

Sec. 3—Legislative, Diplomatic, and Law Enforcement Duties of the President

charge of such duty? In the debate in the House in 1789 on the location of the removal power, Madison argued that it ought to be attributed to the President alone because it was “the intention of the Constitution, expressed especially in the faithful execution clause, that the first magistrate should be responsible for the executive department,” and this responsibility, he held, carried with it the power to “inspect and control” the conduct of subordinate executive officers. “Vest,” said he, “the power [of removal] in the Senate jointly with the President, and you abolish at once the great principle of unity and responsibility in the executive department, which was intended for the security of liberty and the public good.”⁷¹⁸

But this was said with respect to the office of the Secretary of State, and when shortly afterward the question arose as to the power of Congress to regulate the tenure of the Comptroller of the Treasury, Madison assumed a very different attitude, conceding in effect that this office was to be an arm of certain of Congress’s own powers and should therefore be protected against the removal power.⁷¹⁹ And in *Marbury v. Madison*,⁷²⁰ Chief Justice Marshall traced a parallel distinction between the duties of the Secretary of State under the original act which had created a “Department of Foreign Affairs” and those which had been added by the later act changing the designation of the department to its present one. The former were, he pointed out, entirely in the “political field,” and hence for their discharge the Secretary was left responsible absolutely to the President. The latter, on the other hand, were exclusively of statutory origin and sprang from the powers of Congress. For these, therefore, the Secretary was “an officer of the law” and “amenable to the law for his conduct.”⁷²¹

Administrative Decentralization Versus Jacksonian Centralism.—An opinion rendered by Attorney General Wirt in 1823 asserted the proposition that the President’s duty under the Take Care Clause required of him scarcely more than that he should bring a criminally negligent official to book for his derelictions, either by removing him or by setting in motion against him the processes of impeachment or of criminal prosecutions.⁷²² The opinion entirely overlooked the important question of the location of the power to interpret the law, which is inevitably involved in any effort to enforce it. The diametrically opposed theory that Congress is unable to vest any head of an executive department, even within the field of Con-

⁷¹⁸ 1 ANNALS OF CONG. 495, 499 (1789).

⁷¹⁹ Id. at 611–612.

⁷²⁰ 5 U.S. (1 Cr.) 137 (1803).

⁷²¹ 5 U.S. (1 Cr.) at 165–66.

⁷²² 1 Ops. Atty. Gen. 624 (1823).