers as well; scholars can use the same categories to describe the President’s various powers or to refute particular conceptions of presidential power.

### III. THE POTENTIAL FOR OVERLAPPING PRESIDENTIAL POWERS

The Constitution occasionally makes clear that certain powers are exclusive. Indeed, Article I has such language in numerous places.<sup>43</sup> The absence of such language in Article II raises the question of the extent to which presidential powers are exclusive or concurrent.

#### A. *Horizontally Concurrent Powers*

Horizontally concurrent powers are those powers both Congress and the President can exercise. Congress exercises its power by statute, with the President’s concurrence or over his veto; the President exercises his or her power in the manner specifically provided by the Constitution. For instance, some might adopt the view that Congress can grant a statutory amnesty for violations of federal law. This view supposes the President and Congress have

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<sup>41</sup> See, e.g., Robert J. Delahunty & John C. Yoo, *The President’s Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL’Y 487, 488-97 (2002).

<sup>42</sup> See Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566.

<sup>43</sup> See, e.g., U.S. CONST. art. I, § 3, cl. 6; *id.* art. I, § 8, cls. 1, 17.

horizontally concurrent powers to grant general pardons. Elsewhere, I have posited that both the Congress and the President may remove executive officers,<sup>44</sup> thus making removal a horizontally concurrent power. Many also seem to regard Congress as having the ability to demand the opinions of the heads of departments in much the same way the President may demand their opinions.<sup>45</sup>

Horizontally concurrent powers differ from residual powers in that congressional exercise of a horizontally concurrent power does not constrain the President's exercise of the same power. If removal is a horizontally concurrent power, then Congress can remove officers even if the President wants the officer to remain. Likewise, the President might remove officers even if Congress wishes them to remain in place.

Thus, in contrast to residual powers, the exercise of a concurrent power does not preclude the exercise of the power by another entity (or entities) also enjoying the concurrent power. On the one hand, if the power to control military operations is a residual power, the President has whatever power over military operations Congress elects not to exercise. But, if the power to control military operations is concurrent, vested with both Congress and the President, then the military must follow the most recently issued set of instructions relating to military operations, whoever might issue them.<sup>46</sup>

#### B. *Vertically Concurrent Powers*

One also might imagine certain presidential powers are vertically concurrent, being held both by the President and some branch of state governments. While, it seems unlikely any of the powers found in Article II, Section 2 are vertically concurrent,<sup>47</sup> consider various potential vesting clause powers. For example, if the President has foreign affairs powers arising from the Vesting Clause, state legislatures or their executive counterparts might likewise possess some of the powers the President enjoys in this arena. My colleague Michael Ramsey has noted that, under the Constitution, States may make international compacts and agreements with the consent of Congress. He has further argued States have the ability to make non-binding foreign policies about the desirability of religious freedom, democracy, child labor, etc.<sup>48</sup>

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<sup>44</sup> Prakash, *supra* note 23, at 1844-45.

<sup>45</sup> See, e.g., Peter L. Strauss, *Overseer, or "The Decider"?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 727 (2007).

<sup>46</sup> Given that the President could immediately and rather effortlessly countermand any statutory commands issued by Congress, it seems likely the power to direct military operations is not a horizontally concurrent power.

<sup>47</sup> For instance, it is rather hard to imagine that either state legislatures or executives have the power to get written opinions from federal executives or enjoy the authority to nominate individuals for federal office. It seems clear the states have no power over such matters.

<sup>48</sup> See MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 259-82 (2007).

Professor Ramsey's claims could be recast as an assertion that some of the President's foreign affairs powers are vertically concurrent. While the federal executive can make treaties (with the Senate's supermajority consent), compacts, and agreements, some entity at the state level also can make compacts and agreements. Likewise, while the President arguably can make non-binding foreign policy for the entire United States, someone at the state level, either the executive or the legislature, presumably can make non-binding foreign policy for the particular state.<sup>49</sup>

### C. *Exclusive Powers*

"Exclusive powers" are exclusive precisely because they are neither horizontally nor vertically concurrent. For instance, if one concludes the President has the sole power to nominate individuals to federal offices, the power to nominate has no horizontal or vertical concurrence. Similarly, if one concludes neither Congress nor the states can make any treaties,<sup>50</sup> then the President's power to make treaties, constrained as it is by the requirement of Senate consent, is an exclusive power.

### D. *Implications*

Some examples of each type of power might be useful. If one imagines the President has the exclusive power to serve as Commander-in-Chief of the entire armed forces, then the power flowing from the title is horizontally and vertically exclusive. In a more complicated arrangement, if only the President can make executive agreements for the federal government, but state officials (either legislative or executive) can make non-treaty agreements on behalf of their states (at least where Congress permits), then the power to make executive agreements is horizontally exclusive but vertically concurrent. Finally, if one believes Congress can enact amnesties for federal offenses, but no state entity can pardon federal offenses, then the pardon power is horizontally concurrent but vertically exclusive.

## CONCLUSION

Some might think a taxonomy of presidential powers is precisely what we, as a nation, do not need. In an era of supposedly inflated claims of presidential power, far better to have a sound sense of the scope of presidential and congressional powers than to spend precious time thinking about how to discuss those powers. There is something to be said for this view.

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<sup>49</sup> To be sure, the powers are not completely concurrent. While the President can make international agreements and foreign affairs policy for the entire United States, officials within a state only have power to make such decisions for a particular state. Yet if one compared the President to the entire foreign policy apparatus of all the states, perhaps one would conclude that the President's power to make non-binding foreign policy and international agreements is horizontally concurrent.

<sup>50</sup> U.S. CONST. art. I, § 10, cl. 1.

Still, if we cannot easily make sense of sophisticated, and sometimes complex, claims about presidential powers, then we make any debate over these powers rather difficult to follow. To be sure, people will have a sense of the overall claim – the President has broad power or he has narrow authority – but people will likely miss some nuances. Whatever one’s sense of the scope of presidential and congressional powers, one can use the terminology introduced here to better understand the possible contours of presidential powers and to more clearly convey one’s theories.

Having said all this, it probably is wishful thinking to imagine one can standardize discussions via a suggested taxonomy of presidential powers. Though scholars introduce new terminology all the time, the newfangled terms and phrases typically have the shelf-life of a banana. Moreover, even if scholars embrace the terminology, they might decline to adopt the meanings I have proposed for the various phrases. If so, we will be at much the same place we are at now, where terms like “inherent,” “unenumerated,” and “plenary” are used in ways that often confuse more than they enlighten. Even worse, we would have still more terms with no common meaning, thus making it even more difficult to understand claims about presidential powers. Hopefully, this proposed taxonomy of presidential powers does not have the unintended consequence of making discussions about such powers even more opaque.