VOLUME 136 MAY 2023 NUMBER 7

HARVARD LAW REVIEW

ARTICLES

THE EXECUTIVE POWER OF REMOVAL

Aditya Bamzai & Saikrishna Bangalore Prakash

CONTENTS

THE EXECUTIVE POWER OF REMOVAL

Aditya Bamzai[*] *& Saikrishna Bangalore Prakash*[**]

Whether the Constitution grants the President a removal power is a longstanding, far-reaching, and hotly contested question. Based on new materials from the Founding and early practice, we defend the Madisonian view that the "executive power" encompassed authority to remove executive officials at pleasure. This conception prevailed in Congress and described executive branch practice, with Presidents issuing commissions during pleasure and removing executive officers at will. While some Justices and scholars assert that Congress has broad legislative power to curb executive removals, their reading leads to a host of troubles. If, as some argue, Congress can limit the grounds for a presidential removal, what prevents Congress from likewise limiting the grounds for executive pardons, judicial judgments, and impeachment removals? The far-reaching legislative power that some scholars advance cannot be cabined to presidential removals. We also respond to a number of judicial and scholarly critiques, many grounded in claims about early statutes and practices. Though valuable, these critiques misunderstand or ignore certain practices, sources, and key episodes, like the events surrounding Marbury v. Madison*. There was a widespread consensus that the President had constitutional power to remove, and early laws did not limit, much less bar, presidential removal of executive officers.*

INTRODUCTION

The assertion that Presidents enjoy a constitutional power to remove executive officers implicates one of the oldest constitutional disputes. From debates in the First Congress, to President Andrew Jackson's Bank War, to President Andrew Johnson's impeachment, to the firing of FBI Director James Comey and the criminal investigation of President Donald Trump, removal has played an outsized role in the separation of powers and in the political disputes of the day. The issue's centrality is self-evident, for a President with removal power may direct the vast federal bureaucracy that conducts law execution, military affairs, and foreign relations. Without removal, there is no unitary, responsible Chief Executive.

In recent years, the Supreme Court has reexamined this age-old issue, asking both whether the President has a power to remove and under what circumstances Congress may constrain that power. In three

---

[*] Martha Lubin Karsh and Bruce A. Karsh Bicentennial Professor of Law, University of Virginia.

[**] James Monroe Distinguished Professor of Law, Albert Clark Tate Jr. Professor of Law, and Miller Center Senior Fellow, University of Virginia. For helpful comments and encouragement, we owe thanks to Akhil Amar, Divya Bamzai, Robert Glicksman, John Harrison, John Manning, Michael McConnell, Martha Minow, Richard Murphy, Robert Post, Rashmi Prakash, Michael Ramsey, Michael Rappaport, Stephen Sachs, Adam White, Ilan Wurman, and the many participants in the Harvard Law School's Public Law Workshop and the Scalia Law School's C. Boyden Gray Center Roundtable on Agency Independence. Thanks to the University of Virginia for their financial support. Gratitude for excellent research assistance to Barrett Anderson, Christopher Baldacci, Niccolo Beltramo, Eddie Colombo, Elizabeth Fritz, Janessa Mackenzie, and Michael Patton. Thanks to colleagues at the University of Virginia Law Library for superb support. Finally, gratitude to the editors of the *Harvard Law Review* for their splendid edits and helpful queries.

opinions — *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[1] *Seila Law LLC v. Consumer Financial Protection Bureau*,[2] and *Collins v. Yellen*[3] — the Court endorsed the traditional view that the Constitution grants the President the power to remove.[4] Even the dissents did not deny the point, at least not in toto.[5] The Court also evinced marked skepticism about congressional authority to limit removal.[6] Though the Court had sanctioned for-cause protections,[7] it insisted in *Free Enterprise Fund* that the Constitution forbids *double* for-cause protections, where multiple layers of officers enjoy such protection within a single agency.[8] And the Court held that while Congress can grant for-cause protections to the plural leadership of *certain* agencies,[9] it cannot grant such shields to a single executive officer in charge of an agency.[10]

The Court has overturned no precedent.[11] Nonetheless, it seems keen to prune (or root out) cases like *Humphrey's Executor v. United*

---

[1] 561 U.S. 477 (2010).

[2] 140 S. Ct. 2183 (2020).

[3] 141 S. Ct. 1761 (2021).

[4] *See Free Enter. Fund*, 561 U.S. at 513–14 ("The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties."); *Seila L.*, 140 S. Ct. at 2191–92 ("The President's power to remove . . . follows from the text of Article II . . . ."); *Collins*, 141 S. Ct. at 1784 ("The President's removal power . . . helps the President maintain a degree of control over the subordinates he needs to carry out his duties as the head of the Executive Branch . . . .").

[5] *See, e.g.*, *Free Enter. Fund*, 561 U.S. at 516 (Breyer, J., dissenting) (noting that while "Congress sometimes may . . . limit the President's authority to remove an officer," the separation of powers "guarantees the President the authority to dismiss certain Executive Branch officials at will"); *Seila L.*, 140 S. Ct. at 2225 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (approving "limits on the President's removal power over heads of agencies" but not denying the existence of a "presidential removal power"); *Collins*, 141 S. Ct. at 1803 (Sotomayor, J., concurring in part and dissenting in part) ("Where Congress is silent on the question, the general rule is that the President may remove Executive Branch officers at will." (citing Myers v. United States, 272 U.S. 52, 126 (1926))).

[6] *See Collins*, 141 S. Ct. at 1787 ("[T]he Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer." (quoting *Seila L.*, 140 S. Ct. at 2205)).

[7] *E.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935); Morrison v. Olson, 487 U.S. 654, 693–96 (1988).

[8] *Free Enter. Fund*, 561 U.S. at 484 ("[M]ultilevel protection from removal is contrary to Article II's vesting of the executive power in the President.").

[9] *Seila L.*, 140 S. Ct. at 2199–200.

[10] *Id.* at 2207.

[11] *See id.* at 2198–200 (noting that *Free Enterprise Fund* "left in place," *id.* at 2198, the holdings of *Humphrey's Executor v. United States*, 295 U.S. 602, and *Morrison v. Olson*, 487 U.S. 654). For a critique of judicial enforcement of the separation of powers, see generally Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020 (2022).

While Professors Bowie and Renan see something amiss in enforcement of the separation of powers, the idea that the courts would engage in judicial review in this area is longstanding. For instance, during the removal debate of 1789, several representatives observed that the courts could decide whether the President had a removal power. *See* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 978 n.363 (2003).

States[12] and *Morrison v. Olson*.[13] Its recent opinions have extolled presidential supervision of the bureaucracy.[14] They have characterized the "independent agencies" as executive and have rejected the notion that these agencies exercise quasi-legislative or quasi-judicial powers.[15] According to the Court, agencies like the Securities and Exchange Commission (SEC), the Consumer Financial Protection Bureau (CFPB), and the Federal Housing Finance Agency (FHFA) are executive through and through.[16]

In dissent in *Seila Law*, Justice Kagan wrote a spirited defense of for-cause protections, claiming that Congress may limit presidential removals.[17] The Court's opinions also inspired a deluge of antiunitarian scholarship, much of which focused on early practices.[18] Call these

---

[12] 295 U.S. 602 (1935).

[13] 487 U.S. 654 (1988).

[14] *See Seila L.*, 140 S. Ct. at 2203 ("The President 'cannot delegate . . . the active obligation to supervise . . . ' because Article II 'makes a single President responsible for the actions of the Executive Branch.'" (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496–97 (2010))).

[15] *See Free Enter. Fund*, 561 U.S. at 498 (concluding that the Public Company Accounting Oversight Board, an agency under the Securities and Exchange Commission, exercises "executive power"); *Seila L.*, 140 S. Ct. at 2201 (describing the Consumer Financial Protection Bureau as an "independent agency . . . vested with significant executive power"); Collins v. Yellen, 141 S. Ct. 1761, 1782 (2021) (noting that even though the statute describes the Federal Housing Finance Agency as an "independent agency," that "does not necessarily mean that the Agency is 'independent' of the President").

[16] The Court's assertions echoed, in part, scholarship arguing that the Article II Vesting Clause vests power to execute the law and power to remove. *See, e.g.*, Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1169 n.75 (1992); Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 991 (1993); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 593–99 (1994); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 703–05.

[17] *Seila L.*, 140 S. Ct. at 2227–28 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part). Justice Breyer did the same in *Free Enterprise Fund*, saying that the Court's judgment and opinion was "wrong — very wrong." 561 U.S. at 548 (Breyer, J., dissenting). In *Collins*, Justice Sotomayor contended that the majority was "far too eager in recent years to insert itself into questions of agency structure best left to Congress." 141 S. Ct. at 1809 (Sotomayor, J., concurring in part and dissenting in part).

[18] *See, e.g.*, Jed Handelsman Shugerman, *Presidential Removal: The* Marbury *Problem and the Madison Solutions*, 89 FORDHAM L. REV. 2085, 2090 (2021) (positing that the Founders believed in an "anti-unitary" theory of the Executive where "removal power was mixed and shared between the legislature and the executive"); Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 182 (2021) ("[T]here is no evidence to support the assertion that the removal of executive officers was . . . an inherent attribute of the 'executive power' as it was understood in England."); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 5 (2021) ("Since before the Founding, offices held for a term of years, in the absence of constitutional or statutory language to the contrary, were designed to be inviolable . . . ."); Richard W. Murphy, *The DIY Unitary Executive*, 63 ARIZ. L. REV. 439, 445–46 (2021) ("The[] 'exceptions' to unitary presidential control embedded in *Humphrey's Executor* and *Morrison* turn out to have very deep historical

scholars the "Disunitarians." One strand of Disunitarian thought asserts that the Constitution does not demand a hierarchical executive[19] and denies that it grants removal power to the President.[20] Another strand proclaims that Congress can abridge the President's removal power.[21] A third strand asserts that removal restrictions date back to the Founding.[22]

We address three enduring questions.[23] First, does the Constitution grant Presidents the power to remove executive officers at pleasure? We agree with James Madison, George Washington, Thomas Jefferson, Alexander Hamilton, and the many others who thought so.[24] After a famous debate in 1789, Congress endorsed this precise view.[25] Further, our first Presidents repeatedly proclaimed a power to remove and, in fact, ousted scores of officers.[26] These early endorsements, declarations, and exercises reflect the correct interpretation of Article II.

Second, may Congress constrain the executive power of removal by requiring cause or barring removals altogether? Congress's power over offices, considerable though it is, does not authorize the passage of statutes that limit removal at pleasure. Unlike some of its predecessors, Congress conspicuously lacks a generic constitutional power to refashion or modify the powers of rivals.[27] Relatedly, the Necessary and Proper Clause does not authorize laws limiting removals by the President any

---

roots."); Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1273 (2020) (calling Article II executive power an "empty vessel"); Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Administrative Agencies*, 96 NOTRE DAME L. REV. 1, 16 (2020) (arguing the early statesmen "took a functional approach and allowed agencies to possess significant independence from the President"); Patricia A. McCoy, *Constitutionalizing Financial Instability*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), https://lawreviewblog.uchicago.edu/2020/08/27/seila-mccoy [https://perma.cc/GVG3-EN96] (arguing that insulating financial regulators from presidential control dates back to the early nineteenth century). For contrary views, see generally Ilan Wurman, *The Removal Power: A Critical Guide*, 2019–2020 CATO SUP. CT. REV. 157 (2020).

19 *See* Shugerman, *supra* note 18, at 2111; *see also* Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 361 (2016).

20 *See* Birk, *supra* note 18, at 183 ("[T]he historical record shows that the executive power vested in the President by Article II would not include an inherent removal power . . . .").

21 *See* Manners & Menand, *supra* note 18, at 68–71 (describing how Congress can create independent agencies without infringing on the President's Article II power).

22 *See id.* at 6 (arguing that executive offices with removal restrictions "have been a feature of English and American law since at least the eighteenth century").

23 For our previous efforts to address aspects of these problems, see generally Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 U. RICH. L. REV. 691 (2018); Aditya Bamzai, *Tenure of Office and the Treasury: The Constitution and Control over National Financial Policy, 1787 to 1867*, 87 GEO. WASH. L. REV. 1299 (2019) [hereinafter Bamzai, *Tenure of Office and the Treasury*]; Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006) [hereinafter Prakash, *Decision of 1789*]; Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779 (2006) [hereinafter Prakash, *Removal and Tenure*].

24 *See infra* section I.A.3, pp. 1770–73; section I.A.5, pp. 1777–82.

25 *See infra* section I.A.4, pp. 1773–77; section II.B, pp. 1793–802.

26 *See infra* section I.A.5, pp. 1777–82; section I.A.4, pp. 1773–77.

27 *See infra* section I.B.1, pp. 1782–84.

more than it sanctions laws limiting impeachment removals by the Senate.[28] The clause is no license to treat presidential powers as default allocations alterable by ordinary legislation. Tellingly, early Congresses did not restrict the power to remove executives at pleasure.[29]

Third, what light do early commentary and practice shed on the first two questions? While providing a comprehensive defense of removal,[30] we surface new evidence from the Constitutional Convention, the *Federalist Papers*, and the overlooked writings of several Antifederalists. We also reveal Thomas Jefferson's actual stance toward the justices of the peace (spoiler alert: he fired them all), which leads to a deeper understanding of *Marbury v. Madison*.[31] We highlight opinions of attorneys general that bear on recent arguments and contextualize opinions that others have overread. Finally, we describe why side constraints curb the power to remove at pleasure.

Part I argues for an executive power of removal and against congressional authority to curtail that power. Part II responds to the many critiques of the Court's recent turn. Part III considers implications and areas where further scholarship would be fruitful.

As a matter of original meaning, the Roberts Court is right. The "executive power" granted by Article II encompassed multiple strands, one of which was the power to remove executive officers. Early Congresses and Executives agreed that the Constitution granted the President the power to remove. Further, Congress lacks generic power to alter or diminish constitutional grants of authority, including removal. While ours is not the only possible reading, it best synthesizes text, structure, history, and early practice.[32] In contrast, Disunitarians lack a coherent or consistent reading of the text, particularly as it relates to congressional authority, and cannot explain decades of practice.

This is not merely a faculty-lounge quarrel between disheveled dons in ivory towers. If the Disunitarians are right, Congress can demote the "constitutional Executor of the laws"[33] and transform the executive branch into a perpetual and unaccountable bureaucratic machine. Every executive department might be transplanted into an independent fourth branch, with the Chief Executive reduced to the Chief Bystander. In our reading, the Constitution did not grant the first branch this measure of supremacy over the second.

---

[28] *See infra* section I.B.2, pp. 1784–89.

[29] *See infra* section II.C, pp. 1802–18.

[30] We have benefited from J. DAVID ALVIS, JEREMY D. BAILEY & F. FLAGG TAYLOR IV, THE CONTESTED REMOVAL POWER, 1789–2010 (2013). Our work differs from theirs in focusing on the Founding and early practice.

[31] 5 U.S. (1 Cranch) 137 (1803).

[32] Our paper uses an originalist lens for understanding the Constitution. But we also aim to persuade nonoriginalists who regard original meaning as relevant to interpreting the Constitution.

[33] Alexander Hamilton, *For the Gazette*, 4 GAZETTE U.S. 449, 450–51 (1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON 33, 43 (Harold C. Syrett ed., 1969) [hereinafter Hamilton, *Pacificus No. 1*].

I. THE PRESIDENT, THE CONGRESS, AND THE REMOVAL OF EXECUTIVE OFFICERS

The Constitution expressly mentions removal only in the context of impeachment.[34] Nonetheless, statesmen have long held that it permits other means of removal.[35] The First Congress provided that certain criminal convictions automatically ousted officers.[36] Further, many legislators successfully argued that the Constitution granted the President the power to dismiss executive officers.[37]

Along with Madison, Jefferson, Washington, Hamilton, and so many other Founding figures, we believe that the Article II vesting of "executive power" is a grant of substantive authority and not merely a reference to the powers subsequently mentioned.[38] The Vesting Clause's grant of power has several components, one of which is the power to remove executive officers.

In this Part, we defend this claim about removal, using early understandings and practices as a benchmark. To be sure, some early politicians denied that Presidents had a constitutional power to remove. But their theory did not prevail and has never been our law. In three landmark statutes, the First Congress endorsed the notion that the Constitution granted a removal power to the President. In turn, Presidents repeatedly and publicly claimed a constitutional power to remove. Finally, in removing scores of officers, Presidents relied upon constitutional authority, for no law conveyed a removal power.

We also argue that Congress lacks power to restrict removal "at pleasure." Unlike Parliament or some state legislatures at the Founding, Congress does not enjoy carte blanche authority to alter the separation of powers. Instead, congressional power regarding the allocation of powers is crucially limited to *implementing*, rather than refashioning or eliminating, federal powers. The familiar Disunitarian claim that Congress can constrain the removal power opens a can of worms. If Congress may constrain removal, it likewise may restrict the veto power,

---

[34] *See* U.S. CONST. art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office . . . ."); *id.* art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

[35] *See* Prakash, *Decision of 1789*, *supra* note 23, at 1034–42.

[36] *See, e.g.*, Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67 ("[I]f any person shall offend against any of the prohibitions of this act, he shall be deemed guilty of a high misdemeanor . . . and shall upon conviction be removed from office, and forever thereafter incapable of holding any office under the United States . . . .").

[37] *See* Prakash, *Removal and Tenure*, *supra* note 23, at 1815.

[38] *See* Prakash, *The Essential Meaning of Executive Power*, *supra* note 16, at 703–05; Charles J. Cooper et al., *What the Constitution Means by Executive Power*, 43 U. MIA. L. REV. 165, 177 (1988). For recent scholarship, see Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 103–04 (2020); MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING 251–55 (2020).

the impeachment power, the judicial power, and each of its legislative powers.

A. Removal as an Executive Power

Early American lawyers understood the phrase "executive power" to contain a conceptual core, such that the vesting of "executive power" implicitly conferred certain authorities. An examination of British, state, and early federal practice and commentary signals that removal authority was a facet of executive power.

1. A Multifaceted "Executive Power." — At the Founding, people commonly spoke of "executive power" without specifying each of its features. Take state constitutions. Five granted specific powers to their executives but also conveyed "executive powers"[39] — essentially an executive catchall. Three of these five — those of Delaware, Maryland, and North Carolina — conveyed "other" executive powers,[40] thereby signaling that the list of powers was not exhaustive. For instance, North Carolina first conveyed powers over embargo and pardon and then expressly vested "other executive powers."[41] The other two constitutions — those of Georgia and Virginia — conveyed "the executive powers."[42] The latter constitution granted the "executive powers of government" to a governor who would exercise that power with "the advice of a Council of State."[43] Virginia also provided that the governor could not use English law, statute, or custom to justify an exercise of power.[44] The grant, and the restriction, regarded executive power as a multifaceted concept. Finally, some constitutions granted "Supreme executive power"[45] or "supreme executive power and authority,"[46] a reference to powers widely deemed executive.

Law execution was the executive power's principal component.[47] As Professor M.J.C. Vile observed, the Executive "gets its name from *one* of its major functions, that of putting the law into effect."[48] Other authorities came to be understood as part of the executive power because they were typically associated with Chief Executives. Additional facets

---

[39] *See* DEL. CONST. of 1776, art. VII; GA. CONST. of 1777, art. XIX; MD. CONST. of 1776, art. XXXIII; N.C. CONST. of 1776, art. XIX; VA. CONST. of 1776, ch. II, § 9.

[40] *See* DEL. CONST. of 1776, art. VII; MD. CONST. of 1776, art. XXXIII; N.C. CONST. of 1776, art. XIX.

[41] N.C. CONST. of 1776, art. XIX.

[42] GA. CONST. of 1777, art. XIX; VA. CONST. of 1776, ch. II, § 9.

[43] VA. CONST. of 1776, ch. II, § 9.

[44] *Id.*

[45] N.J. CONST. of 1776, art VIII; *accord* PA. CONST. of 1776, § 3.

[46] N.Y. CONST. of 1777, art. XVII.

[47] *See generally* Prakash, *The Essential Meaning of Executive Power*, *supra* note 16.

[48] M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 67 (1998).

of executive power[49] included appointments,[50] foreign affairs,[51] military command,[52] and pardons.[53]

Regarding appointments, Madison at the Philadelphia Convention suggested that an explicit appointment authority was not "absolutely necessary," because it was "perhaps included in the first member of" the proposal then being considered, which "instituted" a "national Executive."[54] Because "certain powers were in their nature Executive," any "national Executive" would enjoy these powers, even if the powers were left unmentioned.[55] Antifederalists agreed with the categorization. For instance, they condemned the Appointments Clause because it split "executive power" between the President and the Senate.[56] That

---

[49] Hamilton discusses some portions of executive authority in *The Federalist No. 72*. THE FEDERALIST NO. 72, at 434 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("[A]dministration" is "the province of the executive department" and includes "[t]he actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys . . . , the arrangement of the army and navy, the direction of the operations of war — these, and other matters of a like nature.").

[50] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 67 (Max Farrand ed., 1911) (recording Madison's observation that appointment was an executive power).

[51] *See* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 287 (2001).

[52] *See* THE FEDERALIST NO. 74, *supra* note 49, at 446 (Alexander Hamilton) ("[T]he power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority.").

[53] *See* James Iredell, *Answers to Mr. Mason's Objections to the New Constitution, Recommended by the Late Convention at Philadelphia*, NORFOLK & PORTSMOUTH J., Mar. 5, 1788, at 1, *reprinted in* 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 322, 322–24 (John P. Kaminski & Gaspare J. Saladino eds., 1986) [hereinafter DOCUMENTARY HISTORY OF THE RATIFICATION] (asserting belief that every executive power in America has the power of pardon); 1 CONG. REG. 518 (1789), *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, at 904, 937 (Charlene Bangs Bickford et al. eds., 1992) (recording Rep. William Smith's comments that pardon was "in some degree an executive power" but also noting disputes about the power within the states); Republicus, KY. GAZETTE, Mar. 1, 1788, at 1, *reprinted in* 8 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra*, at 446, 448 (John P. Kaminski & Gaspare J. Saladino eds., 1988) (describing the President as being invested with executive powers, including pardon).

[54] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 50, at 67.

[55] *Id.*

[56] *See* Mortenson, *supra* note 18, at 1325, 1329–32, 1364–65 (2020) (claiming that this "view of appointments as 'executive' drew on a longstanding (though not uncontested) strand of Anglo-American legal thought," *id.* at 1325, that "was prominent among antifederalists," *id.* at 1329); *see also* THE FEDERALIST NO. 38, *supra* note 49, at 232 (James Madison) (remarking that one faction of the Antifederalists objected to "the junction of the Senate with the President in the responsible function of appointing to offices, instead of vesting *this executive power in* the Executive alone" (emphasis added)).

At times, Professor Julian Davis Mortenson suggests that the Executive Vesting Clause was an "empty vessel." Mortenson, *supra* note 18, at 1273, 1306, 1334. Other times, he describes "executive power" as nothing more and nothing less than law execution. *Id.* at 1271, 1278; *accord id.* at 1273. Further, as indicated above, he characterizes appointments as being part of the executive power, *id.* at 1364–65, and says that executive power consists of disaggregated powers, *id.* at 1332–33. Finally, and relatedly, Mortenson leaves open the possibility that executive power might

criticism rested on a shared sense that appointments were part of the "executive power."[57] Publius conceded the point, writing that "the appointment to offices . . . is in its nature an executive function."[58]

In the New York Assembly, Alexander Hamilton supplied a broader definition: "The objects of executive power are of three kinds, to make treaties with foreign nations, to make war and peace, to execute and interpret the laws."[59] This was consistent with his more comprehensive discussion in *The Federalist No. 72*.[60] To vest executive power in an entity or an officer was to convey these sorts of authorities.[61]

Finally, consider an influential essay: the *Essex Result*. Written in 1778, the public resolution from Essex County, Massachusetts, declared that:

> The executive power is sometimes divided into the external executive, and internal executive. The former comprehends war, peace, [and] the sending and receiving ambassadors . . . . [T]he internal executive power . . . is employed in the peace, security and protection of the subject and his property . . . . The executive power is to marshal and command her militia and armies for her defence, to enforce the law, and to carry into execution all the orders of the legislative powers.[62]

The catalog of powers was representative, even as it omitted appointment, pardon, and removal.

Again, because of the conceptual core, it was common to write of "executive powers" without minutely detailing any of them.[63] Readers

---

encompass removal authority. *See* The C. Boyden Gray Center, George Mason University, *Panel 4: The Constitutional Presidency: Two New Books*, YOUTUBE, at 32:02 (Oct. 15, 2021), https://youtu.be/HINomHYMjh4 [https://perma.cc/FM6N-23NZ].

We agree with his assertion that the phrase "executive power" consists of a series of related powers.

[57] *See* Mortenson, *supra* note 18, at 1325–32.

[58] THE FEDERALIST NO. 47, *supra* note 49, at 301 (James Madison).

[59] Remarks on an Act Granting to Congress Certain Imposts and Duties (Feb. 15, 1787), *in* 4 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 33, at 71, 75 (Harold C. Syrett ed., 1962). For a discussion of this speech, see generally Aditya Bamzai, *Alexander Hamilton, The Nondelegation Doctrine, and the Creation of the United States*, 45 HARV. J.L. & PUB. POL'Y 795 (2022).

[60] *See* THE FEDERALIST NO. 72, *supra* note 49 (Alexander Hamilton).

[61] Similarly, in 1785 James Madison wrote that the state executives were of lesser importance because "all the great powers which are properly executive [were] transfer[red] to the Fœderal Government" by the Articles of Confederation. Letter from James Madison to Caleb Wallace (Aug. 23, 1785), *in* 8 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES 350, 352 (Robert A. Rutland et al. eds., 1973). Professor Jack Rakove confirms that Madison was referring here to "the matters of war and diplomacy which were prerogatives of the British Crown." JACK N. RAKOVE, ORIGINAL MEANINGS 253 (1996).

[62] RESULT OF THE CONVENTION OF DELEGATES 24 (Newburyport, John Mycall 1778).

[63] *See, e.g.*, Letter from Edward Rutledge to John Jay (Nov. 24, 1776), *in* 1 THE SELECT PAPERS OF JOHN JAY 307, 308 ("vest the executive powers of government" in a single person); A Democratic Federalist, *Thoughts on the Federal Senate, &c.*, INDEP. GAZETTEER (Phila.), Nov. 26, 1787, at 2, *reprinted in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 53, at 294, 298 (Merrill Jensen ed., 1976) (observing that "executive powers of the Union" are better

would understand the general sense. Likewise, one could legally vest "executive power" and not separately list any powers. For instance, the Virginia Plan sought to grant the new executive the "executive rights" of the Continental Congress.[64] No enumeration of those "rights" followed because one could read the Articles of Confederation and discern the executive powers granted therein.

The content of "executive power" was conceptually distinct from who wielded it. Although often concentrated in one hand, the executive power could be granted to a triumvirate, a council, or an assembly. While our Congress is chiefly legislative, the Continental Congress was principally executive. The Articles did not expressly confer "executive power" on the Continental Congress.[65] Nonetheless, Congress was understood to possess executive authorities by virtue of its powers to

---

separated from the legislative powers than in any known government and citing the Senate's check on appointments); *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents*, PA. PACKET, Dec. 18, 1787, at 1, *reprinted in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 53, at 617, 634 (Merrill Jensen ed., 1976) (referring to the Senate's "great executive powers" to include, among other things, its role in treaties); Cincinnatus, *Number IV. To James Wilson, Esq.*, N.Y. J., Nov. 22, 1787, at 2, *reprinted in* 19 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 53, at 281, 285 (John P. Kaminski & Gaspare J. Saladino eds., 2003) (complaining of the division of "executive powers" between the Senate and President and describing the Senate as one of two "executives," *id.* at 286); Letter from Richard Henry Lee to Edmund Randolph, Governor, Virginia (Oct. 16, 1787), *in* 8 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 53, at 61, 61 (John P. Kaminski & Gaspare J. Saladino eds., 1988) (saying that in certain respects such as making treaties, the President and Senate have the "whole legislative and executive powers"); *An Independent Freeholder*, VA. GAZETTE (Winchester), Jan. 18, 1788, *reprinted in* 8 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 53, at 310, 310 (John P. Kaminski & Gaspare J. Saladino eds., 1988) (describing the King as having the "executive powers of government"); *Cassius I: To Richard Henry Lee, Esquire*, VA. INDEP. CHRON., Apr. 2, 1788, *reprinted in* 9 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 53, at 641, 645 (John P. Kaminski & Gaspare J. Saladino eds., 1990) (noting that the power of treaties has always been considered as executive); 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA, *reprinted in* 4 WORKS OF JOHN ADAMS 271, 398 (Charles Francis Adams ed., Boston, Charles C. Little & James Brown 1851) [hereinafter ADAMS, A DEFENCE] (indicating the necessity of keeping "all the executive power" away from the legislature); FEDERAL FARMER, *Letter XI*, *in* ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 89, 99 (1788), *reprinted in* 20 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 53, at 1011, 1019 (John P. Kaminski & Gaspare J. Saladino eds., 2004) (to make treaties is properly the "exercise of executive powers"); Letter from Louis Guillaume Otto to Comte de Montmorin (Oct. 20, 1787), *in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 53, at 422, 422 (John P. Kaminski & Gaspare J. Saladino eds., 1981) (describing the President as vested with "most extensive executive powers"); A PLEBEIAN, AN ADDRESS TO THE PEOPLE OF THE STATE OF NEW-YORK 14 (1788), *in* 20 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 53, at 942, 953 (John P. Kaminski et al. eds., 2004) (describing the Senate as having a "mixture of legislative, judicial, and executive powers"); ARATUS: TO THE PEOPLE OF MARYLAND (n.d.), *reprinted in* 11 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 53, at 30, 42 (John P. Kaminski et al. eds., 2015) (describing the Senate and President as having "the material executive powers").

[64] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 50, at 21.

[65] *See* ARTICLES OF CONFEDERATION OF 1781, arts. V–IX (describing the various powers of the Continental Congress).

appoint and direct officers, superintend law execution, and steward foreign affairs. That is why the *Essex Result*,[66] as well as Hamilton, Madison,[67] and others,[68] regarded Congress as enjoying executive authority. Indeed, Americans called Congress a "deliberating Executive assembly," the "Supreme Executive," and the "Supreme Executive Council"[69] — which is why many have long regarded the Continental Congress as a plural executive.[70]

2. Antecedents. — One authority encompassed by "executive power" was the power of managing officeholding through appointment and removal. The British Crown could set official tenures,[71] choosing among options: to an individual and heirs, for the officer's life, during good behavior, or during pleasure.[72] If it granted tenure at pleasure, the Crown could remove at will.[73] Because most high executive officers served at pleasure, the Crown had a removal power over them.[74] By the eighteenth century, Parliament also could set tenure, including by granting tenure protections.[75] Despite Parliament's authority to strip away Crown powers, the British had created a vocabulary that deemed certain powers to be "executive." The shared definition meant that

---

66 RESULT OF THE CONVENTION OF DELEGATES, *supra* note 62, at 24 ("The confederation of the United States of America hath lopped off [the external] branch of the executive, and placed it in Congress."). Original spellings have been preserved in quotations from Founding-era sources throughout this Article.

67 Letter from James Madison to Caleb Wallace, *supra* note 61, at 352 (saying all the "great powers which are properly executive" were given to the Continental Congress).

68 *See, e.g.*, Debates of the Virginia Convention (June 4, 1788), VA. INDEP. CHRON., June 11, 1788, *reprinted in* 9 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 53, at 915, 931 (John P. Kaminski & Gaspare J. Saladino eds., 1990) (comments of Governor Randolph before the Virginia ratifying convention); Debates of the Virginia Convention (June 6, 1788), VA. INDEP. CHRON., June 11, 1788, *reprinted in* 9 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 53, at 970, 986 (John P. Kaminski & Gaspare J. Saladino eds., 1990) (same); Debates of the Pennsylvania Convention (Dec. 4, 1787), *in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 53, at 465, 474 (Merrill Jensen ed., 1976) (comments of James Wilson at the Pennsylvania ratifying convention); *see also* EDMUND RANDOLPH, A LETTER OF HIS EXCELLENCY EDMUND RANDOLPH, ESQUIRE, ON THE FEDERAL CONSTITUTION (1787), *reprinted in* 8 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 53, at 261, 262–67 (John P. Kaminski & Gaspare J. Saladino eds., 1988) (complaining that under the Confederation, legislative and executive powers are combined); 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 90–91 (Jonathan Elliot ed., 2d ed. 1901) (comments of Theophilus Parsons at the Massachusetts convention) (arguing to the same effect).

69 JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 383 (2019).

70 *See, e.g.*, *id.*; JERRILYN GREENE MARSTON, KING AND CONGRESS 6, 8, 205 (1987) (describing the Continental Congress as primarily executive); CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775–1789, at 56 (1922) (calling the Continental Congress a "plural . . . executive body").

71 1 WILLIAM BLACKSTONE, COMMENTARIES *272.

72 *See* G.E. AYLMER, THE KING'S SERVANTS 69, 106–10 (rev. ed. 1974).

73 *Id.* at 108.

74 *Id.* at 106.

75 *See, e.g.*, Act of Settlement 1701, 12 & 13 Will. 3, c. 2, § III (Eng.).

appointment and removal were understood to be part of the "executive power."[76]

Colonial governors likewise enjoyed the power to appoint and remove. Mimicking practices in Great Britain, colonial governors sometimes granted judges tenure during good behavior.[77] But, troubled by judicial independence, the Crown mandated that colonial judges serve at pleasure.[78] Of course, one of the complaints voiced in the Declaration of Independence was that the King had "made Judges dependent on his Will alone, for the tenure of their offices,"[79] a striking protest against the executive's power to remove at pleasure.

State constitutions associated removal with the Executive. Some explicitly referenced removal. For officers not appointed by the legislature, the South Carolina Governor could "appoint [officers] during pleasure."[80] The Delaware Constitution similarly said its "President" had a power to appoint civil officers during pleasure.[81] New York's Governor was part of the council of appointments that could remove.[82] The Maryland Governor could suspend or remove any civil officer who lacked tenure during good behavior.[83]

Other state constitutions incorporated a removal power through grants of executive power. For instance, the Pennsylvania Assembly could impeach an officer even after he had been removed, implying that state officers served at the pleasure of the plural state executive.[84] In fact, Pennsylvania's Council of Censors confirmed this reading.[85] The

---

[76] Monarchs were generally seen as enjoying a power of removal. During a debate on removal in 1789, various Representatives referenced the practices of the British Crown and monarchies generally. For instance, James Jackson, a Representative from Georgia, noted that his opponents had argued that "in all governments the executive necessarily had the power of dismissing officers under him." *Congressional Intelligence. Debate in the House of Representatives on Wednesday (Continued.)*, DAILY ADVERTISER (N.Y.C.), June 20, 1789, at 2, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 889. He conceded that, although "[t]hat might hold good in Europe," the same principle "did not apply to our constitution, by which the President had not the executive powers exclusively." *Id.* Representative Jackson (and others) supposed that European monarchies wielded a power to dismiss officers and that such dismissal authority was categorized among "the executive powers." *Id.* But he claimed that the President had not been vested with the removal power by the Constitution because "[t]he Senate was associated with him." *Id.* Hence, even some critics of a unilateral presidential removal authority proceeded on the premise that the "executive power" included removal power.

[77] *See* EVARTS BOUTELL GREENE, THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA 134–35 (N.Y., Longmans, Green & Co. 1898).

[78] *See id.* at 135.

[79] THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

[80] S.C. CONST. of 1778, art. XXXII. We believe this was the Governor's pleasure.

[81] DEL. CONST. of 1776, art. XVI.

[82] *See* N.Y. CONST. of 1777, arts. XXII, XXIV, XXVIII.

[83] MD. CONST. of 1776, art. XLVIII.

[84] *See* PA. CONST. of 1776, § 22.

[85] The Council of Censors determined whether the government had violated the state constitution. *See id.* § 47.

Council noted that removal was an "executive power" and that many officers served "at pleasure."[86]

State constitutions that granted executive power were perhaps understood the same way. In Virginia, for instance, the plural executive enjoyed some power to remove executives,[87] likely a feature of its constitutional grant of "executive powers."[88] Indeed, Governor Thomas Jefferson wrote that the "power of appointing and removing executive officers [is] inherent in [the] Executive."[89] Though he was speaking of military officers,[90] the claim he made was true of all executive officers.

Our point is that in Britain and in America, removal was seen as a power of the executive and hence was regarded as an executive power. This was so even though, in both Britain and America, other institutions, including legislatures, could also remove executive officers. This explains why so many would later regard the President as enjoying a removal power.

3. The Creation of the Presidency. — Although the Founding is generally thought to have generated few discussions of removal,[91] there is more material than scholars have supposed. At the Philadelphia Convention, delegates proposed a council composed of several high officers, six of whom would serve during the President's "pleasure."[92] Although never adopted, the proposal reflected an understanding of some delegates that executive officers, such as the six listed Secretaries, served at the Chief Executive's sole discretion.[93]

The debates also elucidate "at pleasure" tenure. When Roger Sherman proposed that "the National Legislature should have power to remove the Executive *at pleasure*,"[94] George Mason objected. He

---

[86] A REPORT OF THE COMMITTEE OF THE COUNCIL OF CENSORS 22 (Philadelphia, Francis Bailey 1784).

[87] Letter from B.H. Latrobe to the Governor (Sept. 8, 1798), *in* 8 CALENDAR OF VIRGINIA STATE PAPERS AND OTHER MANUSCRIPTS 513, 514 (H.W. Flournoy ed., Richmond, James E. Goode 1890) [hereinafter CALENDAR OF VIRGINIA STATE PAPERS] (noting action by Virginia's Privy Council (or Council of State) to remove Latrobe — an executive officer — from his position as Architect to the state penitentiary); Letter from A. Blair to the Governor (June 7, 1800), *in* 9 CALENDAR OF VIRGINIA STATE PAPERS, *supra*, at 115, 115 (noting motion made in the Privy Council to remove Blair as Clerk to the Council).

[88] VA. CONST. of 1776, ch. II, § 9. Our claim is not that executives had a monopoly on removal. Clearly they did not, as various other state entities could often remove officers via impeachment or otherwise. *See, e.g.*, H. Brooke, In the House of Senators (Dec. 8, 1796), *in* 8 CALENDAR OF VIRGINIA STATE PAPERS, *supra* note 87, at 402, 402 (noting joint action by the Virginia legislature to remove members from the Privy Council). Our claim is that removal was often linked to state executives, not that there was an exclusive linkage.

[89] Notes Concerning the Right of Removal from Office (1780), *in* 4 THE PAPERS OF THOMAS JEFFERSON: MAIN SERIES 281, 281 (Julian P. Boyd ed., 1951).

[90] *See id.*

[91] Prakash, *Removal and Tenure*, *supra* note 23, at 1824.

[92] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 50, at 335–36.

[93] The six listed Secretaries in the proposal were "domestic-affairs," "Commerce and Finance," "foreign affairs," "war," "Marine," and "State." *Id.*

[94] 1 *id.* at 85 (emphasis added).

"opposed decidedly . . . making the Executive the mere creature of the Legislature as a violation of the fundamental principle of good Government."[95] The exchange signals that tenure "at pleasure" rendered the agent a "mere creature" of a principal. Similarly, Madison remarked that decreeing that Senators would serve "during the pleasure of the State Legislatures"[96] would make them "the mere Agents & Advocates of State interests & views."[97]

In his Publius avatar, Alexander Hamilton addressed who could oust executive officers, as well as the standard for removals. As to the former, Hamilton claimed in *The Federalist No. 77* that the Senate's concurrence "would be necessary to displace as well as to appoint" officers.[98] Most (but not all)[99] read this as a claim that the President could not remove officers without the Senate's consent.

Hamilton's other remarks have been largely overlooked. Some critics of the Constitution had objected to the Senate trying impeachments, fearful that senators would be "too indulgent."[100] The leniency would arise because of senatorial advice and consent.[101] In *The Federalist No. 66*, Hamilton responded:

> The principle of this objection would condemn a practice which is to be seen in all the State governments, if not in all the governments with which we are acquainted: I mean that of rendering those who hold offices during pleasure dependent on the pleasure of those who appoint them.[102]

Hamilton's remarks highlighted two points. First, Hamilton characterized the standard as during "*pleasure*."[103] Second, he presupposed that appointers implicitly possessed removal authority — a practice he characterized as perhaps true in all known governments.[104] *The Federalist No. 77* later argued that, because the President and the Senate jointly appointed to offices, they would have to concur in a removal.[105] If, however, the President alone appointed (with "the advice and consent

---

[95] *Id.* at 86; *cf.* 2 *id.* at 34 (remarks of James Madison) ("The Executive could not be independent of the Legislature, if dependent on the pleasure of that branch for a re-appointment."); *id.* at 550 (remarks of James Madison) (contending that a vague standard for impeachment "will be equivalent to a tenure during pleasure of the Senate").

[96] 1 *id.* at 427.

[97] *Id.* at 428.

[98] THE FEDERALIST NO. 77, *supra* note 49, at 458 (Alexander Hamilton).

[99] *See, e.g.*, Seth Barrett Tillman, *The Puzzle of Hamilton's* Federalist No. 77, 33 HARV. J.L. & PUB. POL'Y 149, 165 (2010) (arguing that Hamilton in *The Federalist No. 77* did not believe that Senate consent was necessary to remove).

[100] THE FEDERALIST NO. 66, *supra* note 49, at 402 (Alexander Hamilton).

[101] *See* U.S. CONST. art. II, § 2, cl. 2.

[102] THE FEDERALIST NO. 66, *supra* note 49, at 402 (Alexander Hamilton).

[103] *Id.* (emphasis added).

[104] *Id.*

[105] THE FEDERALIST NO. 77, *supra* note 49, at 458 (Alexander Hamilton).

of the Senate"),[106] then the logic of *The Federalist No. 66* signals that the Constitution implicitly granted the President an "at pleasure" removal authority.

Support for Senate participation in removals can also be found in the *Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania*. Criticizing the Constitution, the Minority observed that though Article III judges had good-behavior tenure, they could serve in other offices.[107] Tenure in these other offices would be the more precarious "pleasure of the president and senate."[108]

Others spoke of a unilateral presidential power. Luther Martin, a Convention delegate who left midstream and became an Antifederalist,[109] gave a speech to the Maryland House of Delegates containing his criticisms.[110] Speaking of the military, Martin contended that its "officers . . . are all to be appointed by [the President], and dependent on his will and pleasure."[111] In a subsequent "Letter to the Citizens of Maryland," Martin criticized the possibility that federal judges with "good behavior" tenure under Article III were nevertheless "capable of holding other offices at the will and pleasure of the government."[112] Moreover, when Richard Henry Lee of Virginia proposed a privy council to replace the Senate in appointments, one critic responded that the council would hardly be independent because privy counselors would be "removable at [the President's] pleasure."[113] The critic had interpreted the proposed Constitution as authorizing the President to remove at pleasure, for Lee's proposal did not discuss removal.[114] Finally, consider the point of "An American Citizen": the *President* could not "take

---

[106] Many readers of the Constitution concluded that while the Senate's consent is *necessary*, the President alone appoints. *See, e.g.*, *Congressional Intelligence. Debate in the House of Representatives on Wednesday*, DAILY ADVERTISER (N.Y.C.), June 19, 1789, at 2, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 886, 887 (statements of Representative Laurance); *infra* note 136 and accompanying text.

[107] *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents*, *supra* note 63, at 634.

[108] *Id.*

[109] *See Luther Martin*, ENCYCLOPEDIA BRITANNICA (July 6, 2022), https://www.britannica.com/biography/Luther-Martin [https://perma.cc/CAK4-KPFL].

[110] Luther Martin, *Genuine Information*, MD. GAZETTE & BALT. ADVERTISER, Dec. 28, 1787–Feb. 8, 1788, *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 50, at 172, 172.

[111] *Id.* at 218.

[112] Luther Martin, *Number III. To the Citizens of Maryland*, MD. J., Mar. 28, 1788, at 1, *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 50, at 295, 296.

[113] *Cassius II: To Richard Henry Lee, Esquire*, VA. INDEP. CHRON., Apr. 9, 1788, *reprinted in* 9 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 53, at 713, 718 (John P. Kaminski & Gaspare J. Saladino eds., 1990).

[114] *See* Richard Henry Lee: Proposed Amendments, *in* 8 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 53, at 65, 65–66 (John P. Kaminski & Gaspare J. Saladino eds., 1988).

away offices [held] during good behaviour."[115] To say this was to suppose that the President could "take away offices" not so held. After all, if the President could not remove at all, the point as to offices held under good behavior would ring rather hollow. Indeed, some read good-behavior tenure as a constraint on the *Executive's* power to remove.[116]

Many suggested that the President could direct executives, thus confirming their status as agents. Publius argued that executive officers "ought to be considered as the assistants or deputies of the Chief Magistrate, and . . . ought to be subject to his superintendence."[117] If a President cannot remove his "assistants," they would pay scant attention to their principal. William Maclaine of North Carolina spoke of the Chief Executive being responsible for the orders he gave to revenue "deputies."[118] Such responsibility is appropriate only if the "deputies" are obliged to honor instructions on pain of dismissal. Even Antifederalists recognized that one man was best situated "to superintend the execution of laws with discernment and decision, with promptitude and uniformity."[119] This assertion was premised on the assumption that the President could direct other executives to ensure "promptitude and uniformity." Although it is possible to imagine that the Constitution implicitly requires executives to follow presidential orders without also supposing that the President enjoys a removal power, it is more plausible to regard removal as the indispensable power by which the Chief Executive would exert control over the executive branch.[120]

We are aware of no one who asserted that Congress would have to *grant* removal authority. Rather, those that addressed the matter assumed that executive officials served at the President's pleasure or the will of the President and Senate.

4. Congress Recognizes a Constitutional Power of Removal. — Removal took center stage in the summer of 1789.[121] In mid-June, the

---

[115] An American Citizen, *On the Federal Government. No. 1.*, INDEP. GAZETTEER (Phila.), Sept. 26, 1787, at 2, *reprinted in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 53, at 247, 251 (John P. Kaminski & Gaspare J. Saladino eds., 1981).

[116] For a discussion of good-behavior tenure and why it is distinct from impeachment, see Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72 (2006).

[117] THE FEDERALIST NO. 72, *supra* note 49, at 434 (Alexander Hamilton). Publius also said that executives within the executive department would be "subordinate." THE FEDERALIST NO. 47, *supra* note 49, at 300 (James Madison).

[118] *See* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 68, at 47.

[119] Letters from the Federal Farmer (No. 14), *in* 2 THE COMPLETE ANTI-FEDERALIST 307, 310 (Herbert J. Storing ed., 1981).

[120] *See* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1209–10 (2014).

[121] *See* Prakash, *Decision of 1789*, *supra* note 23, at 1032–34.

House spent days debating the question.[122] Four theories were voiced: (1) officers could be removed only via impeachment; (2) by statute, Congress could authorize the President to remove; (3) because the President and Senate appointed to office, their joint action was necessary to remove; and (4) the "executive power" granted a power to remove.[123]

Later in June, after a great and momentous debate, the House (the Committee of the Whole) refused to delete[124] bill language that provided that the Secretary of Foreign Affairs was "removable from office by the president of the United States."[125] Not content with this victory, Representative Egbert Benson observed that this language might be misread as a legislative grant of removal authority when, in fact, a House majority believed that the President had a constitutional power to remove.[126] Benson proposed two amendments to signify a congressional endorsement of the view that the *Constitution* granted removal authority.[127] The House agreed to delete the "to be removable from office by the president of the United States" language[128] and separately added the following: "Whenever the said principal officer[] shall be removed by the President, or a vacancy in any other way shall happen,"[129] the chief clerk shall have custody of papers.[130] The House subsequently endorsed the bill as amended.[131] In July, the Senate approved the bill but only after tie-breaking votes of John Adams that rejected

---

[122] *See generally* 1 CONG. REG. 569–70 (1789), *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 999; *Sketch of Proceedings of Congress. In the House of Representatives of the United States*, 21 GAZETTE U.S. 81 (1789), *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1026, 1026–28 [hereinafter *Sketch of Proceedings of Congress*].

[123] Prakash, *Decision of 1789*, *supra* note 23, at 1034–42.

[124] 1 CONG. REG. 599 (1789), *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 999, 1024.

[125] *Id.* at 450, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 860, 860.

[126] *See Sketch of Proceedings of Congress*, *supra* note 122, at 81, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1026, 1027–28.

[127] *Id.*

[128] 2 CONG. REG. 18 (1789), *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1028, 1036.

[129] *Sketch of Proceedings of Congress*, *supra* note 122, at 81, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1026, 1026, 1027.

[130] 2 CONG. REG. 3 (1789), *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1028, 1028.

[131] *See Monday, June 22*, 1 J. HOUSE REPRESENTATIVES U.S. 50–51, *reprinted in* 3 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 94, 95 (Charlene Bangs Bickford et al. eds., 1977).

amendments to the removal text.[132] The same language found its way into the Treasury and War Department laws.[133]

Although various arguments were made in support of a removal power, the dominant one rested on the claim that the executive power included authority to remove officers.[134] Some advocates also insisted that if the appointment power included an implicit power of removal, as others had argued, removal nonetheless rested with the President alone.[135] They observed that, although the Senate must consent to an appointment, the Constitution gives the power to appoint to the President alone.[136] Therefore, if the removal power follows the appointment power, the President has a power to remove at pleasure and can exercise it independent of the will of the Senate or Congress.[137] Further, some advocates of presidential removal said that the Chief Executive could not ensure a faithful execution of the laws if he could not remove unfaithful officers.[138] These arguments were secondary to the principal point that the executive power conveyed a removal power.

With good reason, Chief Justice John Marshall understood the congressional debate as resting on a determination of the constitutional powers of the presidency. In his work *The Life of George Washington* — published in 1807, four years after *Marbury* — he described the Decision of 1789 as follows:

> To obviate any misunderstanding of the principle on which the question [of removal] had been decided, Mr. Benson [later] moved . . . to amend . . . the bill . . . . If [the original text] continued [in the bill], he said the power of removal by the president might hereafter appear to be exercised by virtue of a legislative grant only, and consequently be subjected to legislative instability; when he was well satisfied in his own mind, that it was by fair construction, fixed in the [C]onstitution . . . . As the bill passed into a law, it has ever been considered as a full expression of the sense of the legislature on this important part of the American [C]onstitution.[139]

---

[132] *See* Foreign Affairs Bill, H.R. 8, 1st Cong. (1789), *reprinted in* 4 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 696, 697 n.4 (Charlene Bangs Bickford & Helen E. Veit eds., 1986).

[133] *See* Act of Aug. 7, 1789, ch. 7, § 2, 1 Stat. 49, 50 (providing that chief clerk would have custody of departmental papers whenever the president removed the Secretary of War); Act of Sept. 2, 1789, ch. 12, § 7, 1 Stat. 65, 67 (providing that the Treasury "Assistant" would have custody of departmental papers whenever the president removed the Secretary of Treasury).

[134] *See* Prakash, *Decision of 1789*, *supra* note 23, at 1065.

[135] *Id.* at 1036–37.

[136] *Id.* at 1037.

[137] *See, e.g.*, *Congressional Intelligence. Debate in the House of Representatives on Wednesday (Continued.)*, *supra* note 76, at 887 (statements of Representative Laurance).

[138] *See, e.g.*, *Congressional Intelligence. Debate in the House of Representatives on Wednesday. (Continued.)*, DAILY ADVERTISER (N.Y.C.), June 22, 1789, at 1, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 895, 896.

[139] 5 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 199–200 (Philadelphia, C.P. Wayne 1807).

Chief Justice Marshall's reading of the Decision of 1789 tracks our own.[140] He was hardly alone. Many politicians, scholars, and judges understood that Congress had endorsed the view that the Constitution gave the President the power to remove executives.[141]

Congress reaffirmed the principle in two other statutes. For the Northwest Territory, Congress declared that the President had the same powers to remove officers that the Continental Congress formerly had.[142] In the Judiciary Act of 1789, Congress provided that the marshals served at "pleasure."[143] As we discuss later,[144] people assumed it was the *President's* pleasure.

Yet the dominant pattern was for Congress to create offices and say nothing about removal. Congress created district attorneys,[145] military officers,[146] duty collectors,[147] and many other offices. Given the Decision of 1789, statutes that said nothing about removal were understood as leaving intact the settled conclusion that the President had a *constitutional* power to remove executive officers.[148] As one representative put it in 1789 after the passage in the House of the bill establishing a Department of Foreign Affairs, the majority had decided that "all officers concerned in executive business should depend upon the will of the President."[149] As another observed, judges served during good behavior and "all others, during pleasure."[150] In 1793, one representative noted that the President could "remov[e] any of the Executive officers

---

140 As discussed below, *see infra* section II.C, pp. 1802–18, some scholars and Justices have argued that Chief Justice Marshall endorsed limits on the President's power to remove executives in *Marbury v. Madison*. It is entirely possible that Chief Justice Marshall changed his mind between 1803 and 1807. Yet the more plausible inference, based on the material discussed below, is that *Marbury*'s holding as to the tenure of justices of the peace was intended to apply, more narrowly, to judicial officers (or possibly territorial officers). That inference is also consistent with Chief Justice Marshall's reasoning in *The Life of George Washington*.

141 *See* Parsons v. United States, 167 U.S. 324, 330–35 (1897) (collecting materials supporting this view); *see also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1535–1536 (Boston, Hilliard, Gray & Co. 1833); AN APPEAL FROM THE NEW TO THE OLD WHIGS 1 (Boston, Russell, Odiorne & Co. 1835) (saying that all three branches concluded that the President had a constitutional removal power); 10 ANNALS OF CONG. 131 (1800) (statement of Sen. Charles Pinckney) (claiming "every officer of the United States is nominated by the President, and (except Judges) removable at his pleasure"); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 289 (New York, O. Halsted 1826) (concluding that the 1789 Congress had construed the Constitution as granting removal power).

142 Northwest Ordinance of 1787 (codified as Act of Aug. 7, 1789, ch. 8, § 1, 1 Stat. 50, 53).

143 *See* Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87.

144 *See infra* section II.D.3, pp. 1823–24.

145 *See* Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92 (creating attorney offices).

146 *See* Act of Mar. 3, 1791, ch. 28, § 5, 1 Stat. 222, 222 (allowing the President to appoint with "advice and consent of the Senate" a major general and brigadier general).

147 *See* Act of July 31, 1789, ch. 5, § 1, 1 Stat. 29, 29–35 (creating offices of collectors in various port districts).

148 Prakash, *Removal and Tenure*, *supra* note 23, at 1827.

149 1 ANNALS OF CONG. 637 (1789) (Joseph Gales ed., 1834) (statement of Rep. Sedgwick).

150 *Id.* at 638 (statement of Rep. Benson).

at pleasure."[151] We discuss more such statements later, for they bear on a number of disputes about the scope and existence of the removal power.

5. Presidents Wield a Constitutional Power of Removal. — The first President agreed with Congress, concluding that he had constitutional power to remove executives. The first trove of evidence comes from President Washington's removal of almost twenty officers, including a consul, diplomats, tax collectors, surveyors, and military officers.[152] Because no statute granted the President authority to remove these officers,[153] President Washington must have concluded that the Constitution empowered him to dismiss them.

President Washington's commissions signal the same. Article III commissions specified tenure "during . . . good Behaviour."[154] In contrast, executives received commissions that said they could hold office during "the pleasure of the President of the United States for the time being."[155]

President Washington issued at-pleasure commissions to Treasury comptrollers,[156] consuls,[157] accountants,[158] district commissioners,[159] collectors,[160] commissioners of the Bank of the United States,[161] masters

---

151 3 *id.* at 909 (1793) (statement of Rep. Barnwell).

152 Carl Russell Fish, *Removal of Officials by the Presidents of the United States*, *in* 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1899, at 67, 69 (Washington, Gov't Printing Off. 1900).

153 Prakash, *Removal and Tenure*, *supra* note 23, at 1827.

154 *E.g.*, Commission of John Jay (Sept. 26, 1789), *in* 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 10, 10 (Maeva Marcus & James R. Perry eds., 1985).

155 Prakash, *Removal and Tenure*, *supra* note 23, at 1828.

156 *See Oliver Wolcott, Jr. Papers: Awards and Appointments, 1781–1819*, CONNECTICUT DIGITAL ARCHIVE (1791), https://collections.ctdigitalarchive.org/islandora/object/40002%3A74031#page/14/mode/2up [https://perma.cc/62WR-FJYT] (providing that Treasury comptroller Oliver Wolcott served at the President's pleasure); Commission (July 1, 1796), *in* 1 THE PAPERS OF JOHN STEELE 142, 142 (H.M. Wagstaff ed., 1924) (providing that Treasury comptroller John Steele served at the President's pleasure).

157 *See* Letter from George Washington to the U.S. Senate (May 28, 1794), *in* 16 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 147, 148–49 n.3 (Erik B. Alexander et al. eds., 2011) (quoting commission noting that Consul Arnold Delius would serve at the President's pleasure).

158 *See* Letter from Bartholomew Dandridge, Jr., to Timothy Pickering (Apr. 11, 1795), *in* 18 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 157, at 36, 36 (William M. Ferraro et al. eds., 2015) (quoting commission noting that chief clerk of the auditor's office in the Department of the Treasury William Simmons served at the President's pleasure).

159 *See* Commission (Jan. 22, 1791), *in* 7 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 157, at 258, 258–59 (Edward G. Lengel et al. eds., 1998) (noting that Commissioners Thomas Johnson, Daniel Carroll, and David Stuart served at the President's pleasure).

160 *See* Letter from George Washington to the U.S. Senate (Aug. 3, 1789), *in* 3 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 157, at 377, 381 n.3 (W.W. Abbot et al. eds., 1989) (noting that Collector Otho Holland Williams served at the President's pleasure).

161 *See Appointment of David Rittenhouse [as] Commissioner for Subscriptions of the Bank of the United States*, GILDER LEHRMAN INST. AM. HIST., http://www.americanhistory.amdigital.co.uk/Documents/Details/GLC02717 [https://perma.cc/EH55-QHMA] (commission from 1791 providing that Commissioner David Rittenhouse served at the President's pleasure).

of cutters of the revenue service,[162] inspectors of revenue,[163] attorneys,[164] marshals,[165] and diplomats.[166] Again, these "at pleasure" commissions were issued to many officers, most of whose organic statutes said nothing about removal.

Commissions were typically addressed to the public and not the officer ("To All Who Shall See These Presents, Greeting: Know Ye, That . . . I Have appointed . . . ."[167] Think of commissions as a form of government identification. Hence, through his commissions, President Washington notified the *entire world* that Presidents could remove executives. Anyone reading an at-pleasure commission, including the recipient, would conclude that President Washington believed that he could remove the officer.

Secretary of State Thomas Jefferson prepared President Washington's commissions.[168] He also affixed the seal of the United States and signed them.[169] Hence, the first Secretary of State gave his imprimatur to the proposition that the President had constitutional power to remove executives. Because Jefferson used templates, the "at pleasure" language perhaps found its way into the commissions of all executives appointed during this period by the President with the Senate's consent.[170] In 1797, then–Secretary of State Timothy Pickering confirmed as much:

> In all cases except that of the Judges, it has been established from the time of organizing the Government, that removals from offices should depend on the pleasure of the Executive power: and you know that with the above exception, the commissions of all officers, civil and military, appointed by

---

[162] *See* Captain Jonathon [sic] Maltbie, 3d, *in* MALTBY-MALTBIE FAMILY HISTORY, 326, 328 (Dorothy Maltby Verrill ed., 1916) (noting that Master of a cutter Jonathan Maltbie served at the President's pleasure).

[163] *See* Commission (Mar. 1, 1791), *in* MARGARET PROUTY HILLHOUSE, HISTORICAL AND GENEALOGICAL COLLECTIONS RELATING TO THE DESCENDANTS OF REV. JAMES HILLHOUSE 579 (1916) (noting that Inspector John C. Ten Broeck served at the President's pleasure).

[164] *See* Commission (Nov. 28, 1789), *in* 27 ANNALS OF CONG. app. at 2661 (1854) (noting that Attorney William Nelson served at the President's pleasure).

[165] *See* Commission (July 3, 1790), https://www.raabcollection.com/presidential-autographs/washington-jefferson-marshal [https://perma.cc/PYU2-VZQE] (noting that Marshal William Peck served for four years unless sooner removed by the President).

[166] *See* Commission (Nov. 24, 1794), *in* 6 ANNALS OF CONG. app. at 2524, 2524–25 (1796) (commission to Thomas Pinckney to serve as envoy to Spain).

[167] Letter from George Washington to the U.S. Senate (Aug. 3, 1789), *supra* note 160, at 381 n.3 (quoting a commission to Otho Holland Williams to serve as collector).

[168] *See* Act of Sept. 15, 1789, ch. 14, § 4, 1 Stat. 68, 68–69.

[169] *See id.* (providing that the Secretary of State affix the seal of the United States to civil commissions after they are signed by the President).

[170] Jefferson apparently created model blank commissions and had printers produce many of them. *See* Contingent Expenses of the Department of State, 1790–1793, *in* 17 THE PAPERS OF THOMAS JEFFERSON: MAIN SERIES, *supra* note 89, at 359, 361, 365–66, 369, 374 (listing expenses for various blank commissions bought in bulk).

> the President with the advice and consent of the Senate, explicitly declare they hold their offices 'during the pleasure of the President . . . .'[171]

Pickering was a holdover Secretary of State from the Washington Administration.[172] Because he had been signing and sealing civil commissions from 1795 onwards,[173] he knew early practices and understandings. Ironically, Pickering later became better acquainted. No longer pleased, President John Adams booted Pickering in 1800.[174]

We do not claim that all executives received commissions specifying "at pleasure" tenure because we do not have copies of all commissions. And of course, commission preparers could make errors or omissions, such as by drafting a commission with the wrong tenure or delivering a commission that failed to mention that an executive served at pleasure. But neither mistake nor oversight could vary the constitutionally established tenure for judges or executive officers.[175] If someone is an executive officer, the President has constitutional power to remove the officer even if the commission fails to state the obvious.

President Washington's correspondence adverted to his removal power. In a letter to two Secretaries, President Washington sought advice about whether to remove Edmund Randolph, the second Secretary of State.[176] Similarly, he requested counsel about dismissing James Monroe from his Paris posting as United States Minister to France.[177]

For their part, the Secretaries cited the executive power as granting removal power. During the House's 1789 debates, Alexander Hamilton told a representative that he "was now convinced that the [President]

---

171 Letter from James Monroe to Timothy Pickering (July 31, 1797), *in* 3 THE WRITINGS OF JAMES MONROE 73, 75 n.1 (Stanislaus Murray Hamilton ed., 1969) (quoting a letter from Pickering to Monroe).

172 *Biographies of the Secretaries of State: Timothy Pickering (1745–1829)*, U.S. DEP'T STATE: OFF. HISTORIAN, https://history.state.gov/departmenthistory/people/pickeringtimothy [https://perma.cc/2J73-DTCQ].

173 *See id.*

174 *Id.*

175 *See* U.S. CONST. art. III, § 1.

176 Letter from George Washington to the Secretaries of the Treasury and War (Aug. 12–18, 1795), *in* 34 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745–1799, at 275, 275 & n.93 (John C. Fitzpatrick ed., 1940); *Biographies of the Secretaries of State: Edmund Jennings Randolph (1753–1813)*, U.S. DEP'T STATE: OFF. HISTORIAN, https://history.state.gov/departmenthistory/people/randolph-edmund-jennings [https://perma.cc/8WQ2-BRKX].

177 Letter from George Washington to the Attorney General (July 6, 1796), *in* 35 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, *supra* note 176, at 122, 122–24; *see also* Letter from George Washington to the Secretary of State (July 8, 1796), *in* 35 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, *supra* note 176, at 127, 127–28 (noting that Washington had "determined to recall" Minister Monroe, *id.* at 127).

alone [should] have the power of removal at pleasure."[178] Writing as Pacificus in 1793, Hamilton rested his argument on the executive power:

> With [certain] exceptions [(the appointment, treaty, and war powers)] the Executive Power of the [United States] is completely lodged in the President. This mode of construing the Constitution has indeed been recognized by Congress in formal acts, upon full consideration and debate. The power of removal from office is an important instance.[179]

A 1796 cabinet opinion representing the views of the Secretaries of War, Treasury, and State said the same: "To appoint to and remove from office are equally executive powers . . . . It is with the President, . . . the watchful guardian of the laws, and responsible for their due execution, that the *power of removal* is chiefly lodged."[180] This power arose "[f]rom its being an essential attribute of Executive power."[181] Attorney General Charles Lee, who argued the case on behalf of the petitioners in *Marbury*,[182] noted his agreement, adding that "the President alone has power to remove from Office."[183]

Presidents John Adams and Thomas Jefferson both removed officers, with the former ousting over two dozen and the latter over one hundred.[184] Further, each issued "at pleasure" commissions to executive officers.[185] The general sense that the President could remove executive officers was thus confirmed in word and deed by Washington's successors.

The reaction to the removals is telling. Members of the public accepted that Presidents had a removal power, as when they petitioned

---

[178] Letter from William Smith (S.C.) to Edward Rutledge (June 21, 1789), *in* 16 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 831, 832–33 (Charlene Bangs Bickford et al. eds., 2004).

[179] Hamilton, *Pacificus No. 1*, *supra* note 33, at 40; *see also* Alexander Hamilton, *The Examination. No. 13.*, N.Y. EVENING POST, Feb. 27, 1802, at 3, *reprinted in* 25 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 33, at 539, 539–40 (Harold C. Syrett ed., 1977) [hereinafter Hamilton, *The Examination No. 13*] (observing that by "the theory of the Constitution," it is "an Executive act [to] remov[e] the person from the office").

[180] Enclosure to Letter from James McHenry to George Washington (July 2, 1796), *in* 20 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 157, at 355, 357 n.2 (Jennifer E. Steenshorne et al. eds., 2019).

[181] *Id.*

[182] *Attorney General: Charles Lee*, U.S. DEP'T JUST. (Oct. 24, 2022), https://www.justice.gov/ag/bio/lee-charles [https://perma.cc/2C4A-Z2XY].

[183] Letter from Charles Lee to George Washington (July 7, 1796), *in* 20 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 157, at 394, 395–96 (Jennifer E. Steenshorne et al. eds., 2019).

[184] Fish, *supra* note 152, at 67, 70.

[185] *See* Prakash, *Removal and Tenure*, *supra* note 23, at 1830.

Presidents to fire officers.[186] The complaints were varied, with the same remedy: appoint someone more worthy after you fire the incumbent.[187]

The congressional response is equally revealing. Recall that in 1789, Congress had endorsed the principle that the Constitution granted the President the power to remove executive officers.[188] Subsequently, Presidents occasionally notified Congress, the Senate in particular, that they had ousted officers.[189] In the face of public commissions, public removals, and public requests to the President to remove, we are aware of no representative or senator who asserted that these Presidents had unconstitutionally (or unlawfully) claimed a power not theirs. The evidence points in the other direction. For instance, the Senate opponents of Chief Justice John Jay's nomination to serve as treaty negotiator with Britain proposed a resolution that assumed a removal power: "[T]o permit Judges of the Supreme Court to hold at the same time any other office . . . holden at the pleasure of the Executive, is contrary to the spirit of the Constitution."[190] The complaint supposed that Presidents had *constitutional* power to remove treaty negotiators, for no law granted such authority.

The wisdom of certain removals might be gainsaid. The policy of sweeping removals was contentious during the third presidency because Jefferson wielded the power so vigorously.[191] But we know of no one

---

[186] *See, e.g.*, Letter from George Thatcher to Thomas B. Wait (Apr. 7, 1790), *in* 19 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1168, 1168 (Charlene Bangs Bickford et al. eds., 2012) (noting that some were reportedly petitioning the President to remove a "certain Collector"); Letter from Thomas Jenkins, Ambrose Spencer, and Alexander Coffin to Thomas Jefferson (Oct. 16, 1802), *in* 38 THE PAPERS OF THOMAS JEFFERSON: MAIN SERIES, *supra* note 89, at 501, 501 (Barbara B. Oberg ed., 2011) (asking President Jefferson to remove two officers and thereby use his "constitutional prerogative").

[187] *See, e.g.*, Letter from Thomas Jenkins, Ambrose Spencer, and Alexander Coffin to Thomas Jefferson, *supra* note 186, at 501, 502 (asking Jefferson to remove and appoint more "suitable Characters").

[188] *See supra* notes 125–43 and accompanying text; Prakash, *Decision of 1789*, *supra* note 23, at 1026.

[189] *See* Letter from George Washington to the U.S. Senate (May 17, 1796), *in* 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 208, 208 (Washington, D.C., Duff Green 1828) (recording message from President Washington to the Senate that announced the removal of Sylvanus Walker, Inspector of the Revenue); Letter from Thomas Jefferson to U.S. Senate (Jan. 11, 1803), *in* 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA, *supra*, at 432, 432–33 (noting removal of several officers by President Jefferson).

[190] *See* 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA, *supra* note 189, at 152. This resolution failed and the Senate consented to the appointment of Chief Justice Jay to serve as treaty commissioner. *Id.*

[191] *See* CARL RUSSELL FISH, THE CIVIL SERVICE AND THE PATRONAGE 42 (2d ed. 1963) ("Jefferson, in the course of his administration, removed 109 out of a total of 433 officers of the presidential class."); *see also id.* at 31–43 (describing some of the controversy of these removals); Letter from George Jefferson to Thomas Jefferson (Mar. 4, 1801), *in* 33 THE PAPERS OF THOMAS JEFFERSON: MAIN SERIES, *supra* note 89, at 158, 159 (Barbara B. Oberg ed., 2006) (warning President Jefferson of "censure" should he be perceived as "turning others out of Office in order to make room for [his] relation").

who sought the impeachment of Washington, Adams, or Jefferson on the grounds that each had usurped a power that the Constitution never granted to them.

B. Congressional Authority

While the Constitution grants the President authority to remove executive officers, it nowhere grants Congress the authority to depart from the "at pleasure" baseline. The removal power is not a default allocation that Congress may defease or encumber.

The interaction of Articles I and II, read in the light of history, signals that the Constitution does not authorize Congress to create executive offices immune from removal at will. Our assertion somewhat parallels Representative Madison's:

> The constitution affirms, that the executive power shall be vested in the president: Are there exceptions to this proposition? Yes . . . . The constitution says that, in appointing to office, the senate shall be associated . . . . Have we a right to extend this exception? I believe not. If the constitution has invested all executive power in the president, . . . the legislature has no right to diminish or modify his executive authority.[192]

There are, of course, other particular exceptions. For instance, Congress can vest the appointment of inferior officers in persons other than the President.[193] Congress can also countermand presidential military orders, as when its rules of military conduct contradict standing presidential commands.[194] Congress has long deployed its power to create rules for the government of the armed forces to constrain what the Commander in Chief might otherwise command.[195] Congress may do so because the Constitution confers on the President a defeasible, or default, military authority. Notwithstanding such narrow exceptions, Madison was right. Congress does not possess a generic power to "diminish or modify" presidential authority.

1. Congress Lacks Express Authority to Refashion the Separation of Powers. — Madison reached his mostly sound conclusion because he recognized how Congress differed from more potent legislatures. In his era, Parliament was supreme — it had unconstrained power to modify the British Constitution via ordinary statutes.[196] Hence, if the Parliament drafted a bill to constrain the Crown's removal power, that

---

[192] *Congressional Intelligence. House of Representatives.*, DAILY ADVERTISER (N.Y.C.), June 18, 1789, at 2, *reprinted in* 12 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES, *supra* note 61, at 225, 228 (Charles F. Hobson & Robert A. Rutland eds., 1979).

[193] U.S. CONST. art. II, § 2, cl. 2.

[194] *See id.* art. I, § 8, cl. 14.

[195] *See, e.g.*, *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 138–41 (1866); *Ex parte* Quirin, 317 U.S. 1, 25–30 (1942); Hamdan v. Rumsfeld, 548 U.S. 557, 591–95, 613–15, 635 (2006).

[196] *See, e.g.*, Act of Settlement 1701, 12 & 13 Will. 3, c. 2, § III (Eng.) (barring the use of pardons to halt impeachments).

bill would become law with the Crown's assent.[197] Parliamentary supremacy meant that there were no fixed constraints when it came to the separation of powers. The limits on Parliament were political, not legal.[198]

State assemblies were rather potent, but for a different reason. Some state constitutions expressly authorized the legislative alteration of executive powers. Virginia decreed that "executive powers" were to be exercised "according to the laws of this commonwealth."[199] Georgia declared that the "executive powers" were to be wielded "according to the laws of this state[] and the constitution thereof."[200] Some frameworks provided that executives would enjoy certain powers "for the time being,"[201] perhaps signaling that the legislature might strip those powers. Legislative authority to modify executive powers led Madison to lament that while state assemblies were "omnipotent," the executives were but "[c]yphers."[202] He was right.

Our Constitution does not establish a cipher of an executive because it does not countenance *congressional* supremacy. While the first branch is the most powerful and has the broadest array of powers, it is no British Parliament.[203] The Constitution — in its individual rights and structural provisions — limits congressional authority. Unlike some state assemblies, Congress was not designed to reign over the branches.[204] The Framers crafted a Congress unable to continue the woeful tradition of the state assemblies that seized powers from other branches.[205]

In a similar vein, Congress cannot curb or alter the Constitution's grants of power. For instance, Congress cannot legislate that the President may veto bills solely "for good cause," rather than at discretion. This is not merely because of Articles I, II, and III. After all, to "vest" powers, as these Articles do, does not necessarily preclude authority, granted elsewhere, to divest such powers.[206] Rather, the limits on Congress come from the *absence of divesting or encumbering authority*.

---

[197] *See* Leander Beinlich, *Royal Prerogative*, MAX PLANCK ENCYCLOPEDIA COMPAR. CONST. L. (Mar. 2019), https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e773 [https://perma.cc/BWT7-S2CD] ("[T]he supreme legal force of statute means that prerogative powers may be curtailed or abrogated by statute.").

[198] SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 262 (2015).

[199] VA. CONST. of 1776, ch. II, § 9.

[200] GA. CONST. of 1777, art. XIX.

[201] *E.g.*, DEL. CONST. of 1776, art. XVII; GA. CONST. of 1777, art. XXXIII; S.C. CONST. of 1778, art. XXXV.

[202] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 50, at 35.

[203] *See generally* Saikrishna Bangalore Prakash, *Congress as Elephant*, 104 VA. L. REV. 797 (2018).

[204] *See* THE FEDERALIST NO. 51, *supra* note 49, at 319–20 (James Madison).

[205] *See* THACH, *supra* note 70, at 27–34.

[206] Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 256–57 (2005) (reviewing HAROLD J. KRENT, PRESIDENTIAL POWERS (2005)).

There is no generic legislative power to modify the Constitution's allocations of power to the branches. Within the Constitution, there is no proviso declaring that legislative, executive, and judicial powers are to be exercised "according to [ordinary federal] laws."[207] No text in the Constitution proclaims that the President or the judiciary may enjoy constitutional powers except when the law may "otherwise direct."[208] Finally, no federal article, section, or clause pronounces that powers are vested in the three branches "for the time being,"[209] a phrase that might imply statutory power to alter or divest those powers. Again, when there is no legislative power to regulate, encumber, or seize a power vested in any federal institution, the Constitution's allocation cannot be disturbed for want of authority to disturb it.

These principles apply to removal, of all sorts. Though no clause expressly bars Congress from encumbering the President's removal power, Congress cannot impose for-cause constraints on the President because there is no affirmative legislative authority empowering it to constrain removals. Nor can Congress encumber the Senate's power to remove after an impeachment trial. No specific text authorizes Congress to constrain either sort of removal.

Consider the stark contrast with some state constitutions and their treatment of removal, and the point becomes more powerful. The Delaware Constitution of 1776 said its "president" could "appoint, during pleasure, until otherwise directed by the legislature, all necessary civil officers not hereinbefore mentioned."[210] The South Carolina Constitution of 1778 said much the same of its "governor."[211] In comparison, the Federal Constitution never ordains that the President may veto bills, remove officers, and superintend federal law execution "until otherwise directed by the legislature." It never declares that the President has the "executive power until otherwise altered by the legislature." The absence of such language with respect to removal, and most other presidential powers, is telling.

2. The Necessary and Proper Clause and the Separation of Powers. — While some will agree with our claim that Congress lacks express authority to constrain removals (as well as other powers), others

---

[207] *Cf.* GA. CONST. of 1777, art. XIX; VA. CONST. of 1776, ch. II, § 9.

[208] DEL. CONST. of 1776, art. VII. Such clauses were quite common in the state constitutions. *See, e.g.*, *id.* art. XIII (providing that certain courts have "the power of holding inferior courts of chancery" unless "the legislature shall otherwise direct"); MD. CONST. of 1776, art. XXXIII (providing that Governor may pardon unless legislature otherwise directs); N.Y. CONST. of 1777, art. XXXVI (providing that Council shall appoint officers "until otherwise directed by the legislature"); N.C. CONST. of 1776, art. XIX (providing that Governor may pardon except where the law "shall otherwise direct"); S.C. CONST. of 1778, art. XXIV (providing that the Lieutenant Governor and Privy Council shall form a court of chancery "until otherwise altered by the legislature").

[209] *Cf.* DEL. CONST. of 1776, art. XVII; GA. CONST. of 1777, art. XXXIII; S.C. CONST. of 1778, art. XXXV.

[210] DEL. CONST. of 1776, art. XVI.

[211] S.C. CONST. of 1778, art. XXXII.

will demur and cite the "Sweeping Clause." Indeed, those favoring broad congressional power over the separation of powers may embrace Dean John Manning's claim that the Necessary and Proper Clause is a "master clause."[212] Manning's view of the clause suggests that it can be used to constrain removals.[213] Some of the Court's cases might seem to favor this argument, particularly *Morrison v. Olson*[214] and *Humphrey's Executor v. United States*.[215]

With respect, we are dubious of any claim that the clause grants Congress the same power over the separation of powers as Parliament enjoyed. Relatedly, the clause seems a rather unlikely means of replicating the potent clauses found in state constitutions, ones that allowed state assemblies to transform or modify state separations of powers.[216]

In our view, the clause makes express what would have been implicit: Congress can pass laws to implement federal power, to make sure that federal power is not a shadow but has real substance.[217] Using this power, Congress may create departments and offices.[218] In other words, the Necessary and Proper Clause conveys authority to implement federal powers — it is *only* an *implementing* clause.[219] Readings that cram authority to *transform* or *modify* the separation of powers into a narrow implementing provision do not cohere with the text of the clause, which does not grant a generic power to detract from, diminish, or weaken the powers of the three branches.

No less importantly, the clause should not be interpreted to replicate the very difficulties that Publius criticized. As Madison put it in *The Federalist No. 48*, "[t]he legislative department is everywhere extending the sphere of its activity and drawing all power into its *impetuous vortex*."[220] That was intended to describe the then-recent past, where state legislatures were seizing executive and judicial powers. It was *not* intended to describe the lawful powers of Congress under the Constitution. The Sweeping Clause, as broad as it is, is no master clause

---

[212] John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 63 (2014).

[213] *See id.* at 66–67.

[214] 487 U.S. 654, 693–96 (1988).

[215] 295 U.S. 602, 629–30 (1935).

[216] *See supra* notes 199–202, 210–11 and accompanying text.

[217] THE FEDERALIST NO. 44, *supra* note 49, at 280 (James Madison).

[218] *See, e.g.*, Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65, 65 (codified as amended at 5 U.S.C. § 301, 31 U.S.C. §§ 301, 331) (establishing the Department of the Treasury); Act of Aug. 7, 1789, ch. 7, §§ 1–2, 1 Stat. 49, 49–50 (codified as amended at 5 U.S.C. §§ 301, 7012, 7831) (establishing the Department of War); Act of July 27, 1789, ch. 4, §§ 1–2, 1 Stat. 28, 28–29 (codified as amended at 5 U.S.C. § 301, 22 U.S.C. §§ 2651, 2656–2657) (establishing the Department of Foreign Affairs).

[219] *See* William Baude, Response, *Sharing the Necessary and Proper Clause*, 128 HARV. L. REV. F. 39, 46 (2014); *see also* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 271–72 (1993) (arguing that Congress cannot alter the separation of powers); Calabresi & Prakash, *supra* note 16, at 590 (same).

[220] THE FEDERALIST NO. 48, *supra* note 49, at 306 (James Madison) (emphasis added).

that delegates to Congress a master power. To read the Necessary and Proper Clause as a generic power to refashion the separation of powers would be to construe it to authorize "'great substantive and independent power[s]' beyond those specifically enumerated."[221]

To take an example, Congress cannot use the Sweeping Clause to limit the pardon power by requiring the President to meet a for-cause standard.[222] Such a law would undermine, rather than implement, the pardon power.[223]

Proponents of the master-clause theory might agree that Congress cannot require "cause" before issuing pardons. Yet how can they embrace a congressional power to limit removals and simultaneously reject a power to limit pardons? Those favoring the master-clause reading should address the limits, if any, of their reading. Further, they should discuss how the master-clause theory meshes with more particularized grants of encumbering authority, such as Congress's power to strip away the Supreme Court's appellate jurisdiction.[224] After all, there is no need for a narrow clause that permits Congress to strip away only certain authority if there is a crosscutting power to curb or retract powers granted to the branches.

If the Executive Power Clause confers on the President a removal power, then Congress cannot use the Necessary and Proper Clause to sweep that power away. A law that bars removal of executives is not "necessary and proper for carrying into execution" any federal power. Although less onerous than a removal ban, a law that says the President can remove an officer only for inefficiency, neglect, or malfeasance[225] is

---

221 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 559 (2012) (alteration in original) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411 (1819)).

222 *See Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866) ("This power of the President [to grant pardons] is not subject to legislative control . . . [and] cannot be fettered by any legislative restrictions."); United States v. Klein, 80 U.S. (13 Wall.) 128, 148 (1871).

223 What is true for the presidency holds true for other constitutional actors. The Necessary and Proper Clause would not sanction a federal law that bars presidential electors from voting for particular candidates. (A federal law barring electoral votes for persons ineligible to serve as President might be constitutional, however.) Nor can Congress use the clause to eliminate the Supreme Court's original jurisdiction. The Sweeping Clause does not sweep that far.

These principles also bar Congress from diminishing its own constitutional authority. Congress cannot pass a law taking away a future Congress's power to legislate. United States v. Winstar Corp., 518 U.S. 839, 872–73 (1996) (plurality opinion) (quoting Manigault v. Springs, 199 U.S. 473, 487 (1905)). It cannot pass a law that imposes qualifications for federal legislative office. *See* Powell v. McCormack, 395 U.S. 486, 550 (1969). Most relevant, Congress cannot pass a law that limits the category of impeachable offenses or one that makes it more difficult to impeach or remove officers. *Cf. Klein*, 80 U.S. (13 Wall.) at 141–42; *Garland*, 71 U.S. (4 Wall.) at 380. For instance, the Sweeping Clause cannot sanction a law that would bar removals after a Senate conviction.

224 U.S. CONST. art. III, § 2, cl. 2 ("[T]he supreme Court shall have appellate Jurisdiction . . . with such Exceptions . . . as the Congress shall make.").

225 *See, e.g.*, 12 U.S.C. § 5491(c)(3) (providing that the President may remove the Director of the Consumer Financial Protection Bureau only for inefficiency, neglect of duty, or malfeasance in office).

similarly unconstitutional because it is improper. Congress can no more impose for-cause removal restrictions than it can impose a restriction that henceforth vetoes must rest only on constitutional grounds. In both cases, Congress lacks authority to limit the use of a constitutional power to certain specified causes.

To be sure, Congress can deploy the clause to carry the removal power into execution. For example, Congress can supply money and offices to help the President identify officers that ought to be removed. By appropriating money for a pardon attorney, Congress helped implement the President's pardon power.[226] Similarly, creating a "Director of Removal" would facilitate the removal power. Assistance in monitoring executives would help ensure a faithful performance of the presidency.[227]

Maybe Congress can go further. For instance, perhaps Congress may insist, via statute, that all removals be in writing.[228] Congress might suppose that written removals remove all doubts about whether, and when, a removal occurred. First, a requirement that removals be in writing would eliminate any confusion or dispute that might arise when there is a contested assertion that the President orally fired an officer.[229] Second, given related disputes about the timing of removals,[230] perhaps Congress may insist that any written removal must specify when the removal takes effect. In other words, a law that required that a removal be in writing and specify when the removal takes effect might be necessary and proper to carry into execution the removal power.

Some might observe that — unlike the pardon, the veto, and the impeachment powers — the President's removal power is implied, rather than express. Further, they might argue that congressional authority is greater under the Necessary and Proper Clause when the regulated power is not specifically mentioned but is instead part of a general grant. In *Public Citizen v. U.S. Department of Justice*,[231] Justice Kennedy effectively took such a position by distinguishing between express and

---

[226] Act of Mar. 3, 1891, ch. 541, § 1, 26 Stat. 908, 946.

[227] *See* U.S. CONST. art. II, § 3.

[228] *Cf.* Act of Mar. 1, 1792, ch. 8, § 11, 1 Stat. 239, 241 (codified as amended at 3 U.S.C. § 20) (providing that presidential and vice-presidential resignations must be in writing).

[229] Consider the case of the disputed pardon of Isaac Toussie. Toussie's lawyers received a phone call signaling that President George W. Bush had pardoned him. But the President had second thoughts. The Administration subsequently claimed that the pardon was not complete because Toussie had never received a written pardon. *See* David Stout & Eric Lichtblau, *Pardon Lasts One Day for Man in Fraud Case*, N.Y. TIMES (Dec. 24, 2008), https://www.nytimes.com/2008/12/25/washington/25pardon.html [https://perma.cc/TJU2-W4S9]. For two opposing views about whether President Bush had pardoned Toussie, compare George Lardner Jr., Opinion, *A Test of the Power to Unpardon*, WASH. POST (Jan. 14, 2009), https://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011302581.html [https://perma.cc/73DQ-SR9V], with Brian C. Kalt, Editorial, *Once Pardoned, Always Pardoned*, WASH. POST, Jan. 26, 2009, at A11.

[230] *See, e.g.*, Bowerbank v. Morris, 3 F. Cas. 1062, 1062 (C.C.D. Pa. 1801) (No. 1,726) (discussing when a presidential removal takes effect).

[231] 491 U.S. 440 (1989).

inferred presidential powers.[232] According to the Justice, while laws that limit inferred presidential powers are subject to balancing,[233] the Court always shields express powers from legislative regulation.[234]

Justice Kennedy's attempt to make sense of Court doctrine failed on its own terms, for it could not account for the formalism of *INS v. Chadha*[235] and its adoption of a categorical rule against legislative vetoes.[236] Further, his *Public Citizen* opinion did not hew to the line he sees in the doctrine. Though Article II does not contain an express presidential power to receive private advice or the private information necessary to make wise appointments, Justice Kennedy ruled out any legislative interference with the President in this respect.[237]

Doctrine aside, there is no warrant for supposing that specifically enumerated powers receive more protection from congressional interference than powers subsumed in a more general grant. We admit that subsumed powers are more disputable, in the sense that it is easier to contest their existence. But, if one concludes that an express power includes several subsumed powers, those lesser included powers are on an equal plane with their counterparts that seem more textually grounded. They are textually identified, albeit in a way that may seem opaque to some. Recall Chief Justice Marshall's assertion in *Gibbons v. Ogden*[238] that all America knows that commerce includes navigation.[239] The power to regulate navigation was no less real or potent than the power to regulate commerce because commerce included navigation. Just as important, Congress's Necessary and Proper power relating to navigation is not more potent than its power over more obvious forms of interstate commerce, like the sale of goods.

The same points apply to presidential powers. The Constitution grants no express power to issue amnesties, meaning a general pardon issued simultaneously to a class of individuals. Yet such power is part of the power to issue pardons and reprieves.[240] We do not believe that congressional power to regulate presidential amnesties is broader than congressional power to regulate presidential pardons.

Likewise, the Necessary and Proper Clause does not convey greater authority to regulate those presidential powers that arise from the Vesting Clause. Again, the Sweeping Clause contains nothing

---

232 *Id.* at 484–85 (Kennedy, J., concurring in the judgment).

233 *Id.*

234 *Id.* at 486.

235 462 U.S. 919 (1983).

236 *See id.* at 951–59. Justice Kennedy described a legislative veto as "legislation" and hence supposed Congress was evading the presidential veto. But his characterization was question-begging. *See Pub. Citizen*, 491 U.S. at 486 (Kennedy, J., concurring in the judgment) (citing with approval *Chadha*'s description of legislative veto provisions).

237 *Pub. Citizen*, 491 U.S. at 488–89 (Kennedy, J., concurring in the judgment).

238 22 U.S. (9 Wheat.) 1 (1824).

239 *Id.* at 190.

240 United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871).

suggesting that congressional power varies based on whether the power is specially mentioned or embedded within a more general grant. Subsumed powers, including the removal power, are not second-class powers, ones that can be more easily constrained via the Necessary and Proper Clause.

In sum, the Constitution's allocations of powers are not default rules that Congress can refashion at its pleasure. As compared to Parliament and state assemblies, Congress lacks a generic power to curtail constitutional powers. The Necessary and Proper Clause does not yield a different result, regarding removal or otherwise. Finally, though the Constitution does not mention the President's removal power, it is not a second-class power subject to greater legislative regulation.

* * *

The Chief Executive has a nondefeasible power to remove executive officers at pleasure because the Constitution grants a removal power via the "executive power" and because it nowhere grants Congress power to defease that power. In this respect, the removal power is no different from the pardon power, the veto power, or the legislative powers of Congress. In each case, Congress lacks authority to defease the power.

What we have described — executive power to remove executive officers coupled with a congressional inability to curb that power — was the practice until the Civil War. In 1863, Congress belatedly imposed restrictions on the removal of executive officers.[241] In the twentieth and twenty-first centuries, Congress repeatedly encroached upon executive power by restraining presidential removal and thereby creating numerous independent agencies and officers. Some dispute this timeline, asserting that early Congresses barred removal of certain executive officers well before 1863. We evaluate a multitude of such claims below.

II. The Disunitarian Challenge

By declaring unlawful several statutory restrictions that constrained executive removal, the Court has stirred up the law school professoriate. First, relying upon English practices, some scholars seek to cast doubt on the claim that the President enjoys a constitutional power to remove. Second, some maintain that the First Congress arguably granted authority to remove to the President, rather than arriving at a legislative consensus that the President enjoyed a power that derived from the Constitution. If that were true, there would be no "Decision of 1789" with respect to the question whether the President enjoys a constitutional power to remove. Third, some argue that Congress regulated removals of executive officers far earlier than the Civil War. Fourth, some contend that Congress can regulate the tenure of quasi-judicial

---

[241] *See* Myers v. United States, 272 U.S. 52, 163–65 (1926).

officers. Finally, some argue that for-cause protection is appropriate for some executive offices and not others.

A. The British Backdrop

Relying on Professors Daniel Birk's and Peter Shane's scholarship, Justice Kagan's *Seila Law* opinion contended that British (and state) practice before the Constitution "belie[d]" an unconstrained removal power.[242] That was because, in her words, "Parliament often restricted the King's power to remove royal officers" and, in any event, the President "wasn't supposed to be a king."[243] Perhaps Justice Kagan meant that while removal was an executive power in the English system, Parliament could regulate that power by law. If that is her claim, we have no quarrel with it. But we part ways on the light that Parliament's authority sheds on our Congress's powers under the Constitution.

The starting point for understanding the implications of British practice for American constitutionalism is that, when the Framers spoke of the "executive power," they referred to a cluster of powers that had come to be associated with the "executive" *generally* through their association with the British Crown *and other executives*, both republican and monarchical.[244] But the "executive power" of the Framers was simultaneously more limited than were the Crown's historical powers and more expansive than were the Crown's powers in an era of parliamentary supremacy.

As far as British practice went, numerous high and low officers served at the Crown's pleasure.[245] While Birk correctly observes that the common law and parliamentary law constrained removal, he nonetheless admits that the Crown could remove many officers at pleasure.[246] Indeed, parliamentary laws were necessary to nullify the common backdrop of at-pleasure removal. The Act of Settlement[247] insisted upon judicial commissions during good behavior[248] precisely to bar the Crown from issuing commissions at pleasure. Hence, British

---

[242] Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2228 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (citing Birk, *supra* note 18; Shane, *supra* note 19, at 334–44).

[243] *Id.* (citing Birk, *supra* note 18).

[244] *See supra* section I.A, pp. 1764–82; ADAMS, A DEFENCE, *supra* note 63, at 579 (contending that "the legislative and executive authorities are naturally distinct" after canvassing a variety of governments, ranging from ancient democratic republics to modern monarchies). *See generally* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012).

[245] *See* Birk, *supra* note 18, at 211, 232 (discussing privy counsellors and sheriffs).

[246] Birk does not deny that the Crown could remove and that many officers served at the Crown's pleasure. Rather, Birk denies that the removal power extended to all executive officers. *See id.* at 204, 214 (noting that the Crown could remove officers, subject to common law and statutory constraints); *id*. at 203 (explaining that the Crown's removal authority did not extend to all officers).

[247] Act of Settlement 1701, 12 & 13 Will. 3, c. 2 (Eng.).

[248] *Id.* § 3.

statutes limiting removal suggested that the Crown could otherwise grant tenure at pleasure.

Americans of the Founding generation believed that the Crown's "executive power" included removal authority,[249] either because they had an abstract notion of the "executive power" or, perhaps, because they were unaware of every intricacy of British governance. Recall the Declaration of Independence's legitimate complaint that colonial judges served at the Crown's whim: "He has made Judges dependent on his Will alone, for the tenure of their offices . . . ."[250] This was a complaint that British practices of curbing at-will tenure for judges had not been replicated in America. But it also was a complaint grounded in the sense that the British Executive had the power to remove officers at pleasure.

It is easy to see why so many in the American Founding generation had abstracted a notion of "executive power" from British, other foreign, and domestic practices. Because many offices were held at the Crown's pleasure,[251] and because foreign executives had removal power as well,[252] Americans saw removal as a power associated with the executive. That the British Executive was not strictly unitary, and that Parliament could constrain removal,[253] did little to detract from the more abstract conception. In other words, Americans regarded removal as an executive power notwithstanding the fact that the British Crown lacked power to remove all officers and Parliament could enact laws curbing the Crown's removal authority.

If removal is an "executive power," and if, as the Constitution says, the executive power rests with the President, then the only way that the President's constitutional power to remove could be limited or eliminated would be if *Congress* had power to limit presidential removal. On this point, the British practice is not dispositive. That the eighteenth-century Parliament could alter every one of the Crown's numerous powers is obvious. After all, Parliament had plenary legislative power.[254] That Congress can alter the President's various powers is not so obvious. As we have shown earlier,[255] and as everyone admits, Congress is no British Parliament. It lacks unlimited legislative powers and therefore lacks the generic power to modify the Constitution's separation of powers, including the President's power to remove.[256]

Because Birk rarely addresses our Constitution, he does not focus on the lack of generic congressional power to alter the separation of powers.

---

[249] *See supra* note 76.
[250] THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).
[251] Birk, *supra* note 18, at 211–12.
[252] *See supra* note 76.
[253] Birk, *supra* note 18, at 182–83.
[254] *See supra* notes 196–98 and accompanying text.
[255] *See supra* note 203 and accompanying text.
[256] *See supra* section I.B.1, pp. 1782–84.

When he briefly touches upon this crucial question, he quotes Madison's claim in *The Federalist No. 39* that "[t]he tenure of the ministerial offices generally will be a subject of legal regulation, conformably to the reason of the case and the example of the State constitutions."[257] Birk concludes that Madison sanctioned congressional constraints on the President's power to remove.[258] But the quotation does not say that Congress can either bar, or require cause for, presidential removals of executive officers. Instead, it is best read to mean that Congress may set the "tenure" of an officeholder by imposing a maximum term of years on the office — precisely as the First Congress would with respect to marshals.[259] Reading Madison more broadly, as Birk does, would mean that there are no limits to Congress's power over tenure. But Congress cannot legislatively decree that some civil officers are exempt from removal by House impeachment and Senate conviction or that Article III judges serve during presidential pleasure. Similarly, Congress cannot grant tenure that would liberate executive officers from at-pleasure removal. The constitutional rule is simple: Congress can tinker on the margins with official tenure, subject to constitutional grants of removal authority (in the Article I Impeachment Clauses[260] and the Article II Vesting Clause[261]) and constitutional grants of protections (good behavior for judges[262]).

Were readers to adopt Birk's reading of Madison — that Congress can limit removal of executive officers — they would have to suppose that in 1789 Representative Madison directly contradicted what he wrote in 1788 in *The Federalist No. 39*.[263] Recall that in the House, Madison explicitly denied that Congress could detract from the President's power to remove.[264] Though Hamilton's *The Federalist No. 77* was wielded against Madison in 1789 to argue for Senate participation in removals,[265] we know of no one who cited *The Federalist*

---

[257] Birk, *supra* note 18, at 187 (quoting THE FEDERALIST NO. 39, *supra* note 49, at 238 (James Madison) (alteration in original)).

[258] *Id.* at 229 n.336.

[259] Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87. Perhaps Madison also meant to suggest that Congress might have some power to decide whether adjudicators and territorial officers could be given protected tenures. More on that later.

[260] U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cls. 6–7.

[261] *Id.* art. II, § 1, cl. 1.

[262] *Id.* art. III, § 1.

[263] *Compare* Birk, *supra* note 18, at 187 (quoting Madison's statement in *The Federalist No. 39*), *with id.* at 188–89, 229 n.336 (quoting Madison's statements in the Decision of 1789). *See also Congressional Intelligence. House of Representatives*, *supra* note 192, at 2, *reprinted in* 12 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES, *supra* note 61, at 225, 225–29 (Charles F. Hobson & Robert A. Rutland eds., 1979) (containing Madison's speech as a representative concerning the President's removal power stemming from the executive Vesting Clause).

[264] *See supra* note 192 and accompanying text.

[265] *See Congressional Intelligence. House of Representatives. Business of Yesterday.*, DAILY ADVERTISER (N.Y.C.), June 17, 1789, at 2, *reprinted in* 11 THE DOCUMENTARY HISTORY OF

No. 39 against the twin Madisonian positions that Presidents could remove executives and that Congress lacked power to divest that constitutional authority. Happily, our reading generates no inconsistency. We can harmonize what Madison said as Publius, what he said in the House, and what Congress wrought in the Judiciary Act of 1789. While Congress may impose a ceiling on the number of years in office, it may not bar (or limit) either impeachment removals or executive dismissals.

B. The Supposed Ambiguity in the Decision of 1789

We previously asserted that each of Congress's three departmental Acts — Foreign Affairs, War, and Treasury — implicitly endorsed the view that the President had a constitutional power to remove executive officers because rather than granting authority, each statute assumed that the President already had such power. How to read these statutes has long been a subject of dispute.[266]

Professor Jed Shugerman is the latest to enter the fray. He contends that the Decision of 1789 decided rather little.[267] He claims that executive power partisans could have favored these bills supposing that each presumed a presidential removal power.[268] But legislative-grant partisans also could have supported the bills because they could have construed each as a *statutory grant* of removal authority. Because the final Acts endorsed neither one theory nor the other, there was no "Decision of 1789."[269] There was only uncertainty, ambiguity, and statutory opacity.[270]

Just as there is a fog of war, there surely is a fog of legislation, with legislators unsure of what they are doing or harboring different perceptions about a bill's meaning. Nonetheless, the assertion that the departmental laws were ambiguous cannot account for what was said in Congress and elsewhere. Crucially, if Shugerman were correct, there would be some legislators who supposed that the power of removal extended only to the Secretaries. Yet no one voiced this position during discussions of amendments, during the passage of the bills, or thereafter. This is telling. Just as telling, the assertion that the laws were ambiguous cannot account for the fact that Presidents openly asserted authority to remove scores of executives and, in fact, removed officials not named in the 1789 statutes. Finally, no one asserted that because the statutes merely granted authority to remove the three Secretaries, our early

---

THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 842, 842–43, 843 n.7.

266 *See* Prakash, *Decision of 1789*, *supra* note 23, at 1023–24.

267 Shugerman, *supra* note 18, at 2097–102.

268 *See id.* at 2097–98.

269 *See id.*

270 *See* Jed Handelsman Shugerman, *The Decisions of 1789 Were Anti-unitary: An Originalism Cautionary Tale* 12–16 (Fordham L. Legal Stud. Rsch. Paper No. 3597496, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3597496 [https://perma.cc/NH7E-SSE2].

Presidents had unlawfully removed officers by usurping powers nowhere granted.

Recall that in mid-June of 1789, the Committee of the Whole House adopted a clause in a Foreign Affairs bill that said the Secretary was "to be removable by the president."[271] In the wake of the refusal to strip out that language, Representative Egbert Benson proposed two successful amendments: one deleted the text "to be removable by the president,"[272] and the other added what would happen to departmental papers "when ever the [Secretary] shall be removed from office by the president."[273] As one observer put it: "The principal reason assigned for [the amendments] was, that as the bill now stands, it appears to be a grant of power; whereas it was presumed to be the sense of the committee [of the Whole], that the power was vested in the President by the Constitution."[274] That is, Benson (and the majority) wanted "a legislative construction of the constitution,"[275] one that "fixed by a fair legislative construction" that the President had *constitutional* power to remove.[276]

That's what Benson wanted — a text that implied a constitutional power of removal. Did he get it? Almost all the evidence points in that direction, for what legislators uttered, what Presidents did, and what outside observers said comport with the Madisonian theory. Contrariwise, the claim that the departmental acts were ambiguous because they could be read as *granting* removal authority has remarkably little to show for it. As we discuss, no one who voted for the bills said that they constituted legislative grants. Nor did anyone say that the President's power of removal extended only to the Secretaries, something that would have had to be true at least for anyone who read the bills as congressional grants of removal authority.

We are aware of no member of the House who said that the bill, as modified, would constitute a legislative grant of removal authority or even could be construed as such. Everyone speaking on the matter adopted Benson's interpretation of his own proposals. Madison

---

[271] 1 CONG. REG. 480 (1789), *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 999, 999; *see also supra* notes 120–32 and accompanying text.

[272] Proceedings of the United States House of Representatives, GAZETTE U.S., June 22, 1789, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1028, 1028.

[273] *Id.*

[274] *Sketch of Proceedings of Congress*, *supra* note 122, at 81, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1026, 1026–27.

[275] 2 CONG. REG. 3–4 (1789), *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1028, 1030.

[276] *Id.* at 5, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1028, 1029–30.

certainly did.[277] *But so did the opponents of a presidential removal power.* Representative Elbridge Gerry of Massachusetts said he "[w]as glad to find the majority had *relinquished* the right of the legislature to *grant* this power."[278] Representative John Page of Virginia said that "it was now left to be inferred from the *constitution*, that the president had the power of removal."[279] Representative Thomas Tudor Tucker of South Carolina said that the amended text would be dangerous precisely because it endorsed the view that the Constitution granted a power to remove:

> If we say the president may remove from office, it is a grant of power — and we can repeal the law, and prevent the abuse of it: but if we by law imply that it is a constitutional right vested in the president, there will be a privilege gained, which the legislature cannot affect . . . .[280]

Tucker understood the final text as Benson had hoped it would be read — as a legislative endorsement of the view that the Constitution granted the President the power to remove.[281]

A one-time proponent of the legislative-grant theory, Representative Theodore Sedgwick[282] said that if the House adopted Benson's amendments, the President "can hardly draw [removal] authority from [Benson's] law."[283] He opposed Benson's second amendment on the ground that it conveyed no removal authority. Needless to say, *proponents* of the two amendments, like Benson and Madison, approved them

---

[277] *Id.* at 8, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1028, 1032 ("It was said truly by the gentleman from New-York [sic] (mr. [sic] Benson), that these words carry with them an implication that the legislature has the power of granting the power of removal.").

[278] *Id.* at 9, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1028, 1033 (emphasis added).

[279] *Id.* at 6, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1028, 1030 (emphasis added).

[280] *Id.* at 11, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1028, 1035.

[281] Tucker understood that if he were going to lose, it would be better to lose with the legislative-grant theory than with the theory of the amended bill — namely that the President had a constitutional power. *See id.* ("The amendment adopted this morning I likewise voted against, because I do not wish that the law should imply that the power of removing officers at pleasure, is a constitutional right vested in him. Now, I would rather a law should pass vesting the power in improper hands, than that the constitution should be wrong construed.").

[282] *Id.* at 9, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1028, 1033 ("[Sedgwick] thought it was the discretion of the legislature to authorise the exercise of it, because they had complete power over the duration of the offices they created. Hence he deemed it necessary to make an express grant of the power of removal . . . .").

[283] *Id.* Sedgwick imagined that the President might not believe that the Constitution granted him a removal power. In that context, the President would be in a dilemma because the bill would not have granted that power either. *Id.* That would leave the President with the option of acting ultra vires. *Id.* (referencing Representative White's position that governors sometimes had to act illegally, *see* 1 *id.* at 525–26 (1789), *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 951, 955).

precisely because they supposed that the Constitution granted removal authority to the President, and they wanted to banish any suggestion that Congress was conveying a removal power.[284] That was the point of the two amendments.

After the House Foreign Affairs bill assumed its final form, at least one former proponent of the legislative-grant theory said, with no contradiction by anyone who voted for the bill, that a House majority had approved the constitutional theory that all executive officers served at the President's pleasure. Sedgwick, who previously favored the legislative-grant theory, "conceived that a majority of the house had decided, that all officers concerned in executive business, should depend upon the will of the president, for their continuance in office."[285] Sedgwick thereby embraced the view that the House had just endorsed a legislative construction of the President's *constitutional* powers. After all, the bill said nothing about the removability of *other* officers and could in no way be read as granting the President the authority to remove *all executives*.[286] The only textual discussion of removal related to one officer, the Secretary of Foreign Affairs. But in the context of the debate, Sedgwick's reading makes complete sense. Given what was said about removal and given the very purpose of the alterations, the House had endorsed the view that the President could remove all executive officers by virtue of the Constitution. Again, we are aware of *no one in the House* who contemporaneously said that the Foreign Affairs bill contained a legislative grant of removal.[287]

The story in the Senate is similar. The proponents of the Foreign Affairs bill said the President had a constitutional power; they never claimed that the bill constituted an implicit legislative grant of removal authority. As Senator Oliver Ellsworth put it: "[T]he executive power belongs to the President. [T]he removing of officers is a Tree on this Acre [of executive power]. [T]he power of removing is therefore his, it is in him, it is no where else."[288] Or consider his further claim that "[t]here is an explicit grant of Power to the President [executive power], which contains the Powers of Removal."[289] No one in the Senate who

---

[284] *See, e.g.*, 2 *id.* at 12, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1028, 1035–36 (noting comments of Representative Vining that the "constitution vested the power in the president").

[285] *Id.* at 47 (1789), *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1079, 1082.

[286] *See supra* notes 125–33 and accompanying text.

[287] Shugerman does not claim that anyone in the House voiced the view that the amended House bill granted removal authority. *See* Shugerman, *supra* note 270, at 12–16, 18–27.

[288] Diary of William Maclay (July 15, 1789), *in* 9 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 112, 113 (Kenneth R. Bowling & Helen E. Veit eds., 1988).

[289] Notes on Debates in the United States Senate (July 15, 1789), *in* 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 217, 218 (L.H. Butterfield ed., 1961).

favored the bill endorsed the idea that the bill granted a removal power.[290]

That was no less true for the other departmental laws. We are aware of no proponent of presidential removal declaring that either the War or Treasury bills contained *grants* of removal power. Indeed, when Representative Benson proposed that the War Department bill be amended to reflect the theory that the Constitution granted the President a removal power, opponents said it was unnecessary because his "principle" had already prevailed in the Foreign Affairs bill.[291] Representative Roger Sherman "[t]hought it unnecessary to load this bill with any words on [removal]; he conceived the gentleman ought to be satisfied with having had the principle established in the other bill."[292] Representative Page agreed.[293] Both read the Foreign Affairs bill as establishing a general "principle" of removability of all officers. Yet if the Foreign Affairs bill granted removal authority over the Foreign Affairs Secretary, as some modern scholars would have it, neither Sherman nor Page could have made this point. After all, if Congress were implicitly granting power, as some assert, it would have been *absolutely necessary* to mention removal of an officer whenever Congress wished the President to enjoy a removal power over that particular officer.

The showdown over the Treasury bill is revealing. The House passed a bill providing that the Treasury Secretary's assistant would take custody of documents whenever the Secretary shall be removed from office by the President.[294] The Senate stripped out this language and returned the bill.[295] A conference committee could not resolve the conflict.[296] The Senate was "called upon by [the House committee conferees] to restore the Clause which they struck out, or by an explicit

---

[290] Those who opposed the bills complained that they vested power precisely because they did not believe the Constitution granted the President a unilateral power to remove. But they also knew that the other side was making a claim about the constitutional powers of the presidency and not about the legislative powers of Congress. *See, e.g.*, Letter from Richard Henry Lee to Samuel Adams (Aug. 15, 1789), *in* 16 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1320, 1321 (Charlene Bangs Bickford et al. eds., 2004) (complaining that some seek to "increase" the President's power "by giving to the *P*[*resident*], the sole right of removing all officers at pleasure, under a fancy that such was the fair construction of the Constitution" (alteration in original)).

[291] 2 CONG. REG. 20 (1789), *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1043, 1044.

[292] *Id.*

[293] *Id.*

[294] *See* Treasury Bill, H.R. 9, 1st Cong. § 7 (as passed by House, July 2, 1789), *reprinted in* 6 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1983, 1985 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) (noting that Senate acceded to House's demand to withdraw its removal amendment).

[295] *See id.* at 1985 n.9.

[296] *See* Act of Sept. 2, 1789, ch. 12, 1 Stat. 65, *reprinted in* 6 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1975, 1979 (Charlene Bangs Bickford & Helen E. Veit eds., 1986).

Resolution acknowledge the Power of removal in the President."[297] To the House, Madison stated that it would be wrong to accede.[298] His colleagues agreed.[299] The House perhaps understood that deleting the removal language might suggest that the President lacked a removal power over the Treasury. Faced with the House's resolve and the options presented by House conferees — either adopting an extra resolution endorsing the executive power theory or reverting to the original language — the Senate withdrew its amendment, with the Vice President breaking a tie.[300] As with the other bills, the Treasury bill endorsed the view that the President had a constitutional power to remove.

We believe that Benson, Madison, and others wanted to ensure that future readers would understand that the principle extended to all executive departments and officers, hence the repetition of the important language in the War and Treasury bills. The language, and its recurrence, endorsed the principle that the Constitution granted the President a broad removal power; Congress had not conveyed any removal power.

In private correspondence, many legislators, including *opponents*, read the three statutes as a legislative endorsement of the proposition that the President had a constitutional power to remove. Members of the House and Senate, as well as the Vice President, said as much.

Madison observed that the House had endorsed the executive power theory. To Thomas Jefferson, Madison wrote that the House decided that the President had a removal power arising out of the executive power on the grounds that this was "most consonant to the text of the Constitution, to the policy of mixing the Legislative and Executive Departments as little as possible, and to the requisite responsibility and harmony in the Executive Department."[301] Writing to a friend, Madison said: "The opinion which prevailed [in the House] was that the [Executive] power being generally vested in the President, and this

---

[297] *See* Letter from Thomas Hartley to William Irvine (Aug. 17, 1789), *in* 16 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1337, 1337 (Charlene Bangs Bickford et al. eds., 2004).

[298] 2 CONG. REG. 257–58 (1789), *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1319, 1324.

[299] *Monday, August 24*, 1 J. HOUSE REPRESENTATIVES U.S. 89, *reprinted in* 3 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 165, 167 (Charlene Bangs Bickford et al. eds., 1977).

[300] *See* Act of Sept. 2, 1789, ch. 12, 1 Stat. 65, *reprinted in* 6 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1975, 1979–80 (Charlene Bangs Bickford & Helen E. Veit eds., 1986).

[301] Letter from James Madison to Thomas Jefferson (June 30, 1789), *in* 16 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 890, 893 (Charlene Bangs Bickford et al. eds., 2004).

[removal] not [being] particularly taken away, it remained to him."[302] To Tench Coxe he said: "The decision was in favor of [the exposition that removal authority was part of the general grant because it was] most consonant to the text of the Constn. to the maxim which forbids an unnecessary mixture of powers — & to the responsibility of the President."[303]

Others said the same. Representative Lambert Cadwalader of New Jersey said that though the Foreign Affairs bill "was scarcely declaratory of the Power being vested in the President by the Constitution," it nonetheless triggered objections.[304] What he meant was that the bill implicitly, rather than explicitly, endorsed the claim that the Constitution conveyed a removal power to the President. Representative Fisher Ames of Massachusetts said that the Foreign Affairs bill's text "seems to imply the legal (rather constitutional) power of the President" to remove.[305] Representative Richard Bland Lee of Virginia wrote that it "was determined in the affirmative" that the President "had, or ought to have, from a fair Construction of the constitution," a removal power.[306] Discussing the Treasury bill, Representative Thomas Fitzsimons of Pennsylvania remarked the disagreement turned on the "Constitutional power of the President to remove."[307]

Contemporaries likewise saw the Senate vote to retain the House's removal language in the Foreign Affairs bill as a vindication of the executive power position. Senator Paine Wingate of New Hampshire, who voted to strip the removal language from the bill, described the Senate vote as turning on "whether the President had a constitutional right to remove; [and] not on the expediency of it."[308] Senator Richard Henry Lee, another opponent of the Madisonian position, complained that the

---

[302] Letter from James Madison to George Nicholas (July 5, 1789), *in* 16 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 954, 957 (Charlene Bangs Bickford et al. eds., 2004) (first and third alterations in original).

[303] Letter from James Madison to Tench Coxe (June 24, 1789), *in* 16 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 852, 853 (Charlene Bangs Bickford et al. eds., 2004).

[304] Letter from Lambert Cadwalader to James Monroe (July 5, 1789), *in* 16 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 946, 946 (Charlene Bangs Bickford et al. eds., 2004).

[305] Letter from Fisher Ames to George Richards Minot (June 23, 1979), *in* 1 WORKS OF FISHER AMES 54, 55 (Seth Ames ed., Boston, Little, Brown & Co. 1854).

[306] Letter from Richard Bland Lee to Leven Powell (June 27, 1789), *in* 16 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 866, 866–67 (Charlene Bangs Bickford et al. eds., 2004).

[307] Letter from Thomas Fitzsimons to Samuel Meredith (Aug. 24, 1789), *in* 16 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1389, 1390 (Charlene Bangs Bickford et al. eds., 2004).

[308] Letter from Paine Wingate to Nathaniel P. Sargeant (July 18, 1789), *in* 16 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1069, 1069 (Charlene Bangs Bickford et al. eds., 2004).

proponents in the Senate had endorsed that constitutional theory.[309] But it was "ridiculous," he said, to suppose that the Constitution authorized the President to fire at pleasure when it also granted a narrow power to demand opinions.[310] Representative William Smith of Maryland described the Senate vote as favoring the President's "right of removal from office as chief Majistrate."[311] Similarly, an account from New York declared that the "President of the Senate gave the casting vote in favour of the clause as it came from the House, by which the power of the President, to remove from office (as contained in the Constitution) is recognized . . . ."[312] The writer also noted that he "consider[ed] the act as nothing more in this point than a recognition of a principle interwoven in the texture of the [constitutional] system."[313] John Adams complained that his "Vote for the Presidents [sic] Power of Removal, according to the Constitution, has raised from Hell an host of political and poetical Devils."[314] These accounts indicate that the removal language was generally understood to endorse the "construc]tion of the Constitution, which vests the power of removal in the President."[315]

The claim that Congress had adopted a legislative construction of the Constitution is further strengthened by observers who said that the President could remove all executive officers. The three departmental Acts said nothing about removing ambassadors, generals, tax collectors, and so forth. Nonetheless, legislators (and others) assumed that these were likewise removable. This made sense on the theory that Congress had endorsed the view that the President had constitutional authority to remove all executive officers.

Relatedly, we are unpersuaded that anyone voted for the three laws because they supposed that the Acts granted removal authority. We would expect that any such lawmakers would have disabused the many

---

[309] Letter from Richard Henry Lee to Patrick Henry (Sept. 27, 1789), *in* 17 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1625, 1625 (Charlene Bangs Bickford et al. eds., 2004) (stating that those favoring the bills contended that "the Constitution gave the power").

[310] *Id.*; *see also* Letter from Richard Henry Lee to Samuel Adams (Aug. 15, 1789), *in* 16 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1320, 1321 (Charlene Bangs Bickford et al. eds., 2004) (expressing a similar thought).

[311] Letter from William Smith (Md.) to Otho H. Williams (July 27, 1789), *in* 16 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1150, 1150 (Charlene Bangs Bickford et al. eds., 2004).

[312] *News from New York*, 11 MASS. CENTINEL 149, 151 (1789), *reprinted in* 16 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1077, 1077 (Charlene Bangs Bickford et al. eds., 2004).

[313] *Id.*

[314] Letter from John Adams to John Lowell (Sept. 14, 1789), *in* 17 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1538, 1538 (Charlene Bangs Bickford et al. eds., 2004).

[315] Letter from David Stuart to George Washington (Sept. 12, 1789), *in* 17 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1519, 1519 (Charlene Bangs Bickford et al. eds., 2004) (alteration in original).

legislators who declared that the Acts validated the claim that the President had a constitutional power to remove. At a minimum, any such legislators might have said that the Acts were ambiguous. Further, such legislators might have declared that on their reading the three Acts contained *legislative grants* of removal power, authority that extended to the Secretaries and no further. After all, there was no language in the Acts that could be read to grant removal authority over the many other offices within departments. Yet no one who voted for the bills said that they granted removal authority or, relatedly, that the President's power to remove extended only to the Secretaries.[316]

Finally, as noted earlier, early Presidents publicly asserted removal authority over *all sorts of executive officers* via commissions.[317] These Chief Executives also removed executive officers beyond, and below, the departmental Secretaries. Yet we are aware of no one who remarked that these Presidents lacked authority to remove because while the three departmental Acts granted removal authority, that power extended only to the Secretaries. If, as Shugerman argues, some legislators voted for the three departmental bills because each could be read as a grant of authority, those legislators ought to have complained that Washington, Adams, and Jefferson had usurped powers nowhere granted to them.

All in all, there are sound reasons why so many, including the legislative losers, concluded that there was a Decision of 1789, one resting upon a reading of the President's constitutional powers. Like them, we see a material difference between a bill that says someone is "to be removable by the president"[318] and a statute that discusses what happens with departmental papers when the Secretary "shall be removed by the

---

316 There was an outsider who perhaps concluded that the Acts vested (rather than assumed) a power to remove. *See* Letter from John Trumbull to John Adams (Feb. 6, 1790), *in* 18 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 435, 436 (Charlene Bangs Bickford et al. eds., 2011) ("Vesting in the President the power of removing all officers in the executive department is a most important amendment of the Constitution."). Yet Trumbull also said that Congress had *amended* the Constitution, suggesting that he was hardly precise in his description. *Id.*

The first suggestion that the Acts might be ambiguous that we are aware of is from 1791. Proponents of the Bank of the United States alleged that Congress had already endorsed implied powers in the President's hands, so why could Congress not conclude that it had implied power as well? Additional Considerations on the Bank Bill (Feb. 12, 1791), *in* 7 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 157, at 337, 339–40 (Jack D. Warren, Jr. ed., 1998). Edmund Randolph replied that if the First Congress had endorsed the constitutional theory of removal, these proponents had a point. *Id.* If Congress had granted the power to remove, however, the bank's proponents had a weaker argument. *See id.* Randolph was behind the times, for by the time he wrote this opinion, his superior was issuing at-pleasure commissions without any statutory warrant. *See supra* section I.A.5, pp. 1777–82. Washington, like Congress, relied upon the constitutional theory.

317 *See supra* section I.A.5, pp. 1777–82.

318 2 CONG. REG. 3 (1789), *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1028, 1028.

President."[319] While the former could be read as a grant, the latter speaks as if the President already enjoys removal authority. The context bolsters this reading because the mover of the amendments, Representative Benson, proposed them as a means of endorsing the view that the Vesting Clause included removal power. Many who opposed Benson understood the amended text just as he did. Finally, no one who voted for the Acts said that they *granted* removal authority or that the authority extended only to the Secretaries. The long-held view — voiced by Madison, Hamilton, Marshall, Joseph Story, William Howard Taft, and many others — that the Decision of 1789 endorsed the position that Presidents enjoyed a *constitutional* power to remove executive officers, remains intact.

C. Implied Statutory Constraints

Other scholars assert that early Congresses restricted presidential removal by setting a term of years for certain offices. According to these scholars, most prominently Professors Jane Manners and Lev Menand, laws that set a term of years absolutely barred removal by the Executive.[320] So, while a Civil War–era statute may have been the first *express* restriction on presidential removal, Congress had earlier *implicitly* barred removal of certain executive officers. Professors Manners and Menand claim that this reading of fixed terms of years "was uncontroversial and widely accepted."[321]

This claim is mistaken. Statutes creating offices with fixed terms were not uniformly understood to bar removals. Many rejected that precise understanding, including Presidents, attorneys general, and the Supreme Court. Scholars who place great weight on term-of-years tenures are either unaware of these sources or neglect to give them their due.

While one could pen an entire article on this subject, we focus on three specific episodes: President Jefferson's treatment of some midnight officers, President Millard Fillmore's removal of a territorial justice, and President Grover Cleveland's ouster of a federal attorney.

1. Jefferson and the Many Midnight Justices and Judges. — The starting point is Chief Justice Marshall's opinion in *Marbury v.*

---

[319] *Sketch of Proceedings of Congress*, *supra* note 122, at 81, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1026, 1026–27.

[320] Manners & Menand, *supra* note 18, at 25–26 ("At the time of the Founding and for at least several decades thereafter, [the] understanding — that absent statutory or constitutional language to the contrary, a term-of-years office foreclosed executive removal — was uncontroversial and widely accepted. It is reflected in state and federal case law, treatises, and legislative history throughout the nineteenth century."); *see also* Shugerman, *supra* note 18, at 2090 ("[T]he original public meaning was that [the] limited-term-of-years understanding against presidential removal applied to more traditionally executive offices, as well as quasi-judicial ones.").

[321] Manners & Menand, *supra* note 18, at 25.

Madison.[322] Many commentators — including Supreme Court Justices[323] — have argued that *Marbury* concluded that Congress could limit the President's authority to remove executive officials. Such commentators have failed to appreciate that Chief Justice Marshall's dictum was likely not intended to apply to executive branch officers and that, at any rate, it was controverted by President Jefferson in 1801 and by others for decades thereafter.

(a) Marbury Before Marbury. — *Marbury* arose when the petitioners sought a mandamus to compel Secretary of State James Madison to deliver their commissions as justices of the peace.[324] Although *Marbury* is best known for its discussion about judicial review, the opinion's first two parts were far more significant at the time.[325] We focus on the first part. After a lengthy discussion on when an appointment vests, the Chief Justice declared that former President John Adams had appointed the four plaintiffs as justices of the peace.[326] In contrast, he tersely concluded that Presidents could not oust the justices.[327] The D.C. Organic Act[328] proclaimed that the justices could serve five years.[329] According to Chief Justice Marshall, the justices held office "independent of the executive."[330] Further, "the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws."[331] Chief Justice Marshall later concluded that the Court lacked jurisdiction,[332] thereby rendering this discussion dictum.

Was that dictum correct? Perhaps, but only when read narrowly. Chief Justice Marshall's removal claim may have depended on regarding the justices of the peace as either distinctive officers serving in the District or, alternatively, as Article III judges. If he regarded the justices as fitting into one of these specific classes, the case had no implications

---

[322] Though Manners and Menand do not identify the earliest removal constraint, they cite the statute at issue in *Marbury* as an instance of an implicit removal restriction created by a term of years. *See id.* at 6 n.23. The statute created a five-year term and made no mention of presidential removal of the justices of the peace. *See* Act of Feb. 27, 1801, ch. 15, § 11, 2 Stat. 103, 107.

[323] *See, e.g.*, Myers v. United States, 272 U.S. 52, 242–44 (1926) (Brandeis, J., dissenting) ("[I]t was assumed, as the basis of decision [in *Marbury*], that the President, acting alone, is powerless to remove an inferior civil officer appointed for a fixed term with the consent of the Senate." *Id.* at 242.).

[324] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 137–38 (1803).

[325] *Cf.* Saikrishna Bangalore Prakash, *The Appointment and Removal of William J. Marbury and When an Office Vests*, 89 NOTRE DAME L. REV. 199, 202 (2013) (discussing why Chief Justice Marshall discussed appointment for pages before deciding that the Court lacked jurisdiction). The Court's discussion of mandamus was also important because the Court was asserting power to direct the executive branch, something hardly obvious. *See id.* at 214 n.94 (discussing how members of the Jefferson Administration denied that courts could direct the executive to take certain actions).

[326] *Marbury*, 5 U.S. (1 Cranch) at 162.

[327] *Id.*

[328] Act of Feb. 27, 1801, ch. 15, 2 Stat. 103.

[329] *Id.* § 11, 2 Stat. at 107.

[330] *Marbury*, 5 U.S. (1 Cranch) at 162.

[331] *Id.*

[332] *Id.* at 175–76.

for the constitutionality of restrictions on the removal of executive officers simpliciter.

Some later cases regarded *Marbury* as a case about the District. In *Parsons v. United States*,[333] the Court noted that *Marbury* concerned an appointee seeking "to retain possession of an office created by Congress in and for the District of Columbia."[334] *Parsons* observed that Congress had the constitutional "power to exercise exclusive legislation in all cases" in D.C.[335] For that reason, *Marbury*'s dictum was "not necessarily applicable to the case of an officer appointed to an office outside of such District."[336] Thus, even if *Marbury*'s dictum on removal was correct, it arguably was limited to the District and, perhaps, the territories. Many scholars view the District and the territories as islands of exceptionalism when it comes to the separation of powers.[337]

As discussed at length below, some regarded the justices of the peace as *Article III judges*, which meant that good-behavior tenure barred Presidents from removing them. Under this view, *Marbury*'s language that they served "independent of the executive"[338] had no implications for executive officers.

These alternative readings of *Marbury* — coupled with the fact that, outside the District and the territories, early Congresses did not enact laws with terms of years absent a provision specifically contemplating

---

[333] 167 U.S. 324 (1897).

[334] *Id.* at 335.

[335] *Id.* at 336 (citing U.S. CONST. art. I, § 8, cl. 17).

[336] *Id.* at 335–36. The Court touched on the question raised in *Parsons* some decades later in *Myers v. United States*, 272 U.S. 52, 143 (1926) ("How much weight should be given to this distinction, which might accord to the special exclusive jurisdiction conferred on Congress over the District power to ignore the usual constitutional separation between the executive and legislative branches of the Government, we need not consider.").

[337] For a discussion of this phenomenon, see generally GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE 121–38 (2004).

[338] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803). Chief Justice Marshall had previously addressed the topic of removal and the justices of the peace in an 1801 letter to his brother, future Judge James Markham Marshall. *See* Letter from John Marshall to James M. Marshall (Mar. 18, 1801), *in* 6 THE PAPERS OF JOHN MARSHALL 90, 90 (Charles F. Hobson et al. eds., 1990). There, Chief Justice Marshall had said that he "apprehended such [offices] as were for a fixd time to be completed when signd & seald & such as depended on the will of the President might at any time be revokd." *Id.* His claim that offices for "a fixd time . . . might at any time be revokd" tended to suggest that his later reasoning in *Marbury* did not depend on the term-of-years provision alone, but rather on the potential Article III status of the justices of the peace. *Cf. id.* ("To withhold the commission of the Marshal is equal to displacing him which the President I presume has the power to do, but to withhold the commission of the Justices is an act of which I entertaind no suspicion."). It is also possible that he meant that at least some officers who held offices with fixed terms were removable even in the absence of statutory language. After all, he says both officers with fixed terms and those who depend upon the will of the President might have their offices revoked (that is, terminated). Having said all this, the letter is arguably ambiguous because Chief Justice Marshall did not give an example of an office for "a fixd time." *Id.*

removal[339] — take the wind out of the sails of the argument that Congress may enact a term-of-years provision for *executive* officers and thereby limit the President's authority to remove such executives at pleasure.

But there is another powerful argument against a reliance on *Marbury*'s term-of-years dictum: it might be wrong. Before Chief Justice Marshall's dictum, President Jefferson had fired every one of the justices of the peace, taking the very act that Chief Justice Marshall had insisted that Presidents could not.[340] The *Marbury* opinion sought to shut the barn door long after the horses had bolted.

In 1801, the new President faced fierce pressure to fire Federalists and replace them with members of his party.[341] Yet others believed it would be wrong to fire hundreds of people, including many experienced and dutiful hands, merely to hire copartisans.[342]

President Jefferson sought to downplay his removals. In his first days, he drafted a letter to the midnight appointees — those appointed in the waning days of the Adams Administration, including the justices. He observed that former President Adams, "not long before his retirement . . . , made several appointments to *civil* offices holden *during the will* of the President."[343] He then pivoted: the "present President deems it proper that those appointments should be a subject of reconsideration & further enquiry."[344] Because he desired officers who would execute his views, he declared: "[Y]ou will therefore be pleased to consider the appointment you have received as if never made, of which this early notice is given to prevent any derangements which that appointment might produce."[345] Whether the letter was sent to anyone is unknown.[346]

On March 16, 1801, less than two weeks after taking office, President Jefferson recess appointed thirty justices of the peace for the District.[347]

---

[339] Although it is difficult to prove a negative, we are aware of no such federal statute. Moreover, those who have argued that a term-of-years provision automatically limited removal have not cited any such federal provision. *See, e.g.*, Manners & Menand, *supra* note 18, at 18–27.

[340] *See* Prakash, *supra* note 325, at 208.

[341] *See* FISH, *supra* note 191, at 30–31; *see also* Letter from Wilson Cary Nicholas (Mar. 7, 1801), *in* 33 THE PAPERS OF THOMAS JEFFERSON: MAIN SERIES, *supra* note 89, at 209, 209 (Barbara B. Oberg ed., 2006).

[342] FISH, *supra* note 191, at 30–35 (recounting how President Jefferson sought to attract Federalists and how Federalists opposed his removals).

[343] Circular Letter from Thomas Jefferson to Midnight Appointees (Mar. 4, 1801), *in* 33 THE PAPERS OF THOMAS JEFFERSON: MAIN SERIES, *supra* note 89, at 172, 172–73 (Barbara B. Oberg ed., 2006).

[344] *Id.* at 173.

[345] *Id.*

[346] *Id.* (including footnote from the editors of President Jefferson's papers noting that "[i]t is not known to whom this letter was sent").

[347] *Editorial Note* to Thomas Jefferson, To the Senate: Interim Appointments, *in* 36 THE PAPERS OF THOMAS JEFFERSON: MAIN SERIES, *supra* note 89, at 309, 312 (Barbara B. Oberg et al. eds., 2009).

Twenty-four of these had previously been appointed by former President Adams, with six new men.[348] About eighteen men that former President Adams had appointed were omitted.[349] Coincidence or not, everyone who had received a commission issued by the prior Administration also received a new recess appointment.[350]

Why did President Jefferson recess appoint some of the justices? *Because he had fired every one of them*. In letters, he laid out his stance: "[A]ll appointments to civil offices during pleasure, made after the event of the election . . . are considered as nullities. I do not view the persons appointed as even candidates for the office, but make others without . . . notifying them."[351] The only midnight appointments with continued validity were the "irremovable" Article III judges.[352]

The events and dispatches confirm that President Jefferson fired the justices only to reappoint most. To begin with, he admitted that the justices were in office prior to his implicit removal of them. Indeed, his draft letter to the midnight appointees instructed that "the appointment . . . received" was to be treated as if it had never been made.[353] He also referred to "appointments" two other times in that draft.[354] Moreover, in the same draft, he noted that these officers held office "*during the will* of the President."[355] When read in conjunction with the rest of the letter, this passage signals that he was implicitly ousting the midnight appointees. Why else mention tenure at pleasure?

A 1779 Jeffersonian letter reinforces the point. "Lawyers know that . . . offices held during will are determinable by the slightest acts *implying* only, without positively *expressing*, a change of will. Hence the issuing a new commission . . . determined" — that is, terminated — "the offices of those named in the former [commission]."[356] Those who were to remain in office had to be mentioned in the new

---

348 *Id.*

349 *See id.* at 313.

350 Prakash, *supra* note 325, at 209.

351 Letter to William Branch Giles from Thomas Jefferson (Mar. 23, 1801), *in* 33 THE PAPERS OF THOMAS JEFFERSON: MAIN SERIES, *supra* note 89, at 413, 413–14 (Barbara B. Oberg ed., 2006). President Jefferson's position mixed rhetoric with action. Some of the rhetoric, such as his use of the word "nullities," *id.* at 413, might have suggested that none of the midnight appointments were made or completed. But more often, he discussed midnight appointments as if they were valid, and that appointees ought to treat "the appointment [they] ha[d] received as if never made." Circular Letter from Thomas Jefferson to Midnight Appointees, *supra* note 343, at 173. In essence, President Jefferson took actions to nullify (in other words, terminate) any midnight appointments that he, as President, could end.

352 Letter to William Branch Giles from Thomas Jefferson, *supra* note 351, at 414. Congress, however, concluded otherwise. *See* Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132 (repealing the Judiciary Act of 1801, ch. 4, § 7, 2 Stat. 89, 90).

353 Circular Letter from Thomas Jefferson to Midnight Appointees, *supra* note 343, at 173.

354 *See id.* at 172–73.

355 *Id.* at 173.

356 Letter from Thomas Jefferson to Unknown (Dec. 25, 1779), *in* 3 THE PAPERS OF THOMAS JEFFERSON: MAIN SERIES, *supra* note 89, at 242, 242.

commission; otherwise, they were fired.[357] That precisely describes President Jefferson's 1801 stratagem. By recess appointing some of the existing justices of the peace, he signaled that he had removed all of them and granted short-term (recess) appointments to a portion of the fired cohort. Ironically, the 1779 letter was about justices of the peace.

An overlooked remark from Attorney General Levi Lincoln clinches the point. The incumbent Attorney General told the Supreme Court in 1803 that he "was furnished with a list of names to be put into a general commission [for the justices of the peace], which was done."[358] The general commission "was considered as superseding the particular commissions; and the individuals whose names were contained in this general commission were informed of their being thus appointed."[359] On the record, Lincoln confirmed that by recess appointing a new cohort of justices of the peace, President Jefferson had fired the existing cohort in 1801 and then had reappointed only some from the batch appointed by President Adams.

Finally, the passivity of the justices of the peace is suggestive of the point. In the wake of Jefferson's firing of the justices of the peace, each justice of the peace could have marched into court in the spring of 1801. In mid-March, those lacking a commission could have sought a copy of their original commission. Further, they might have tried to serve as justices of the peace; after all, their argument in *Marbury* was premised on the claim that they were incumbent justices. Likewise, the justices that President Jefferson had recess appointed in April could have sought a copy of their superseded commission, the one issued by former President Adams. This course of conduct would have tested the question of whether President Jefferson could fire them, as he had purported to do.

None of this happened. For months, none of the justices sought any judicial relief. Apparently, neither Marbury nor his three coplaintiffs went to work or sued the administration. Further, no justice who had been granted an office with much shorter tenure complained that President Jefferson had unconstitutionally deprived them of about four years.[360] We suppose that most did nothing because they recognized that they served at his pleasure.

Of course, things changed when the former Attorney General Lee went to the Court in December 1801 on behalf of four Federalists whom President Jefferson had not recess appointed.[361] He sought a writ of

---

[357] *Id.*

[358] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 145 (1803).

[359] *Id.*

[360] The Adams justices whom President Jefferson recess appointed went from a five-year term to a term that would expire at the end of the Senate's next session. In March 1801, they would not have known when the Senate's next session would end. Hence, "about four years" assumes that their recess appointment would last for about a year.

[361] *Marbury*, 5 U.S. (1 Cranch) at 137–38.

mandamus from the Court asking for copies of the commissions issued by former President Adams.[362] Madison had ignored their request for copies,[363] likely because he concluded that fired officers had no right to defunct commissions.

More than a year later, in early 1803, Lee argued to the Court that the plaintiffs had been appointed and that they could not be removed.[364] Lee made no mention of the recess appointments and their implications for his argument about removal. In a crucial part of his argument, Lee said the office was "independent of the will of the President."[365] Appointments to judicial office were "irrevocable" and "made forever" because each justice of the peace "holds under the constitution."[366] Lee then referenced Numbers 78 and 79 of the *Federalist Papers*, which discussed the need for good-behavior tenure in judges.[367] In other words, in the wake of Lincoln's observation that President Jefferson had fired the justices — a point which rendered the demand for copies of commissions moot — Lee argued that the justices of the peace enjoyed good-behavior ("forever") tenure.[368] Lee's argument implied that the 1801 statute was unconstitutional for attempting to limit tenure to a term of years. Crucially, Lee did not say that the statute implicitly limited removals by establishing a fixed term.

The defendant, Madison, filed nothing and therefore never discussed whether the justices had been removed. But in January 1802, his constitutional superior had something to say. Asserting that former President Adams had "nominated" too many people to serve as justices of the peace, President Jefferson informed the Senate of his recess appointments from March 1801.[369] He also renominated some of those he had previously recess appointed, including several of former President Adams's original appointees.[370] After delay, the Senate consented in April 1802, whereupon President Jefferson granted new five-year appointments to many of the twenty-four Adams appointees that he had previously recess appointed.[371] But the story does not end there. In 1807, President Jefferson again reappointed some in the original Adams cohort.[372] By twice consenting to the reappointment of these Adams

---

362 *Id.* at 138.

363 *See id.* at 137.

364 *See id.*

365 *Id.*

366 *Id.*

367 *Id.*; *see also* THE FEDERALIST NOS. 78, 79.

368 *Marbury*, 5 U.S. (1 Cranch) at 151.

369 Letter from Thomas Jefferson to the Senate (Jan. 6, 1802), *in* 36 THE PAPERS OF THOMAS JEFFERSON: MAIN SERIES, *supra* note 89, at 331, 331–36 (Barbara B. Oberg et al. eds., 2009). President Jefferson's use of "nominated" likely was a case of misdirection; he knew that President Adams had appointed the justices of the peace. *See supra* notes 343–60 and accompanying text.

370 Letter from Thomas Jefferson to the Senate, *supra* note 369, at 335–36.

371 S. EXEC. JOURNAL, 7th Cong., 1st Sess. 423 (1802).

372 S. EXEC. JOURNAL, 10th Cong., 1st Sess. 56–57 (1807).

appointees, the Senate effectively confirmed that President Jefferson had removed them. Otherwise, the Senate's assent to their appointments is inexplicable.

In sum, contrary to the assertions of some legal scholars, it was by no means settled that a term of years implied a bar on presidential removals. President Jefferson removed all the justices of the peace in 1801. And in 1802, the year before *Marbury v. Madison* was issued, the Senate seemed to ratify President Jefferson's action when it consented to the appointment of some of the justices of the peace that former President Adams had previously appointed.[373] We do not know the tally in the Senate because there was no recorded vote,[374] a telling point on a measure that rested on a supposedly *ultra vires* act by President Jefferson. Furthermore, we know of no one who said that the 1802 reappointment was unnecessary because some of the appointees were already serving five-year terms. Finally, we are unaware of any other officers, either during the Jefferson Administration or otherwise, receiving a new appointment less than two years into a fixed five-year term. President Jefferson renominated them because if he did not reappoint them, they would be out of office at the end of the Senate's session. After all, from his perspective, because he had fired them, they no longer had five-year terms. The Senate apparently agreed with the assessment that President Jefferson's nominees were recess appointees rather than regular appointees.

So, in 1803, Chief Justice Marshall dwelled at length on a question that President Jefferson, in 1801, seemed willing to have conceded — that former President Adams had appointed the midnight justices.[375] But Chief Justice Marshall all but ignored what President Jefferson actually did, which was to remove the appointees on the grounds that each justice of the peace held his office during pleasure and that it was the President's distinct pleasure to undo their appointments. In so doing, President Jefferson read "to continue in office [for] five years"[376] as setting an outer limit to tenure. Chief Justice Marshall, however, read the entire statutory scheme as implicitly constraining presidential removal.[377] That, of course, was what Lee pressed him to do.[378] But this reading was hardly uncontroversial, much less obvious, given that the President had already fired every justice of the peace.

---

[373] Similarly, in 1802, Congress created the District mayor, with a one-year term and no mention of removal. *See* Act of May 3, 1802, ch. 53, § 5, 2 Stat. 195, 196. Nonetheless, President Jefferson issued a commission during pleasure. *See* Commission of Appointment as Mayor (June 1, 1802), *in* 2 RECORDS OF THE COLUMBIA HISTORICAL SOCIETY 236, 240–41 (Washington, D.C., Columbia Hist. Soc'y 1899). We know of no one who objected that his commission was contrary to law.

[374] *See* S. EXEC. JOURNAL, 7th Cong., 1st Sess. 423 (1802).

[375] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 156–62 (1803).

[376] Act of Feb. 27, 1801, ch. 15, § 11, 2 Stat. 103, 107.

[377] *See Marbury*, 5 U.S. (1 Cranch) at 162.

[378] *See id.* at 138.

Chief Justice Marshall's construction of "to continue in office [for] five years" was no less troubled than one that would bar impeachment removals or one that would insist that justices could not resign because, after all, they were "to continue in office" for five years.[379]

The issue merited more than the three sentences Chief Justice Marshall gave it. Lee had discussed the question at length, occupying more than two pages in the *United States Reports*.[380] From Chief Justice Marshall's perspective, it made sense to discuss the easy points at length — that former President Adams had appointed the justices. Better to skirt President Jefferson's likely grounds for not giving the Federalists copies of commissions — namely, that they no longer had a right to them because he had fired them all. This point was far tougher to dodge, and Chief Justice Marshall ignored it. Chief Justice Marshall also disregarded Lee's insistence that the judges held their offices during good behavior.[381] This, too, was shrewd. Lee's argument might have suggested that, by limiting a justice's term to five years, former President Adams and the Federalist Congress had enacted an unconstitutional limit on their tenure. If that were true, why had former President Adams signed the unconstitutional bill into law, with the learned Attorney General Lee and then–Secretary of State Marshall silent about its unconstitutional abridgment of good-behavior tenure? Chief Justice Marshall was content to bypass all these complications, hastily asserting that Presidents could not remove the justices of the peace because the justices had five-year terms.[382]

(b) More Midnight Madness. — Besides firing all the justices of the peace and reappointing most, the Jeffersonians disturbed the midnight appointments of the Adams Administration in two other ways: they eliminated the fees available to the justices, and they revoked a statute creating Article III judgeships. Discussions about removal within the debates surrounding these two matters support our understandings of *Marbury* and the Decision of 1789.

Start with the fee abolishment. Congress had granted fees to justices of the peace in 1801[383] but abolished them in 1802.[384] The abolition raised a question: if the justices of the peace were Article III judges, then the abolition was an unconstitutional salary reduction.[385] This issue was similar to one issue raised in *Marbury*: Where in the constitutional scheme did the justices of the peace fit? A justice of the peace,

---

379 Act of Feb. 27, 1801, ch. 15, § 11, 2 Stat. at 107.

380 *See Marbury*, 5 U.S. (1 Cranch) at 141–42.

381 *See id.* at 162.

382 *Id.*

383 Act of Feb. 27, 1801, ch. 15, § 11, 2 Stat. at 107; Act of Mar. 3, 1801, ch. 24, § 4, 2 Stat. 115, 115.

384 Act of May 3, 1802, ch. 52, § 8, 2 Stat. 193, 194–95.

385 *See* U.S. CONST. art. III, § 1 (providing that the "Compensation" of Article III judges "shall not be diminished during their Continuance in Office").

Benjamin More, sued, arguing that the fee abolition was unconstitutional. In *United States v. More*,[386] the Circuit Court of the District of Columbia considered this issue just months after *Marbury*.[387] The majority's reasoning suggested that justices of the peace were Article III judges,[388] whereas the dissent denied the point.[389] No one argued that because the justices were ordinary executives, Congress had the power to cut their fees. Further, no one hinted that Congress had the power to bar removal of executive officers. To the contrary, the arguments hinged on the justices' judicial nature.

Judge Cranch — joined by Judge James Markham Marshall, the Chief Justice's brother and an associate judge on the circuit court[390] — held that Article III barred Congress from diminishing the fees.[391] Judge Cranch rejected the government's position "that congress, in legislating for the district of Columbia, [is] not bound by any of the prohibitions of the constitution."[392] He reasoned that Article III "provide[d] for the independence of the judges of the courts of the United States,"[393] including by establishing "a compensation for their services, [']which shall not be diminished during their continuance in office.[']"[394] The justice of the peace's power to try cases arising under federal laws, Judge Cranch reasoned, "is part of the judicial power mentioned" in Article III.[395] While concluding that Congress could not diminish their salaries,[396] Judge Cranch was cagey about whether those justices held office during good behavior.[397] The evasiveness is hard to justify

---

386 7 U.S. (3 Cranch) 159 (1805).

387 *Id.* at 160 n.* (circuit court opinion of Cranch, J.). More sought the Supreme Court's intervention on writ of error, which the Court unanimously turned aside on the theory that such a writ could not be obtained in a criminal case under the statutory scheme then in existence. *See id.* at 173–74 (Marshall, C.J.). Sources often cite *More* for its holding on non–Article III adjudication. *See, e.g.*, William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1531–33 (2020); Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 880–85 (1990).

388 *See More*, 7 U.S. (3 Cranch) at 161 n.* (circuit court opinion of Cranch, J.).

389 *Id.* at 163 n.* (circuit court opinion of Kilty, C.J., dissenting) ("The nature of some of the duties confided to a justice of the peace may make him a judicial officer . . . without bringing him within the provisions of the constitution.").

390 *See* R. Kent Newmyer, *Thomas Jefferson and the Rise of the Supreme Court*, 31 J. SUP. CT. HIST. 126, 132 (2006). For the earlier letter from Chief Justice Marshall to Judge James Marshall on this issue, see *supra* note 338.

391 *More*, 7 U.S. (3 Cranch) at 161 n.* (circuit court opinion of Cranch, J.).

392 *Id.* at 160 n.*. As he put it, Congress could "legislate for [D.C.], in all cases where they are not prohibited by other parts of the constitution." *Id.*

393 *Id.* at 161 n.*.

394 *Id.* (emphasis omitted) (quoting U.S. CONST. art. III, § 1).

395 *Id.*

396 *See id.* (reasoning that the proposition that the justice of the peace's "compensation shall not be diminished during his continuance in office, seems to follow as a necessary consequence from the provisions of the constitution").

397 *See id.* (finding it "unnecessary . . . to decide the question, whether, as such, [a justice of the peace] holds his office during good behaviour").

because if the justices of the peace were Article III judges, good-behavior tenure would attach just as salary protections had.

Judge Cranch's reasoning tracked Lee's in *Marbury* — and it echoed that of More's attorney, Samuel Jones. Jones acknowledged that the President's power to remove had been "settled in congress in the year 1789, after long debate."[398] He further admitted that "Congress has no power to limit the tenure of any office to which the president is to appoint, unless in the case of a judge under the constitution."[399] But *Marbury* had decided that "a justice of the peace in the district of Columbia does not hold his office at the will of the president,"[400] and Jones insisted that a justice of the peace was an Article III judge.[401] He claimed that it was "no objection that the tenure of office is limited to five years," because it was "not the tenure, but the essence and nature of the office which is to decide this question."[402] They were Article III judges, without regard to their tenure.

In dissent, Chief Judge Kilty agreed that "some of the duties confided to a justice of the peace may make him a judicial officer" ("and he might even be admitted to be a court").[403] Yet Chief Judge Kilty concluded that Article III's undiminishable-salary provision protected only judges who exercised "the judicial power of the *United States*" and that the D.C. justices of the peace did not exercise such power, but rather the power of a "particular territory."[404]

Step back from the particulars. No one argued that Congress could reduce the compensation of the justices of the peace because they were *executive* officers. Judge Cranch (and More's attorney) claimed that the justices of the peace were Article III judges subject to the Constitution's undiminishable-salary protection; Chief Judge Kilty (and the government's attorney) argued that they were territorial officers not subject to Article III's protections. The scope of the debate casts light on how to read *Marbury*: nobody argued that the justices were executive officers, which is the necessary premise for those who wish to read *Marbury*'s

---

398 *Id.* at 166 (argument of Samuel Jones).

399 *Id.*

400 *Id.* (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803)).

401 *See id.* ("The principle we contend for is, that he was a judge of an inferior court of the United States, and protected by the third article of the constitution . . . .").

402 *Id.* at 167.

403 *Id.* at 163 n.* (circuit court opinion of Kilty, C.J., dissenting).

404 *Id.* Chief Judge Kilty reasoned that "it was the intention of the framers of the constitution, to divest the ten miles square of the privileges of a state, and to give to congress the whole and exclusive power of legislation." *Id.* at 164 n.*. This argument echoed that of U.S. Attorney John T. Mason. *See id.* at 168 (argument of John T. Mason) (arguing that the justices did not exercise "the judicial power of the United States" but rather a "power derived from the power given to congress to *legislate* exclusively in all cases whatsoever over the district," which was "*unlimited*"). Like Chief Judge Kilty, Mason embraced the territorial-exception understanding of *Marbury*. *See id.* ("I understand the case of *Marbury v. Madison* to have decided only that the justices held during good behaviour for five years under the law; and not generally during good behaviour, under the constitution.").

dictum as if it meant that Congress had broad power to bar removals of *executives*.[405]

Next, turn to the fate of the circuit court judges. In early 1801, Congress created new circuit judgeships,[406] which President John Adams hastily filled.[407] In 1802, the Jeffersonians repealed the Judiciary Act of 1801's[408] creation of those judgeships.[409] The Jeffersonians argued that the good-behavior provision of Article III constrained the executive department, and not the legislative department, because to the executive "department belongs the power of removal."[410] The Federalist response was to insist that good-behavior tenure limited both the executive and the legislature. Hence, Congress could not disestablish courts with sitting judges.

Alexander Hamilton penned a series of responses to Jeffersonian policies in 1801 and 1802.[411] Among these was an analysis of the Jeffersonian perspective on removal.[412] He considered the repeal to be "a glaring violation of our national compact"[413] because it cut short the tenure of the midnight judges in violation of Article III's good-behavior and undiminishable-salary protections.[414] In the course of denying that Congress could abolish courts and thereby oust incumbent Article III judges, some Federalists went further and denied that the President had a constitutional power to remove.[415] An ally of President Jefferson was incredulous: "After the Government has been in operation above twelve years, and the principle of commissioning all Executive officers during pleasure, ha[d] been practised . . . during the whole . . . period by the Executive, as well as the Legislative," the principle was being denied for the first time.[416]

Hamilton disagreed with some of his allies, arguing that the two kinds of offices "stand on different ground."[417] "[A]n officer during

---

[405] In *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1806), the Court noted that justices of the peace had powers that "seem partly judicial[] and partly executive." *Id.* at 336. That point does not cast doubt on our conclusion that none of the participants in the *More* litigation claimed that the justices were executive officers.

[406] Judiciary Act of 1801, ch. 4, § 7, 2 Stat. 89, 90.

[407] *See* Newmyer, *supra* note 390, at 132.

[408] Ch. 4, § 7, 2 Stat. 89.

[409] Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132.

[410] Hamilton, *The Examination No. 13*, *supra* note 179, at 539.

[411] *See* 8 THE WORKS OF ALEXANDER HAMILTON 246–373 (Henry Cabot Lodge ed., 1904) (reprinting Nos. I–XVIII of Hamilton's *The Examination*).

[412] 8 ALEXANDER HAMILTON, *The Examination No. XII* (Feb. 23, 1802), *reprinted in* THE WORKS OF ALEXANDER HAMILTON, *supra* note 411, at 312, 313–22.

[413] *Id.* at 313.

[414] *Id.* at 313–22.

[415] *See, e.g.*, 11 ANNALS OF CONG. 33 (1802) (statement of Sen. Mason); *id.* at 526 (statement of Rep. Henderson).

[416] *Id.* at 587 (statement of Rep. Giles).

[417] 8 ALEXANDER HAMILTON, *The Examination No. XVII* (Mar. 20, 1802), *reprinted in* THE WORKS OF ALEXANDER HAMILTON, *supra* note 411, at 353, 358.

pleasure," Hamilton argued, was "a tenant *at the will of the government*, liable to be discontinued by the executive organ, in the form of a removal; by the legislative, in the form of an abolition of the office."[418] "Very different," Hamilton continued, "is the case as to the judges."[419] Because of good-behavior tenure, a legislature could not terminate a judge by terminating their underlying office.

This language from Hamilton embraces a robust understanding of "at pleasure" tenure, equating it to a "tenan[cy] at the will of the government."[420] To be sure, Hamilton went on to say that "the pleasure of the President, in all cases not particularly excepted, is understood to be subject to the direction of the law."[421] This language is susceptible to the claim that Congress could "direct[]" removal by "law" by limiting the President's discretion.[422] But another interpretation is more plausible: Hamilton was likely contending that "the law" could "direct[]" presidential removal either by providing for removal upon criminal conviction or by abolishing executive offices.[423] The former position was amply reflected in early statutes that provided for removal when an officer was convicted of certain crimes.[424] The latter position was no less obvious — of course Congress could disestablish executive offices and thereby remove, in a manner of speaking, executive officers. Interpreting Hamilton in this fashion makes sense considering the controversy then pending — the Jeffersonian attempt to abolish judgeships.

2. The Removal of Chief Justice Goodrich. — One high-profile removal of a territorial judge further supports the proposition that a term of years did not confer protection against removal. In 1851, Attorney General John Crittenden advised President Millard Fillmore that the President could remove Chief Justice Goodrich of the Minnesota Territory.[425] The Act creating the Minnesota Territory had conferred the "judicial power" on many courts, including a supreme court composed of justices who "shall hold their offices during the period of four years."[426] The Act said nothing about removal. Crittenden nevertheless

---

418 *Id.*

419 *Id.* at 359 ("The express declaration that they shall hold their offices during good behavior — that is, upon a condition *dependent on themselves*, is repugnant to the hypothesis that they shall hold at the *mere pleasure of others*.").

420 *Id.* at 358 (emphasis omitted).

421 *Id.*

422 *Id.*; *see* Jeremy D. Bailey, *The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton*, 102 AM. POL. SCI. REV. 453, 459 (2008).

423 8 HAMILTON, *supra* note 417, at 358.

424 *See, e.g.*, Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67.

425 Executive Authority to Remove the Chief Justice of Minnesota, 5 Op. Att'y Gen. 288, 291 (1851). The dispute gave rise to *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284 (1854). On March 19, 1849, President Zachary Taylor had appointed Chief Justice Goodrich, with the Senate's consent, to the Supreme Court of the Territory of Minnesota for a four-year term. *Id.* at 301. But on Crittenden's advice, President Fillmore removed Chief Justice Goodrich more than two years later on October 21, 1851. *Id.*

426 *See* Act of Mar. 3, 1849, ch. 121, § 9, 9 Stat. 403, 406.

concluded that the President had removal power: "That these territorial judges were appointed under a law which limited their commissions to the term of four years, does by no means imply that they shall continue in office during that term, howsover they may misbehave."[427]

Crittenden observed that the statute did not give the Chief Justice tenure "for life, nor during good behaviour, but for the term of four years only."[428] He also noted that, because territorial judges staffed "legislative" rather than Article III courts,[429] they were "civil officers."[430] And "[b]eing civil officers," territorial judges were "not exempted from that executive power which, by the constitution, is vested in the President of the United States over all civil officers appointed by him."[431] The tenure of such offices, Crittenden reasoned, was "not made by the constitution itself more stable than during the pleasure of the President of the United States."[432] Indeed, on the constitutional point, Crittenden concluded that it "ha[d] been long since settled, and ha[d] ceased to be a subject of controversy or doubt" that "the President has, by the constitution of the United States, the power of removing civil officers appointed and commissioned by him, by and with the advice and consent of the Senate, where the constitution itself has not otherwise provided."[433]

Finally, although the allegations against the Chief Justice involved "very serious charges of incapacity, unfitness, and want of moral character,"[434] Crittenden did not even hint that a statutory term of years and statutory silence as to removal implied a constrained power to remove solely for cause. To the contrary, Crittenden flatly concluded that the President could remove the Chief Justice "for any cause that may, in [the President's] judgment, require it."[435]

The former Chief Justice ultimately sought a mandamus to compel the Treasury to pay him for the remainder of his four-year term. In *United States ex rel. Goodrich v. Guthrie*,[436] the Supreme Court denied

---

[427] Executive Authority to Remove the Chief Justice of Minnesota, 5 Op. Att'y Gen. at 290. Crittenden claimed that, by giving Minnesota's territorial judges a statutory term of four years, Congress "intended no more than that these officers should certainly, at the end of that term, be either out of office, or subjected again to the scrutiny of the Senate upon a renomination." *Id.* at 291.

[428] *Id.* at 289.

[429] *Id.* (reasoning that territorial courts "are not constitutional Courts" but rather "legislative Courts, created in virtue of the general right of sovereignty which exists in the government" (quoting Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828))).

[430] *Id.* at 290.

[431] *Id.* Crittenden claimed that, because the President's removal power extended to territorial judges, "[a]n express declaration in the statute that they should not, during the term, be removed from office, would have been in conflict with the constitution." *Id.* We take no position on whether Congress may bar or constrain presidential removal of territorial officers.

[432] *Id.*

[433] *Id.*

[434] *Id.* at 289.

[435] *Id.* at 291.

[436] 58 U.S. (17 How.) 284 (1854).

the writ, albeit on grounds unrelated to the constitutional issue.[437] Notably, Attorney General Caleb Cushing argued that the term of years did not preclude removal.[438] He thereby agreed with Crittenden and President Fillmore.

3. The Removal of U.S. Attorney Parsons. — The vital issue finally reached the Supreme Court in 1897, after President Grover Cleveland removed a U.S. Attorney subject to a term-of-years provision. In *Parsons v. United States*,[439] the Court held that the President retained the power to remove a U.S. attorney even "when such removal occurs within the period of four years from the date of his appointment."[440] The case involved a statute providing that "[d]istrict attorneys shall be appointed for a term of four years and their commissions shall cease and expire at the expiration of four years from their respective dates."[441] The statute did not expressly grant the President removal authority. For that reason, Lewis Parsons, the dismissed district attorney, claimed that he could hold the office for the full four-year term and that President Cleveland lacked the power to remove him.[442] The

---

[437] *Id.* at 304. The majority opinion held that mandamus was inappropriate "to command the withdrawal of a sum or sums of money from the treasury" to satisfy "disputed or controverted claims against the United States." *Id.* at 303; *see also id.* at 304 (distinguishing between "purely ministerial" and discretionary actions). For a discussion of the development of mandamus during this time, see Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 947–62 (2017).

[438] Specifically, he reasoned that a statute setting a term of years to an executive did not impliedly limit the President's authority to remove. *See Goodrich*, 58 U.S. (17 How.) at 288 ("[The President's removal power] could not be impaired by the legislature; nothing but an amendment to the constitution could take it from him."). The sole Justice to reach the constitutional merits, Justice McLean, appeared to disagree with the constitutional settlement on removal that Congress reached in 1789. *See id.* at 306–08 (McLean, J., dissenting). *But cf. id.* at 310 ("In the nature of his office, the President must superintend the executive department of the government."). He acknowledged, however, that "this power of removal has been, perhaps, too long established and exercised to be now questioned." *Id.* at 307. Justice McLean further reasoned that the President's removal authority did not apply "to the judicial office," *id.* at 308, including territorial judges, *id.* at 311. *See also id.* at 310 ("[T]he judiciary constitutes a coordinate branch of the government, over which the President has no superintendence, and can exercise no control."). The proper treatment of territorial officers — including territorial judges — under the Constitution is outside the scope of this Article. Notably, Justice McLean did not argue that the term of years precluded removal, but rather the judicial nature of the office gave rise to good-behavior tenure. *See id.* at 311.

[439] 167 U.S. 324 (1897).

[440] *Id.* at 327, 343.

[441] 13 Rev. Stat. § 769 (2d ed. 1878) (compiling provisions from Act of May 15, 1820, ch. 102, §§ 1–2, 3 Stat. 582, 582).

[442] *Parsons*, 167 U.S. at 327. According to the record, President Cleveland's letter to U.S. Attorney Lewis Parsons simply stated that he was "hereby removed from the office of attorney of the United States for the Northern and Middle Districts of Alabama, to take effect upon the appointment and qualification of [his] successor." *Id.* at 325 (statement of the case). Interestingly, before Parsons brought suit in the Court of Claims, his successor filed a motion in an Alabama circuit court to require that Parsons turn over to him all books, papers, and other property accompanying the office. *Id.* at 326. The court granted his successor's motion. *See In re* O'Neal,

logical implication of this argument was that neither the President, nor the President and Senate together, could remove anyone holding an office with a statutory term. Impeachment would be the only method of removal.[443] After reciting instances where courts and the Executive denied that Congress could limit the removal of executive officers and discussing the extensive legislative history of the tenure provision at issue, the Court concluded that despite the term of years, the statute did not constrain the President's removal power.[444] Given the Court's conclusion, it seems clear that many did not read a term of years as barring removal by the President.

* * *

Text must be read in context, and different communities and eras might have different conventions on whether a statutory term of years constitutes an implicit limit on executive removal. Indeed, such text might constitute an attempt to limit impeachment removals. Our point is that a term of years certainly need not be read either way and that reading *every* term of years as if it implicitly limited removal has troubling implications. Such a construction embraces a nettlesome constitutional question — whether Congress can *eliminate* the President's power to remove executive officers — while the contemporaneous readings we have canvassed avoid that question. President Jefferson treated the justices of the peace as removable officers; Judge Cranch treated them as Article III judges; and Chief Judge Kilty treated them as D.C. officers. None of them treated the justices of the peace as irremovable executive officers — a reading that raises a constitutional question so profound that neither Congress nor the courts have ever touched it. We know of no statute that expressly and wholly bars executive removal of executive officers. When Congress has constrained executive removals, it has either required Senate consent or imposed for-cause restrictions.[445]

---

57 F. 293, 293–94 (C.C.N.D. Ala. 1893). While the court did not fully address the President's authority to remove Parsons, it reasoned as follows:

> The department of justice is a department of the government of the United States recognized by law, and the attorney general of the United States is at the head of the department, and district attorneys and the United States marshals are under his order and direction. How can it be maintained that the district attorney and marshal are in the actual possession of the offices they claim when they are acting in opposition to the orders and directions of the attorney general of the United States?

Id. at 294.

443 Parsons argued as much. *See Parsons*, 167 U.S. at 328 (noting that Parsons claimed that the statutory provisions gave "every district attorney the legal right to hold his office for four years, and that during that time the President has no power to remove him directly, and the President and Senate have no power to remove him indirectly").

444 *Id.* at 343.

445 *See, e.g.*, Myers v. United States, 272 U.S. 52, 107 (1926) (quoting Act of July 12, 1876, ch. 179, 19 Stat. 80, 81); Humphrey's Ex'r v. United States, 295 U.S. 602, 620 (1935) (quoting Federal Trade Commission Act of 1914 § 1, 15 U.S.C. § 41).

As we have revealed, many prominent figures did not read a term of years as barring removals by the President. After all, in 1801, President Jefferson fired the justices of the peace despite their fixed term.[446] And in 1802, the Senate acted on President Jefferson's nominations because senators likely supposed that the justices of the peace no longer had five-year terms.[447] Furthermore, scholarship favoring Chief Justice Marshall's dictum has yet to cite any American official or scholar at the Founding saying that a term of years implies nonremovability, relying instead upon British conceptions.[448] We are aware of no American official or scholar from before 1803 who said that a statutory term of years, without more, meant that the President could not fire the officers. And *Marbury*'s 1803 treatment of removal is hardly the Great Chief's finest legal argument, resting as it does on a shallow reading of the statute and an evasion of the constitutional questions raised by that reading. Further, even if President Jefferson were wrong (and Chief Justice Marshall right), it must be said that outside of the unique context of the territories and D.C., Congress did not enact any term-of-years provisions that were seen to limit presidential removal.

D. Good-Behavior Tenure and "Judicial" Officers

A potent source of confusion about the scope of presidential removal arises from congressional discretion over how to treat "judicial" officers. The Constitution, of course, specifies a tenure protection ("good Behaviour") for Article III judges.[449] Yet some governmental work may be performed either by Article III judges or by executives.[450] Under such circumstances, Congress may choose whether to create an official with good-behavior tenure or an official with no such

---

446 *See* Prakash, *supra* note 325, at 215.

447 *See supra* notes 369–72 and accompanying text.

448 Manners and Menand cite the British lawyer Matthew Bacon for the proposition that officers endowed with a term of years were not removable by the Crown. Manners & Menand, *supra* note 18, at 19–20 (citing 3 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 732 (London, E. Nutt, R. Nutt & R. Gosling 1736)). We have no reason to doubt Bacon's reading of British law. But Bacon also claims that a term of years can be passed on to heirs. BACON, *supra*, at 733 ("Offices are allowed to descend as Inheritances . . . ."). Manners and Menand never reject this reading. But if one were to accept Bacon's views without question on the meaning of a term of years, it would follow that one should accept Bacon's views without question on the inheritance of offices. Put differently, Bacon's views on the inheritance of offices indicate that care must be taken before applying the views of English scholars to American law. For although the U.S. Constitution adopted British practices in certain respects, it rejected that backdrop in others. *See supra* section II.A, pp. 1790–93. A term of years need not be read as implying no other means of removal and, in fact, should be read as preserving removal by the President and through impeachment.

449 U.S. CONST. art. III, § 1, cl. 2.

450 *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856) ("[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.").

safeguards. Several early sources and episodes addressed this congressional discretion.

We have discussed one episode: the disagreement over the status of justices of the peace, at issue in *Marbury* and *More*. Participants disagreed over the constitutional status of justices of the peace, with potential consequences for whether the President could remove them at pleasure.[451] But the justices of the peace were not the only officials that could have received either good-behavior or at-pleasure tenure. Here, we discuss three others: the register of wills for the District of Columbia, the Comptroller of the Treasury, and marshals. Some recent critics of the removal power have cited these officers to argue that Congress has near-plenary authority to regulate removal.[452] A careful reading of each episode indicates that Congress's import was far narrower.

1. The Register of Wills and the Wirt Opinion. — Take Justice Kagan's *Seila Law* dissent. She claimed that Attorney General William Wirt "believed that Congress could restrict the President's authority to remove *such*" — by which the Justice meant "executive" — "officials, at least so long as it 'expressed that intention clearly.'"[453] But the Justice misread Wirt's 1818 opinion. Wirt considered whether Congress had given good-behavior tenure to an arguably judicial officer. He nowhere suggested that the Constitution allowed Congress to grant comparable tenure protections to executive officers.

The issue at stake in the Wirt opinion was the President's authority to remove the "gentleman who . . . fill[ed] the office of register of wills for the county of Washington" (then a political subdivision of the District of Columbia).[454] In many states — including Maryland, from which the United States had acquired "the county of Washington"[455] to serve as the "seat of the government"[456] — the register of wills possessed good-behavior tenure.[457] The question that Wirt confronted was whether

---

451 *See supra* sections II.C.1–2, pp. 1802–16.

452 *See, e.g.*, Shugerman, *supra* note 18, at 2102, 2105.

453 Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2231 n.5 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (quoting Duty of President as to a Register of Wills, 1 Op. Att'y Gen. 212, 213 (1818)) (emphasis added).

454 Duty of President as to a Register of Wills, 1 Op. Att'y Gen. at 213. The "gentleman" to whom Wirt was referring was John Hewitt, who had been appointed by President Jefferson as Register of Wills in 1801. William Henry Dennis, Orphans' Court and Register of Wills, District of Columbia (Mar. 6, 1899), *in* 3 RECORDS OF THE COLUMBIA HISTORICAL SOCIETY 210, 212 (1900). As for why President Monroe might have wanted to fire Hewitt in 1818, a manuscript published decades later reveals that "the second Register" — Hewitt's successor, James H. Blake — "complain[ed] to the court that his predecessor, who had held the office for seventeen years, had left papers on file unrecorded, although he had been paid the fees, including the wills for ten years preceding, bonds for thirteen years, and so on." *Id.* at 213.

455 Act of Feb. 27, 1801, ch. 15, § 2, 2 Stat. 103, 105.

456 *Id.* § 1, 2 Stat. at 103.

457 For example, the Maryland Constitution of 1776 established "[t]hat there be a Register of Wills appointed for each county who shall be commissioned by the Governor, on the joint

federal law governing the District had given the register of wills such tenure when it created the office "without defining the tenure by which it shall be held."[458] Wirt concluded that the register served at the President's pleasure.[459] A review of the statute indicates that he was correct to do so but also reveals why the question was sufficiently interesting to warrant an Attorney General opinion. Federal law provided that:

> [T]here shall be appointed in and for each of the said counties [namely, Alexandria and Washington counties, within D.C.], a register of wills, and a judge to be called the judge of the orphans' court, who . . . shall have all the powers [and] perform all the duties . . . as are exercised . . . by the registers of wills and judges of the orphans' court, within the state of Maryland; and appeals from the said courts shall be to the circuit court of said district . . . .[460]

Under both Maryland's constitutional backdrop and the statute that created the office, the register of wills was, if not a judicial officer, at the very least an officer whose work was closely tied to the judicial process and the orphans' court.[461] After all, the last sentence of the section perhaps treats the register of wills as a court by referencing "courts," mentioning that appeals lie with the circuit court.[462] Further, judging by the register of wills' functions, Maryland law seems to have regarded the office as at least a judicial adjunct.[463] In the neighboring state of Pennsylvania, the register of wills served on a "register's court."[464]

The question before Wirt was whether Congress, in creating the office of register of wills, had implicitly conferred good-behavior tenure or, instead, left the officer to serve at pleasure.[465] That context explains Wirt's precise language: "Whenever Congress intend a more permanent tenure, (during good behavior, for example,) they take care to express

---

recommendation of the Senate and House of Delegates." MD. CONST. of 1776, art. XLI. The same constitution further provided that, along with other (judicial) officers, "the Registers of Wills . . . shall hold their commissions during good behaviour, removable only for misbehaviour, on conviction in a Court of law." *Id.* art. XL.

458 Duty of President as to a Register of Wills, 1 Op. Att'y Gen. at 213.

459 *See id.*

460 Act of Feb. 27, 1801, ch. 15, § 12, 2 Stat. at 107.

461 Eight years after Wirt's opinion, a congressional committee asked Secretary of State Henry Clay to produce a list of officials, along with their tenure and emoluments, that had a connection with the Department of State. *See* Letter from Henry Clay, Sec'y of State, to Thomas Hart Benton, Chairman of the Comm. of the Senate for the Reduction of Exec. Patronage, *in* THOMAS BENTON, COMM. OF THE SENATE FOR THE REDUCTION OF EXEC. PATRONAGE, S. REP. NO. 19-88, at 14, 14 (1st Sess. 1826). Secretary Clay listed the judges of the orphans' court as serving "[d]uring good behaviour" and the register of wills as serving "[d]uring the pleasure of the Presd't." *Id.* at 27.

462 Act of Feb. 27, 1801, ch. 15, § 12, 2 Stat. at 107.

463 *See* An Act for the Regulation of Officers Fees, § 3, 1779 Md. Laws ch. 25.

464 PA. CONST. of 1790, art. V, § 7.

465 Duty of President as to a Register of Wills, 1 Op. Att'y Gen. 212, 213 (1818).

that intention clearly and explicitly . . . ."[466] There is little reason to believe that Wirt was suggesting that Congress could impose good-behavior restrictions on officers within the *executive branch*.[467] That would have required biting off a great deal more than Wirt needed to chew to address the narrow issue before him.

This point becomes clearer when one considers the disputed status of judicial officers within the District. Consider that the statutory language just quoted about the register of wills was placed in a section of the D.C. Organic Act (section 12) that *immediately* followed the "justice of the peace" provision (section 11) that *Marbury v. Madison* had read as implicitly barring presidential removals.[468] No wonder Wirt thought that the removability of the register of wills was worth a formal opinion; fifteen years earlier, Chief Justice Marshall had construed the provision creating justices of the peace to give tenure protection.[469] Like the register of wills, the justices of the peace might have been judicial officers who could have been given good-behavior protection. Even though the statute did not explicitly grant such tenure to the justices, Chief Justice Marshall claimed that they had been made presidentially irremovable.[470] President Jefferson disagreed.[471] In sum, Wirt's opinion on the register of the wills was about officers who might be considered judicial and not about executive officers.[472]

2. The Comptroller and James Madison. — A second episode involves the creation of the office of the Comptroller of the Treasury

---

[466] *Id.* Decades later, Attorney General Amos Akerman addressed almost exactly the same issue as the 1818 opinion, reaching the same conclusion about the register of wills' tenure under the 1801 statute. *See* Register of Wills for the District of Columbia, 13 Op. Att'y Gen. 409, 410 (1871) (reasoning that the "tenure of the office" of the register of wills "is the President's pleasure," but acknowledging "the modification prescribed by the recent acts known as the tenure of office acts").

[467] To be fair to the *Seila Law* dissent, Justice Brandeis in *Myers* relied on Wirt's opinion for the same proposition. *See* Myers v. United States, 272 U.S. 52, 291 n.81 (1926) (Brandeis, J., dissenting) (quoting Duty of President as to a Register of Wills, 1 Op. Att'y Gen. at 213). Going further back, Representative Benjamin Butler, one of the House's impeachment managers, cited Wirt's opinion in his opening statement during the impeachment trial of President Andrew Johnson. CONG. GLOBE, 40th Cong., 2d Sess. 33 (Supp. 1868). As our explanation in the text suggests, Justices Kagan and Brandeis and Representative Butler have overread Wirt's opinion.

[468] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 154 (1803) (observing that section 11 provided that "there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time, think expedient, to continue in office five years" (quoting Act of Feb. 27, 1801, ch. 15, § 11, 2 Stat. 103, 107)).

[469] *Id.* at 162.

[470] *Id.*

[471] *See supra* notes 375–77 and accompanying text.

[472] Several attorneys general issued opinions embracing the view that the Decision of 1789 had settled the constitutional question in favor of a constitutional power of presidential removal over executive officers. *See, e.g.*, Military Power of the President to Dismiss from Service, 4 Op. Att'y Gen. 1, 1–2 (1842) ("It is according to that construction, from the very nature of executive power, absolute in the President, subject only to his responsibility to the country . . . for a breach of such a vast and solemn trust."). Strikingly, none of these opinions sought to distinguish Wirt's opinion; the natural inference is that they did not believe it said anything that contradicted their views.

in 1789. After the establishment of the Department of Foreign Affairs — during which he prominently argued that the executive power conferred an authority to remove[473] — Representative Madison suggested that Congress might treat the Comptroller differently.[474] Scholars have long relied on this excerpt to suggest that Madison did not believe either that the President's removal power extended to the Comptroller or that Congress could constrain removals.[475]

Yet according to available newspaper accounts, Madison did not propose a restriction on removal.[476] In fact, he sought the creation of a term of years, "unless sooner removed by the President."[477] While some have argued that he meant to grant good-behavior protection,[478] this is a misreading. Madison never mentioned such a tenure, making it rather hard to impute such a desire. More damaging to the argument is that he *explicitly mentioned* that the President could remove the Comptroller,[479] which was not possible with good-behavior tenure. No one has argued, not then or ever since, that the President could simply oust an officer with good-behavior tenure. Finally, Madison said that the Comptroller would be "thoroughly dependent" on both Congress and the President, a status that contradicts good-behavior protection.[480] No one supposes that Article III tenure makes federal judges "thoroughly dependent" on the President.

Understanding that Congress might have vested some of the Comptroller's functions in a judge elucidates some nuances of the discussion. Madison claimed that the tenure of an official might depend on the "nature of th[e] office," which he believed in the case of the Comptroller of the Treasury was "not purely of an Executive nature," but rather partook "of a Judiciary quality as well as Executive."[481] Under the Treasury Act, which outlined the duties of the Comptroller of the Treasury, an "Auditor" was "to receive all public accounts, and after examination to certify the balance, and transmit the accounts . . . to the Comptroller for his decision."[482] Any person

---

473 *See Congressional Intelligence. House of Representatives*, *supra* note 192, at 2, *reprinted in* 12 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES, *supra* note 61, at 225, 225 (Charles F. Hobson & Robert A. Rutland eds., 1979).

474 *See* 1 ANNALS OF CONG. 612 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison).

475 For the classic treatment, see Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 366–67 (1927). For a recent discussion that explores the Comptroller of the Treasury's roots in practice under the Articles of Confederation, see Bamzai, *Tenure of Office and the Treasury*, *supra* note 23, at 1327–34.

476 *See* 1 ANNALS OF CONG. 612 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison).

477 *Id.*

478 *E.g.*, Shugerman, *supra* note 18, at 2106.

479 1 ANNALS OF CONG. 612 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison).

480 *Id.*

481 *Id.* at 611.

482 Act of Sept. 2, 1789, ch. 12, § 5, 1 Stat. 65, 66.

"dissatisfied" with an audit could "appeal to the Comptroller."[483] Congress could have vested the latter function in an Article III court.

Again, Madison never proposed good-behavior tenure. Further, early Congresses never granted such tenure to comptrollers. As previously discussed, early comptrollers served at the President's pleasure. At most, Madison hinted that Congress could treat an officer with the Comptroller's judicial-style duties as an Article III judge, complete with good-behavior tenure.

3. Marshals and Their Deputies. — Marshals and deputy marshals comprised another set of officers that presented a question of categorization. Under the Judiciary Act of 1789,[484] the President could appoint, with the Senate's advice and consent, a marshal for each judicial district for a four-year term.[485] The law specified that such marshals were removable at pleasure.[486] Each marshal was empowered to appoint deputies.[487] Curiously, the statute authorized the district and circuit courts to remove the deputy marshals at pleasure.[488] Some scholars have interpreted this provision as signaling that the President lacked the power to remove deputy marshals.[489] By including a specific provision authorizing district and circuit courts to remove deputy marshals, they argue, Congress implicitly denied that marshals could remove their deputies — *expressio unius est exclusio alterius*.[490] If Congress could limit the removals of these deputy marshals, it might have the authority to limit the removal of other executives.

These inferences go too far. First, marshals and their deputies might have been judicial officers of the courts. Second, notwithstanding the power to remove deputies lodged in the district and circuit courts, marshals might have had concurrent authority to remove their deputies.

Chancellor James Kent, in his *Commentaries on American Law*, articulated both views.[491] He wrote that "[t]he principal officers of the courts are attorneys and counsellors, clerks and marshals."[492] This reasoning would seem to mark marshals as judicial in nature. Marshals, Kent reasoned, were "analogous to sheriffs at common law."[493] Further, he claimed that the deputies were "removable not only at [the marshal's] pleasure, but they are also by statute made removable at the pleasure of

---

483 *Id.*
484 Ch. 20, 1 Stat. 73.
485 *Id.* § 27, 1 Stat. at 87.
486 *Id.*
487 *Id.*
488 *Id.*
489 *E.g.*, Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 286 (1989).
490 *See id.*
491 1 KENT, *supra* note 141, at 306, 309 (4th ed., New York, E.B. Clayton 1840).
492 *Id.* at 306.
493 *Id.* at 309.

the district or circuit courts."[494] In other words, Kent supposed that, in giving district and circuit courts the authority to remove deputy marshals, the Judiciary Act did not implicitly bar marshals from exercising the same power.

We agree with Kent. We doubt that Congress implicitly limited the power of the Executive to remove deputy marshals. However, if Congress ever sought to limit the Executive's ability to remove deputy marshals, it would present another case where Congress has discretion to categorize borderline officers as either judicial or executive. Kent described the duties of a marshal as: "[T]o attend the district and circuit courts, and to execute, within the district, all lawful precepts directed to him, and to command all requisite assistance in the execution of his duty."[495] Given their close nexus to the courts, these obligations could appear judicial. Similarly, because the duties of clerks of courts appear judicial rather than executive,[496] Congress has authority to vest the power to appoint (and thereby to remove) a clerk of court in the court itself.[497]

E. The Cases of War and Foreign Affairs

In discussing congressional authority to impose removal restrictions, some have sought to distinguish certain departments from others. For instance, some contend that the heads of two departments, Defense and State, cannot enjoy for-cause shields, whereas the heads of certain other departments can.[498] By contrast, others argue that Congress may give such protections to the military officers in the Department of Defense, at least in peacetime.[499]

1. Are War and Foreign Affairs Different? — In *Seila Law*, Justice Kagan argued that, while Congress has broad authority to impose for-cause protections, it cannot grant such protections to certain officers

---

494 *Id.*

495 *Id.*

496 *See id.* at 308 ("Clerks are appointed by the several courts . . . . They have the custody of the seal and records, and are bound to sign and seal all process, and to record the proceedings and judgments of the courts. And this is a trust of so much importance, that in addition to the ordinary oath of office, clerks are obliged to give security to the public for the faithful performance of their duty.").

497 *See Ex parte* Hennen, 38 U.S. 230, 232 (1839) (addressing removal of clerk of court); 28 U.S.C. § 672 (authorizing the Supreme Court to "appoint a marshal, who shall be subject to removal by the Court").

498 *See, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2233 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (reasoning that "Congress could not impede through removal restrictions the President's performance of his own constitutional duties" by, for example, "curb[ing] the President's power to remove his close military or diplomatic advisers").

499 *See, e.g.*, Zachary S. Price, *Congress's Power over Military Offices*, 99 TEX. L. REV. 491, 558 (2021).

within the State and Defense Departments.[500] She argued that, in the case of officers who execute the law, a for-cause removal restriction ordinarily "preserves authority in the President to ensure (just as the Take Care Clause requires) that an official is abiding by law."[501] In contrast, for-cause restrictions are inappropriate in the "conduct of foreign affairs or war," because those duties require "advisers who will (beyond complying with law) help [the President] devise and implement policy."[502]

These claims do not accord with law, history, or the practicalities of departmental governance, where legal and policy duties are often mixed in one office. From the First Congress, statutes have compelled officers within the Defense and State Departments to execute federal laws and satisfy various duties. *Marbury v. Madison* involved a 1789 statute that directed the Secretary of State to convey a copy of a commission.[503] And Congress ordered the War Department to execute laws related to the conduct of war, procurement, and the regulation of soldiers and sailors.[504]

Moreover, no clause in Article II — other than the Vesting Clause of Article II, which confers "executive power" on the President[505] — suggests that the Secretaries of Defense and State must uniquely serve at the President's pleasure. The Commander-in-Chief Clause does not grant such authority,[506] because a Commander in Chief need not have authority to remove. We know this because the Commander in Chief of the Continental Army had no removal authority save for when the Continental Congress, from time to time, granted it expressly.[507] If the Commander in Chief did not have removal authority prior to the adoption of the Constitution, it seems doubtful that the Constitution's Commander-in-Chief Clause necessarily came with implied removal authority. Likewise, the President's authority to make treaties does not imply a power to remove officers within the State Department.[508] Because the negotiation and making of treaties are but tiny slivers of what the State Department does, the treaty power cannot support an illimitable power to remove the Secretary and other diplomats.

The grant of executive power in the Vesting Clause is thus the only source of the President's constitutional authority to remove

---

[500] *Seila L.*, 140 S. Ct. at 2233 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

[501] *Id.* at 2235 n.9 (citing Morrison v. Olson, 487 U.S. 654, 692 (1988)).

[502] *Id.*

[503] *See* 5 U.S. (1 Cranch) 137, 161 (1803).

[504] *See, e.g.*, Act of Apr. 30, 1790, ch. 10, §§ 1–13, 1 Stat. 119, 119–21 (1790).

[505] U.S. CONST. art. II, § 1, cl. 1.

[506] *See id.* § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.").

[507] *See* Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 362–63 (2008).

[508] *See* U.S. CONST. art. II, § 2, cl. 2.

officers within the Defense and State Departments.[509] That is to say, the President has removal authority over military officers because of the executive power, not the Commander-in-Chief Clause. The executive power likewise permits Presidents to remove ambassadors, consuls, and other State Department officials, including the Secretary of State.[510]

In sum, the executive power to remove officials within the Defense and State Departments is not more muscular than the executive power to remove officers in other executive departments. If Justice Kagan is right that Congress, under the Necessary and Proper Clause, can limit removal of the heads of agencies implementing domestic policy pursuant to law, it follows that Congress can likewise limit removal of the Secretaries of State and Defense. But that is precisely why departmental identity should have no role in analyzing whether Congress can limit the removal of executive officers.

2. Can Congress Limit the Removal of Military Officers? — Professor Zachary Price asserts that while the President has a constitutional power to remove military officers, Congress can bar such removals.[511] This supervening power arises from Congress's power to create rules for the military's regulation.[512] Professor Price argues that Congress can bar or limit such removals so long as it ensures that the President can meaningfully command the military.[513] Put another way, Professor Price contends that Congress can circumscribe the President's authority to remove military officers if it maintains another mechanism to ensure adequate presidential control, such as the authority to issue binding commands to those officers.

Before the Civil War — as Professor Price agrees — the Constitution was widely understood to grant the President a removal power over military officers.[514] President Washington issued at-pleasure commissions to military officers,[515] as did President Adams[516] and President

---

509 *See id.* § 1, cl. 1.

510 *See supra* section I.A, pp. 1764–82.

511 *See* Price, *supra* note 499, at 494.

512 *Id.* at 553–54; *see* U.S. CONST. art. I, § 8, cl. 14; *see also id.* § 8, cls. 11–13 (giving Congress the power to "declare War," to "raise and support Armies," and to "provide and maintain a Navy").

513 *See* Price, *supra* note 499, at 566.

514 *Id.* at 557–58 ("By the time of the Civil War, . . . presidential removal authority over military officers appeared to be settled . . . ." *Id.* at 557.).

515 *See, e.g.*, Commission (May 9, 1792), *in* 2 AMERICAN STATE PAPERS: MILITARY AFFAIRS 410, 410 (Walter Lowrie & Walter S. Franklin eds., 1834) (noting at-pleasure status of Caleb Swan, paymaster of U.S. troops); Commission (Sept. 29, 1789), https://www.christies.com/en/lot/lot-5176344 [https://perma.cc/3CRF-TQVT] (noting at-pleasure status of Thomas Doyle, army lieutenant).

516 *See, e.g.*, Commission (July 13, 1798), *in* 2 THE PAPERS OF GEORGE WASHINGTON: RETIREMENT SERIES 402, 402 n.1 (W.W. Abbot ed., 1998) (noting at-pleasure status of George Washington, Lieutenant General); Commission (Aug. 15, 1798), https://www.rrauction.com/auctions/lot-detail/317620303381-john-adams [https://perma.cc/BDX9-D6NF] (noting at-pleasure status of David Stickney, marine lieutenant in the Navy).

Jefferson.[517] No statute authorized the President to issue at-pleasure commissions to all military officers. Presidents, moreover, issued such commissions to officers even though Congress had enacted statutes making it an offense for officers to disobey the orders of their superiors, presumably including presidential orders.[518] Thus, despite the existence of a mechanism that Professor Price believes would satisfy the Commander-in-Chief Clause — namely, a court-martial for failure to obey a superior's order[519] — Presidents nonetheless claimed a constitutional right to remove military officers.

Furthermore, Congress's considerable powers over the military cannot defease the removal power any more than they can defease the President's appointment, veto, or other powers. Professor Price's reading invites the question of whether Congress could leverage its power over the military to constrain the exercise of other non-Commander-in-Chief powers. For instance, can Congress invoke its power over the military to deny the President the power to pardon military convicts? In our view, the power to govern and regulate the armed forces does not permit Congress to negate other presidential powers, including removal.

The decisions of a series of attorneys general made clear that the court-martial provisions did not displace the President's removal authority. In 1842, Attorney General Hugh Legaré, the Attorney General under President John Tyler, addressed "whether the President of the United States may strike an officer from the rolls, without a trial by a court-martial, notwithstanding a decision in that officer's favor by a court of inquiry ordered for the investigation of his conduct."[520] Legaré reasoned that the rationale in favor of presidential removal that had been settled for civilian officers in the Decision of 1789 "applies *a multo fortiori* to the military and naval departments."[521] Five years later, Attorney General Nathan Clifford likewise reasoned that the Decision

---

[517] *See e.g.*, Commission of John B. Scott as Colonel and Commandant (Mar. 13, 1805), *in* 13 THE TERRITORIAL PAPERS OF THE UNITED STATES 105, 106 (Clarence Edwin Carter ed., 1948) (noting at-pleasure status of John B. Scott, army colonel); Commission of Samuel Hammond as Colonel and Commandant (Oct. 1, 1804), *in* 13 THE TERRITORIAL PAPERS OF THE UNITED STATES, *supra*, at 52, 53 (same as to Colonel Hammond).

[518] The 1776 Articles of War for the Army, readopted by Congress in 1789, made it illegal for officers to disobey lawful orders. *See* Articles of War, § 2, art. 5, *in* 5 JOURNALS OF THE CONTINENTAL CONGRESS 788, 790 (Worthington Chauncey Ford ed., 1906); Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 95, 96 (providing that the Articles of War created by the Continental Congress would continue to apply to the Army under the new Constitution). The 1799 Act for the Government of the Navy of the United States provided much the same as the Articles of War by criminalizing disobeying orders. *See* Act of Mar. 2, 1799, ch. 24, § 1, art. 24, 1 Stat. 709, 711.

[519] *See* Price, *supra* note 499, at 535.

[520] Military Power of the President to Dismiss from Service, 4 Op. Att'y Gen. 1, 1 (1842).

[521] *Id.* at 2.

of 1789 applied with equal force to military officers.[522] In 1853, Attorney General Caleb Cushing said that he was "not aware of any ground" to distinguish "between officers of the Army and any other officers of the Government," all of whom "with exception of judicial officers only, . . . hold their commissions by the same tenure," namely, pleasure of the President.[523] During the Civil War, President Lincoln discharged officers despite a court-martial's verdict of acquittal.[524] And Congress embraced this view by providing that the President was "authorized and requested to dismiss and discharge from the military service . . . any officer for any cause which, in his judgment, either renders such officer unsuitable for, or whose dismission would promote, the public service."[525]

Moreover, if Congress can limit the President's authority to remove military officers, it is not clear why it could not limit the President's authority to command the military. In other words, if Congress's power to regulate the armed forces allowed it to limit presidential removal, then Congress would appear to have a comparable power to create officers who do not have to honor presidential orders. A theory that distinguishes removal from command — a theory that is currently lacking — would seem to be necessary.[526]

The nexus between congressional power over the military and the President's power to command is far tighter than the link between congressional power over the military and the power to remove executives. If anything, congressional power over the military suggests *greater* authority to preclude military command than it does to preclude removal. As compared to the removal authority, which comes from Article II's Vesting Clause, Congress arguably has a greater claim to treat military command as a default power than it does to so treat the removal power. We do not endorse any such claim. But given Professor Price's argument, we do not see why he (implicitly) rejects it.

---

[522] The Claim of Surgeon Du Barry for Back Pay, 4 Op. Att'y Gen. 603, 611 (1847). Clifford remarked that the "form of a military commission in general use expressly describes the tenure of office, and very clearly recognises the doctrine of 1789: 'This commission to continue in force during the pleasure of the President of the United States for the time being.'" *Id.* He rejected "the authority of a recent publication" as inconsistent with "the weight of authority on this point." *Id.* at 613 (rejecting the analysis in WILLIAM C. DE HART, OBSERVATIONS ON MILITARY LAW, AND THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL 228–31 (New York, Wiley & Putnam 1846)).

[523] Military Storekeepers, 6 Op. Att'y Gen. 4, 5–6 (1853).

[524] *See* GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 525 & n.3 (3d ed. 1915).

[525] Act of July 17, 1862, ch. 200, § 17, 12 Stat. 594, 596.

[526] Put another way, Professor Price treats the removal power as a default allocation. Yet the power to serve as Commander in Chief can likewise be conceived as a default grant. The President can direct the entire armed forces so long as Congress has not employed its supervening authority under the power to regulate and govern the armed forces to deny him such authority. Price, *supra* note 499, at 504. If that is the structure of the Constitution vis-à-vis removal, as Professor Price argues, why is it not so vis-à-vis command?

Finally, we part ways with Professor Price's reliance on a series of Reconstruction-era statutes that displaced the antebellum understanding of removal.[527] The same constitutional flaws that trouble the Tenure of Office Act of 1867[528] infect the Reconstruction-era statutes limiting the President's authority to control the military.[529] Few defend the former.[530] Yet the initiatives to limit presidential power to remove military officers emerged precisely when Radical Republicans in Congress sought to control and contradict President Andrew Johnson's authority over the military during the Reconstruction of the South.[531]

To be clear, we are no fans of President Johnson's softness towards the South. But on the *legal* question of whether Congress was right to limit removals, the Reconstruction Congresses went too far, not only with the Tenure of Office Act, but also with other legislation that limited presidential control over the military. First, Congress cannot provide for the reinstatement of ousted officers, as it did in 1865.[532] In purporting to reappoint civilians to the military offices they formerly held, Congress violated the Appointments Clause.[533] Second, Congress cannot insist that the Senate participate in removals, as it did in 1867.[534] We agree with Madison that while the Senate has a check on appointments, it has no check on removals.[535] Further, the Necessary and Proper Clause no more authorizes the creation of a Senate role in

---

[527] *Id.* at 558 (recognizing that "[a]s the Civil War drew to a close, Congress abruptly shifted its view of military removals"). For the relevant statutes, see Act of Mar. 3, 1865, ch. 79, § 12, 13 Stat. 487, 489 (requiring a court-martial if a dismissed officer makes an application claiming "he has been wrongfully and unjustly dismissed"); 10 U.S.C. § 1161 (repealing the 1862 statute authorizing presidential removal and providing that "no officer in the military or naval service shall in time of peace, be dismissed . . . except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof"). *See also* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 740 (2d ed. 1920).

[528] Ch. 154, 14 Stat. 430. The Tenure of Office Act permitted civil officers that were previously subject to Senate advice and consent to stay in office until new officials were appointed via advice and consent. *Id.* This effectively meant that Presidents could not unilaterally remove such officers, as they had been doing since 1789. Rather, the Senate had to concur in any presidential removal of any civil officer previously appointed with the Senate's advice and consent.

[529] *See* Price, *supra* note 499, at 558–60 (citing Reconstruction-era precedent to comment on the extent of the President's removal authority and Congress's ability to limit it).

[530] *See, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2232 n.6 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (describing the Tenure of Office Act as a "historical 'aberration'" because of "the ultimate repudiation of the law, and the broad historical consensus that it went too far" by "preventing the President from carrying out his own constitutionally assigned functions in areas like war or foreign affairs").

[531] *See* Charles Ernest Chadsey, The Struggle Between President Johnson and Congress over Reconstruction 132–35 (1896) (Ph.D. dissertation, Columbia University) (HathiTrust).

[532] *See* Act of Mar. 3, 1865, ch. 79, § 12, 13 Stat. 487, 489 (providing that, where officers challenge presidential removal and a subsequent court-martial "shall not award dismissal," such a dismissal "shall be void").

[533] *See* U.S. CONST. art. II, § 2, cl. 2.

[534] Tenure of Office Act of 1867, ch. 154, § 1, 14 Stat. 430, 430.

[535] *Congressional Intelligence. House of Representatives*, *supra* note 192, at 2, *reprinted in* 12 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES, *supra* note 61, at 225, 228–29 (Charles F. Hobson & Robert A. Rutland eds., 1979).

removals than it sanctions a law creating a House check on court judgments. In their righteous zeal to reform the South, the Republicans assumed authority to restrict the removal of executive officers, something the Constitution never authorizes. But the wrongfulness of President Johnson's policies cannot conjure up a congressional power to regulate removals.

III. Lingering Questions

In endorsing a presidential removal power, and in reading congressional power narrowly, the Court in *Seila Law* and *Collins v. Yellen* relied on a similar analytical framework (though not on all the same sources) to the one that we have set forth above. But the Court left open several questions — how to treat "inferior officers," "quasi-judicial" and "quasi-legislative" entities, and entities with "mixed" functions. We take up these issues here, addressing current doctrine and paths for future research.

A. Inferior Executives

The question of the removal of inferior officers introduces new challenges about which an entire separate article could be written. Here, we lay out some of the arguments, pro and con, without necessarily embracing a particular position.[536] We discuss two questions: First, does the executive power of removal extend to inferior executives? Second, even if the President has constitutional power to remove, may Congress grant for-cause protections to inferior officers like generals, postmasters, ambassadors, and the thousands of other inferior officers in the federal government?

Several sources suggest that the President has less authority over inferior officers and that Congress has more. During a debate immediately following the Decision of 1789, Representative Michael Stone suggested that, as an "inferior officer," the Comptroller of the Treasury was not necessarily removable by the President.[537] Justice Story approved, albeit without any reasoning, an adjacent position when he suggested in passing in his *Commentaries on the Constitution* that the Decision of 1789 did not apply to inferior officers.[538] Justice Story speculated that ninety-nine percent of executive officers were inferior officers, and hence, the Decision of 1789 was not so consequential after all.[539]

---

536 One of us (Prakash) believes that the President has a constitutional power to remove all executive officers, including inferior officers, and that Congress lacks constitutional authority to limit the removal of inferior executive officers. The other (Bamzai) wishes to consider the matter at greater length before arriving at a conclusion.

537 1 ANNALS OF CONG. 637 (1789) (Joseph Gales ed., 1834) (statement of Rep. Stone).

538 *See* 3 STORY, *supra* note 141, §§ 1537–1539.

539 *Id.* § 1544.

In *United States v. Perkins*,[540] the Court held that when Congress vested the appointment of an inferior officer in a department head, it could limit that department head's authority to remove.[541] In *Myers v. United States*,[542] Chief Justice Taft acknowledged *Perkins*[543] and used its reasoning to justify the complex web of laws that created the federal civil service.[544] *Seila Law* accepted the holding of *Perkins* as precedent.[545]

And yet, from the Constitution's earliest days, many politicians and judges supposed that the President could remove all executive officers, including inferior officers.[546] During and after the 1789 debate, opponents of recognizing a constitutional power to remove argued that the Madisonian reading was absurd precisely because it was so broad. Representative Samuel Livermore said that Representative Madison's executive-power theory had to be wrong because it subjected all executive officers, including ambassadors and military officers, to removal at pleasure.[547] Representative John Page made a similar point: "[T]o make every officer of the government dependent on the will . . . of one man, will . . . [cause] every friend to liberty to tremble for his country."[548] Senator Richard Henry Lee complained that reading the Constitution as if the President had "the sole right of removing all officers at pleasure" was twisting the Constitution.[549] Representative William Smith said that under the Madisonian theory, every "Collector Naval Officer [and] Surveyor"[550] would be the President's "dependants,"[551] incentivizing them to curry favor to avoid removal.[552]

But dependence upon the Chief Executive was a feature, not a bug, of the Madisonian argument. Madisonians agreed that the President could remove all executive officers. Indeed, Madison noted that if the President had removal power, "the chain of dependence [will] be preserved; the lowest officers, the middle grade, and the highest, will

---

[540] 116 U.S. 483 (1886).
[541] *Id.* at 485.
[542] 272 U.S. 52 (1926).
[543] *Id.* at 127, 161.
[544] *See id.* at 173–74.
[545] Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020).
[546] *See supra* pp. 1772–81.
[547] 1 ANNALS OF CONG. 478 (1789) (Joseph Gales ed., 1834) (statement of Rep. Livermore).
[548] 1 CONG. REG. 559–60 (1789), *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 915, 916.
[549] Letter from Richard Henry Lee to Samuel Adams (Aug. 15, 1789), *in* 16 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1320, 1321 (Charlene Bang Bickford et al. eds., 2004).
[550] Letter from William Smith to Edward Rutledge (Aug. 9, 1789), *in* 16 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 1264, 1267 (Charlene Bang Bickford et al. eds., 2004).
[551] *Id.* at 1268.
[552] *Id.* at 1267–68.

depend, as they ought, on the president."[553] The dependence of the "lowest" and "middle grade" officers on the President followed from the power to remove them at will. Madison's allies said that the debate had turned on "whether the President shoud. [sic] have the sole power of removing *all Officers in the Executive departments*, for altho' it came into view in the bill for establishing the Office of secretary for Foreign affairs yet the debates were upon the general principle."[554] Representative Elias Boudinot said that, while judges hold their offices during good behavior, "all other officers [hold] during pleasure."[555] Even a late convert to this Madisonian stance, Representative Theodore Sedgwick, said that "a majority of the House had decided that *all officers concerned in executive business* should depend upon the will of the President for their continuance in office."[556] While Madison denied that Congress could limit removal authority, no one in the Madisonian camp addressed Justice Story's specific claim that the Appointments Clause authorizes Congress to impose removal protections for inferior officers.[557]

Over the first two decades following the ratification of the Constitution, lawmakers adverted to the President's power to remove all executive officers. One legislator complained that the President did not need Congress to investigate the Treasury Secretary for failure to follow presidential instructions, for if it were true, the President would know and could just fire him.[558] After all, the President had the power "of removing any of the Executive officers at pleasure."[559] In 1802, another legislator signaled that Congress had recognized that "the power of removing other Executive officers [besides the secretaries] has been considered as left to the President, wherever there is no prohibition."[560] Or, as another lawmaker put it, a "majority [of the legislature] agreed

---

[553] 1 CONG. REG. 504 (1789), *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 921, 925.

[554] Letter from Benjamin Goodhue to Samuel Phillips, Jr. (June 21, 1789), *in* 16 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 826, 826 (Charlene Bang Bickford et al. eds., 2004) (emphasis added).

[555] 1 CONG. REG. 526 (1789), *reprinted in* 10 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 730, 731 (Charlene Bangs Bickford et al. eds., 1992).

[556] 1 ANNALS OF CONG. 637 (1789) (Joseph Gales ed., 1834) (statement of Rep. Sedgwick) (emphasis added).

[557] *See* 3 STORY, *supra* note 141, §§ 1537–1538. Some of those who disfavored presidential removal did. *See* 1 CONG. REG. 450 (1789) (showcasing Representative Smith's argument that the power to vest appointment power over inferior officers gave Congress the power to set the terms of office). *But see Congressional Intelligence. Debate in the House of Representatives on Wednesday (Continued.)*, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 889, 892 (including suggestions from Representative Sherman that if Congress granted the President the power to unilaterally appoint inferior officers, the President could remove them).

[558] 3 ANNALS OF CONG. 908–10 (1793) (statement of Rep. Barnwell).

[559] *Id.* at 909.

[560] 11 *id.* at 913 (1802) (statement of Rep. Dana).

[in 1789], that the true meaning of the Constitution was that the power of removal was of an Executive nature, and therefore belonged solely to the President. This construction was adopted, and has ever since been sanctioned by uniform practice."[561]

Against this backdrop, Justice Story's claim that Congress can limit presidential authority to remove inferior officers goes by far too quickly. It is unclear why Congress's express power to vest appointment authority over inferior officers comes with implied power to limit the President's constitutional authority to remove. The Appointments Clause does not say that Congress can eliminate or constrain the President's power to remove. After all, the Clause never mentions removal at all, much less a power to constrain removal.[562] Justice Story never offered an argument, and the connection is hardly obvious.[563]

The difficulties continue. What else can Congress do pursuant to its power to provide an alternative means of appointing inferior officers? Can it restrain Senate removals after an impeachment conviction? Can it demand that the President grant the office to a particular person? Compared to a removal restriction, the latter constraint at least relates to *appointment*, which is, after all, the subject matter of the Appointments Clause. Further, Justice Story insisted that Congress could require the Senate's consent for removals of inferior officers.[564] We know of no one who holds this position in the modern era, and, again, the source of congressional authority to demand Senate participation remains unclear.[565]

As noted, the question of removing inferior officers first arose in the Supreme Court in *United States v. Perkins*.[566] *Perkins* involved a federal law declaring that certain officers could be removed only by court-martial.[567] The Navy Secretary unilaterally ousted a cadet midshipman, who then challenged his dismissal as improper.[568] The Court expressly adopted the lower court's opinion that "when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest."[569] The opinion did not discuss whether the President could dismiss the cadet.

Myers recognized that *Perkins* did not address whether Congress might constrain presidential removal of inferior officers appointed with

---

561 *Id.* at 822.

562 *See* U.S. CONST. art. II, § 2, cl. 2.

563 *See* 3 STORY, *supra* note 141, §§ 1537–1538.

564 *Id.* § 1538.

565 Justice Story's claims may have been influenced by his distaste for President Jackson's partisan removals, which he pointedly criticized. *Id.* § 1543.

566 *See supra* notes 539–45 and accompanying text.

567 *See* United States v. Perkins, 116 U.S. 483, 484 (1886).

568 *Id.* at 483.

569 *Id.* at 485 (quoting Perkins v. United States, 20 Ct. Cl. 438, 444 (1885)).

the advice and consent of the Senate. Moreover, Chief Justice Taft observed that "[w]hether . . . putting the power of appointment in the President alone, would make his power of removal in such case any more subject to Congressional legislation than before is a question this Court did not decide in the *Perkins* case."[570] He hinted that the answer was "no": "Under the reasoning upon which the legislative decision of 1789 was put" — a rationale the *Myers* Court wholeheartedly embraced — "it might be difficult to avoid a negative answer . . . ."[571] Without definitively answering the question, the Court supposed that when Congress granted the President the authority to appoint inferior officers, it could not constrain the President's power to remove those officers.[572]

Notably, some politicians and judges in 1789 and thereafter traced presidential removal to appointment,[573] as if appointment were the only source of removal authority. A commission from Treasury Secretary Alexander Hamilton to his departmental assistant perhaps supports the idea that removal follows from appointment, as Hamilton claimed authority to remove his assistant at pleasure.[574] Nonetheless, the dominant view was that removal flowed from the Vesting Clause and not merely from appointment. If, however, one supposed that the President's removal stems from appointment alone, the President's power to remove inferior officers would depend on whether she appointed them. All inferior officers appointed by persons other than the President would be removable by their appointers alone and not by the President.

Modern jurisprudence concerning inferior officers has zigged and zagged. When discussing the constitutionality of the for-cause removal restriction, *Morrison v. Olson* ignored the distinction, placing minimal weight on the allegedly inferior status of the independent counsel.[575]

---

[570] Myers v. United States, 272 U.S. 52, 161 (1926); *see also id.* at 162 ("The *Perkins* case is limited to the vesting by Congress of the appointment of an inferior officer *in the head of a department*." (emphasis added)).

[571] *Id.* at 162.

[572] *Id.* at 161.

[573] *See, e.g.*, *Ex parte* Hennen, 38 U.S. (13 Pet.) 230, 253 (1839) (declaring that removal is "an incident to the power of appointment"); Letter from Daniel Webster to Mr. Dutton (Jan. 15, 1830), *in* 1 THE PRIVATE CORRESPONDENCE OF DANIEL WEBSTER 483, 483 (Fletcher Webster ed., 1857) (saying that removal flowed from appointment); Letter from Chancellor Kent to Daniel Webster (Jan. 21, 1830), *in* 1 THE PRIVATE CORRESPONDENCE OF DANIEL WEBSTER, *supra*, at 486, 486–87 (leaning toward the same view).

[574] Appointment of Tench Coxe as Assistant Secretary of the Treasury (May 10, 1790), *in* 6 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 33, at 411, 411 (Harold C. Syrett & Jacob E. Cooke eds., 1962). Because the Treasury Act said nothing to signal that the Treasury Secretary could remove his assistant, *see* Act of Sept. 2, 1789, ch. 12, 1 Stat. 65, perhaps Hamilton was relying upon some sense that the Constitution itself authorized secretaries to remove their appointees.

Did Coxe's commission address whether the President could remove the assistant to the Treasury Secretary? The commission says nothing directly on the point, leaving open the possibility that Hamilton believed that the President could remove the assistant as well. *See* Appointment of Tench Coxe as Assistant Secretary of the Treasury, *supra*, at 411.

[575] *See* Morrison v. Olson, 487 U.S. 654, 689–93 (1988).

Free Enterprise Fund refused to apply the supposed rule that inferior officers can be given for-cause protections.[576] *Seila Law* acknowledged that Congress can limit the removal of "certain," but perhaps not all, inferior officers,[577] which might be understood to resurrect the distinction that Chief Justice Taft suggested in *Myers*.

If Congress may bar or constrain the removal of inferior officers, as Justice Story supposed, there may be little to prevent Congress from consolidating all existing departments into a single behemoth, staffed with thousands of tenure-protected inferior officers. Call it the Department of Independent Administration. The Administration Secretary would be appointed by the President after securing the Senate's consent. Within the mega-Department would be thousands of inferior officers, civil and military. By law, Congress could vest in the Secretary the power to appoint each inferior officer and simultaneously grant each inferior office for-cause protection. Such a scheme would seem to be in tension with a Constitution that grants the executive power to the *President* and not to each of a thousand junior officers.

The Court may eventually consider all these matters, and we would urge the Justices to closely scrutinize whether the President's removal power extends to all executive officers and whether Congress has unique power to constrain removals for some or all inferior officers.

B. Quasi Agencies

Seila Law accepted as precedent that Congress can limit the removal of some heads of agencies that perform "quasi-judicial" or "quasi-legislative" functions.[578] The Court used this language, which came directly from *Humphrey's Executor*, to explain (and to cabin) the case.[579] Precisely how the "quasi" categories might apply going forward is sure to be a matter of dispute, as the *Seila Law* opinion itself evinced two different readings.

On one reading of *Seila Law*, the "quasi" categories describe an agency with *functions* like those of the Federal Trade Commission (FTC) at the time *Humphrey's Executor* was decided in 1935. Consider that Chief Justice Roberts (1) remarked that "the contours of the *Humphrey's Executor* exception depend upon the characteristics of the agency before the Court," and (2) reasoned that the FTC, in 1935, was "'an administrative body' that performed 'specified duties as a legislative or as a judicial aid,'" acting "'as a legislative agency' in 'making investigations and reports' to Congress and 'as an agency of the judiciary' in making recommendations to courts as a master in chancery."[580]

---

[576] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 495 (2010).
[577] Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020).
[578] *Id.* at 2192, 2198–99.
[579] *See id.* at 2198–200.
[580] *Id.* at 2198 (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935)).

Seila Law, moreover, observed that *Humphrey's Executor* reasoned that the 1935 FTC did not exercise "any executive *function*" except "in the discharge of its 'quasi-legislative or quasi-judicial powers'"[581] — an assertion that Chief Justice Roberts claimed "has not withstood the test of time."[582] The bottom line, according to Chief Justice Roberts, was that "*Humphrey's Executor* permitted Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power."[583]

On another reading of *Seila Law*, however, the CFPB's *structure* alone — namely, the fact that it had a single Director as a head, rather than a multimember board — distinguished the case from *Humphrey's Executor*.[584] On this interpretation, multimember agencies might generally be constitutional, regardless of their functions. Indeed, Congress might be able to recreate an independent agency with the CFPB's functions so long as it gave the agency a multimember head.[585]

---

581 *Id.* (emphasis supplied by *Seila Law*) (quoting *Humphrey's Ex'r*, 295 U.S. at 628); *see also id.* at 2198–99 (describing other parts of the FTC's 1935 organizational features).

582 *Id.* at 2198 n.2; *see, e.g.*, Fleming v. USDA, 987 F.3d 1093, 1119–20 (D.C. Cir. 2021) (Rao, J., concurring in part and dissenting in part) ("The cases reinforce that regardless of their particular functions — adjudication, rulemaking, prosecution, etc. — officers within the Executive Branch exercise executive power." *Id.* at 1120); *see also Seila L.*, 140 S. Ct. at 2198 n.2 ("It is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." (quoting Morrison v. Olson, 487 U.S. 654, 690 n.28 (1988)); City of Arlington v. FCC, 569 U.S. 290, 305 n.4 (2013) (reasoning that, although the activities of administrative agencies "take 'legislative' and 'judicial' forms," "they are exercises of — indeed, under our constitutional structure they *must be* exercises of — the 'executive Power'" (quoting U.S. CONST. art. II, § 1, cl. 1)).

583 *Seila L.*, 140 S. Ct. at 2199; *see also id.* at 2200 (reasoning that "the CFPB Director is hardly a mere legislative or judicial aid" because (1) the Director does not merely "mak[e] reports and recommendations to Congress, as the 1935 FTC did," but rather "possesses the authority to promulgate binding rules," and (2) the Director does not "submit[] recommended dispositions to an Article III court," but rather "unilaterally issue[s] final decisions awarding legal and equitable relief in administrative adjudications").

584 *See id.* at 2191 (remarking that "[i]n organizing the CFPB, Congress deviated from the structure of nearly every other independent administrative agency in [American] history," by providing that "the CFPB would be led by a single Director, who serves for a longer term than the President and cannot be removed by the President except for" certain specified causes); *id.* at 2192 (describing *Humphrey's Executor* as establishing that "Congress could create expert agencies led by a *group* of principal officers removable by the President only for good cause" and declining to extend its holding "to the novel context of an independent agency led by a single Director"); *cf. id.* at 2201–02 (distinguishing agencies with tenure protection and a single head).

585 *Cf. id.* at 2192 (citing U.S. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 55 (2009)) (observing that early proposals would have established the CFPB as a multimember board). Anticipating this possible reading of *Seila Law*, Professor Akhil Amar argues that while the plural heads of agencies can be given for-cause protections, cabinet secretaries cannot. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 385 (2012). Our contrary approach relies on the Constitution's text and structure, on original meaning, and on early practice, rather than the more modern practice and doctrines on which Professor Amar builds.

The choice between these two readings could determine the fate of a number of multimember boards or commissions — including agencies like the FTC, the SEC, and the Federal Communications Commission. These agencies might be deemed "quasi" based on their multimember *structure*. Alternatively, they could be deemed full-fledged executive agencies based on their executive *functions*. And, depending on how the Court treats the analysis in *Humphrey's Executor*, the use of the "quasi" label could affect the validity of the removal restriction.

Of course, the Court could abandon the "quasi" categories of *Humphrey's Executor* in a future case. But as we have previously discussed, the Constitution confers on Congress the authority to vest certain government functions — which might be described as quasi-judicial — in either the judicial or the executive branch.[586] Similarly, the quasi-legislative investigatory and reporting function discussed in *Seila Law* and *Humphrey's Executor* could be vested in either legislative or executive officers. The key doctrinal step in *Humphrey's Executor* was the approval of a removal restriction for an agency that combined such functions with indisputably executive functions. We will say more about such "hybrid" entities below.[587]

C. A Constrained Removal at Pleasure

We have defended the view that the President has an executive power to remove executive officers *at pleasure*. Yet the Constitution implicitly constrains the President's discretion to exercise constitutional powers, including removal. Presidents vow to faithfully execute their high office.[588] To say that the incumbent must *faithfully* execute the office is to imply that she owes the nation a duty of loyalty, care, and trust.[589]

The intersection of the removal power and the presidential oath has three implications. First, powers are granted in trust for the nation's benefit.[590] As a trustee, the President has no right to exercise powers for private benefit.[591] She cannot remove to improve her political

---

[586] *See supra* section II.D, pp. 1818–24.

[587] *See infra* section III.D, pp. 1840–43.

[588] U.S. CONST. art. II, § 1, cl. 8.

[589] For a discussion of the faithfulness requirement, see generally Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019).

[590] *See* Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1137–68 (2004) (exploring five fiduciary duties recognized in the law, which may be relevant to government officials through the principles of the Constitution). *See generally* GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION 28–48, 130–50 (2017).

[591] *See* Natelson, *supra* note 590, at 1089.

standing.[592] Her office is not a perch from which to shower friends with sinecures, favors, or marks of distinction.[593]

Second, Presidents should remove prudently. Writing in 1797, Secretary of State Timothy Pickering observed that "in using that pleasure with which the constitution has invested him for the removal of public officers, [the President] is bound to exercise it with discretion."[594] Pickering meant that removals must be grounded in reason rather than whimsy or pettiness. Sometimes the justifications relate to a "want of confidence" in a particular officer.[595] Hence, Pickering said that the President may remove for "actual misconduct," "want of ability," or a "deficien[cy] in judgment, skill, or diligence."[596] Other times, a removal reflects changes in the world. As Pickering put it, sometimes there is "a change in political affairs, which demands, or renders expedient," a new officer.[597] Although he was justifying President Washington's removal of a diplomat, Ambassador James Monroe,[598] Pickering's point applies to all removals. For instance, if an executive officer has policy or constitutional views at variance with the President's, the Chief Executive may remove to avoid a constant clash.

Perhaps the ultimate touchstone is whether the removal is "for the public good,"[599] as the President understands it, with misconduct, inability, apathy, or a shift in the world supplying particularized reasons why removal would serve the good. So long as the President believes that the removal of an officer serves the public welfare, she has faithfully exercised the removal power.

Many removals have been grounded on broad, but contestable, conceptions of the public good. When President Jefferson ousted Federalists, he cited the need for representation of Democratic-Republicans in the officer ranks.[600] After all, some Americans might

---

592 *See id.* at 1089–90.

593 This "public good" limit should apply to all exercises of presidential powers, constitutional and statutory. If the President lacks a public policy rationale for her vetoes or appointments, she is not faithfully executing her office. The same limits implicitly apply to legislators and judges. Legislators should not vote for bills merely because doing so adds to their wealth or fame. Judges should not use their high offices for the same venal purposes.

Many politicians are prone to conclude that what is in their best interests almost invariably aligns with their perception of the nation's interests. Consequently, these federal officials would not be bothered by the requirement that they believe that their exercises of power will advance the interests of the people.

594 Letter from Thomas Pickering to James Monroe (July 24, 1797), *in* 6 PORCUPINE'S WORKS 364, 366 (William Cobbett ed., 1801) (emphasis omitted).

595 *Id.* at 365.

596 *Id.*

597 *Id.* at 366.

598 *See* Letter from James Monroe to Thomas Pickering (July 6, 1797), *in* 6 PORCUPINE'S WORKS, *supra* note 594, at 358, 358–59.

599 Letter from Thomas Pickering to James Monroe, *supra* note 594, at 366.

600 *See* Letter from Thomas Jefferson to James Monroe (Mar. 7, 1801), *in* 33 THE PAPERS OF THOMAS JEFFERSON: MAIN SERIES, *supra* note 89, at 208, 208–09 (Barbara B. Oberg ed., 2006).

have lost confidence in the government if their copartisans seemed excluded from office. President Jackson cited "rotation," or the idea that incumbents should not stay in office for protracted periods.[601] He defended his removals on grounds of antielitism, egalitarianism, and accountability.[602]

The third constraint limits discretion by *compelling* removals. Consider President Washington's firing of Monroe. Outraged, Monroe authored a searing critique.[603] President Washington's mask of composure fell, albeit in private. His annotations of the Monroe tome "comprise the most extended, unremitting, and pointed use of taunts and jibes, sarcasm, and scathing criticism of all [President Washington's] writings."[604] Relevantly, President Washington remarked: "[I]f . . . an Agent of his appointment is found incompetent, remiss in his duty, or pursuing wrong courses, it becomes [the President's] *indispensable duty* to remove him from Office . . . ."[605] We agree. Presidents must oust any officer that flouts the law or her duties.

Two clarifications are requisite. First, some may argue that this conception of a constrained removal power is akin to "for-cause" restrictions — inefficiency, neglect of duty, and malfeasance in office.[606] But under our view, a President can remove an officer without regard to inefficiency, neglect, or malfeasance, so long as she believes that removal serves the public good.[607] Further, for-cause restrictions might require some articulation of reasons and a predismissal hearing.[608] Though Presidents must have reasons for flexing their various powers, including removal, the Constitution does not require a President to articulate

---

[601] Andrew Jackson, First Annual Message (Dec. 8, 1829), *in* 2 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 442, 449 (James D. Richardson ed., 1907).

[602] *See id.*

[603] *See* JAMES MONROE, A VIEW OF THE CONDUCT OF THE EXECUTIVE, IN THE FOREIGN AFFAIRS OF THE UNITED STATES (Philadelphia, Benjamin Franklin Bache 1797).

[604] *Editorial Note* to Comments on Monroe's *A View of the Conduct of the Executive of the United States*, *in* 2 THE PAPERS OF GEORGE WASHINGTON: RETIREMENT SERIES, *supra* note 516, at 169, 170.

[605] *Id.* at 193 (emphasis added). Pickering had said the same to Monroe: sometimes dismissal was "require[d]." Letter from Thomas Pickering to James Monroe (July 17, 1797), *in* 6 PORCUPINE'S WORKS, *supra* note 594, at 360, 360.

[606] Under a broad reading of those limitations, this argument might seem especially compelling. *See, e.g.*, John F. Manning, Comment, *The Independent Counsel Statute: Reading "Good Cause" in Light of Article II*, 83 MINN. L. REV. 1285, 1288 (1999) (arguing that for-cause restrictions on removal are not that limiting).

[607] Interestingly, the typical statutory constraints on removal are centered on the officer and not on external circumstances. In other words, inefficiency, neglect of duty, and malfeasance do not seem capacious enough to cover situations where the context (and not the officer's conduct) might require removal.

[608] *See* Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, *supra* note 23, at 745–48; *see also* Shurtleff v. United States, 189 U.S. 311, 314 (1903) (expressing the view that if the President seeks to remove an officer for "inefficiency, neglect of duty, or malfeasance in office, . . . the officer is entitled to notice and a hearing" (citing Reagan v. United States, 182 U.S. 419, 425 (1901))).

them. The issuance of a veto marks the only exercise of presidential power that necessitates giving justifications.[609] Indeed, President Washington and Pickering stoutly insisted that the Constitution never required the President to supply reasons for ousting Monroe.[610] As for a hearing, President Washington once convoked an investigation to decide whether to oust General "Mad" Anthony Wayne.[611] But this was prudential rather than constitutionally required. As Hamilton put it, the "President has a right to dismiss Military Officers as holding their Commissions during pleasure — but the delicacy of the military character requires" that the power be exercised only "after very full investigation."[612] In other words, while hearings and public reasons may be prudent, they are not required by the Constitution.

Second, the "faithful execution" constraints on removal are likely nonjusticiable. The duty of faithful execution constrains the President by weighing on her conscience and curbing base instincts. It may be that the only entities that can adjudicate whether a removal violates the duty of faithful execution are the House and Senate in their impeachment capacities.[613] Indeed, Madison asserted that abuse of the removal power would constitute an impeachable offense.[614]

D. Hybrid Officers

An officer might be understood to perform "hybrid" functions in at least three analytically distinct ways. First, in *Collins v. Yellen*, the Court confronted an agency with arguably "hybrid" characteristics in

---

609 *See* U.S. CONST. art. I, § 7, cl. 2.

610 Letter from Timothy Pickering to George Washington (July 25, 1797), *in* 1 THE PAPERS OF GEORGE WASHINGTON: RETIREMENT SERIES, *supra* note 516, at 273, 273–74; *Editorial Note*, *supra* note 604, at 193; *see* Letter from Thomas Pickering to James Monroe (July 17, 1797), *supra* note 594, at 360. We do not address here the legality of statutory provisions requiring the President to give reasons for a removal. *See, e.g.*, 12 U.S.C. § 2 (providing that the President may remove the Comptroller of the Currency "upon reasons to be communicated by him to the Senate"); 5 U.S.C. § 3(b) (requiring reasons for removal of Inspector General).

611 General Orders (Oct. 12, 1777), *in* 11 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES 490, 490–92 (Philander D. Chase ed., 2001).

612 Letter from Alexander Hamilton to James McHenry (July 15, 1796), *in* 20 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 33, at 252, 253 (Harold C. Syrett ed., 1974) (alteration omitted).

613 *See* U.S. CONST. art. I, § 2, cl. 5 (House of Representatives possesses sole power to impeach); *id.* § 3, cl. 6 (Senate possesses sole power to try impeachments); *id.* § 3, cl. 7 (sanctions for impeachment).

614 *Congressional Intelligence. Debate in the House of Representatives on Wednesday. (Continued.)*, *supra* note 138, at 1, *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 895, 897 (noting that the President "will be impeachable for the wanton removal of a meritorious officer"); 1 CONG. REG. 352 (1789), *reprinted in* 10 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 727, 727 (statement of Rep. Madison) (stating that removal authority "will make [the President], in a peculiar manner, responsible for their conduct, and subject him to impeachment himself, if he suffers them to perpetrate with impunity high crimes or misdemeanours against the United States, or neglects to superintend their conduct, so as to check their excesses").

the sense that, when the FHFA "steps into the shoes of a regulated entity as its conservator or receiver, it takes on the status of a private party and thus does not wield executive power."[615] The Court held that this distinction does not matter for determining the legality of the FHFA's removal restriction because "the Agency does not always act in such a capacity, and even when it acts as conservator or receiver, its authority stems from a special statute, not the laws that generally govern conservators and receivers."[616]

There are many other federal entities that arguably wield private power pursuant to special statutes. Take the National Railroad Passenger Corporation — colloquially known as Amtrak. It is a federally chartered, nominally private entity that operates under a special federal statutory regime.[617] Or take the First and Second Banks of the United States, which were private entities functioning pursuant to charters from the federal government.[618] The Banks' charters provide important historical antecedents for the notion that the federal government can, under appropriate circumstances, authorize private entities not fully subject to governmental control to perform important functions on behalf of the public. But precisely how to assess the lawfulness of such private entities that wield authority under a federal statute will be (and has been) a matter of dispute.[619]

Second, Congress sometimes confers on executive officers functions that might be conceived of as "judicial" or "legislative."[620] The same officers may promulgate rules, adjudicate violations, and prosecute them before the courts.[621] Alternatively, one might understand an agency to act in a legislative or judicial capacity when it "'mak[es] investigations and reports' to Congress" and "mak[es] recommendations to courts as a master in chancery."[622]

---

615 Collins v. Yellen, 141 S. Ct. 1761, 1785 (2020).

616 *Id.*

617 *See* Dep't of Transp. v. Ass'n of Am. R.R.s, 575 U.S. 43, 46–47 (2015); Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 384, 391 (1995).

618 *See* Bamzai, *Tenure of Office and the Treasury*, *supra* note 23, at 1340–45.

619 *See, e.g.*, *id.* at 1356 (discussing President Jackson's objection to the Second Bank's exercise of authority that he believed was vested in Congress).

620 *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248 (1994); *supra* notes 578–83 and accompanying text.

621 *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2234 n.7 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (observing that administrative agency actions "may 'take legislative and judicial forms,'" with the "classic examples [being] agency rulemakings and adjudications" (quoting City of Arlington v. FCC, 569 U.S. 290, 305 n.4 (2013))).

622 *Id.* at 2198 (majority opinion) (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935)); *see also* Buckley v. Valeo, 424 U.S. 1, 137–38 (1976) (deeming functions "legislative," *id.* at 138, because they "are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees," *id.* at 137). We bracket the possibility that Congress might violate other constitutional prohibitions in

Using either characterization, the President has constitutional authority to fire those officers at pleasure. As such officers help exercise the executive power, the President may remove them. Congress cannot attach nonexecutive functions to an executive office, use that as an excuse to grant removal protections, and thereby defeat the executive power of removal.[623] Otherwise, Congress could eliminate presidential removal by adding nonexecutive functions to every executive office and granting each for-cause protections. Congress might grant the Secretary of State adjudicative functions and, concomitantly, for-cause protections. President Joe Biden cannot be forced to work with former–Secretary of State Mike Pompeo even if Congress added the functions of an administrative law judge to the office of Secretary of State.

Consider an analogy. Civil officers are subject to impeachment,[624] with the implication that military officers are not. Can Congress nullify the Impeachment Clauses by attaching military functions to certain civilian offices? Can it make a brigadier general of the Secretary of State and thereby evade impeachment? Congress's power to create offices and specify their functions cannot be leveraged into a power to preclude the impeachment of civil officers.

Third, Article III judges with tenure protection might be given executive functions. For example, by statute, Congress granted the Chief Justice various executive functions, *ex officio*. Two such functions were service on the Board of the Mint[625] and service on the Sinking Fund Commission.[626] The Constitution does not bar judicial officers from exercising executive functions.[627] Some scholars assume that the President, under these statutes, could not fire the Chief Justice from either position, thus defeating presidential removal.[628] Yet the statutes' *silence* on removal hardly suggests that Congress intended to limit the President's authority to remove the Chief Justice.[629] Remember that, although most early statutes creating offices said nothing about removal,

---

conferring such authority on administrative agencies. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2121 (2019) (discussing the nondelegation doctrine); Stern v. Marshall, 564 U.S. 462, 484 (2011) (discussing how Congress may not constitutionally confer judicial power to executive agencies).

623 *Cf.* Bowsher v. Synar, 478 U.S. 714, 732–34 (1986) (holding that the Constitution does not permit Congress to place executive responsibilities "in the hands of an officer who is subject to removal only by itself" because this would allow Congress to "intrude[] into the executive function," *id.* at 734).

624 U.S. CONST. art. II, § 4.

625 Coinage Act of 1792, ch. 16, § 18, 1 Stat. 246, 250.

626 Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 185, 186.

627 *See* Saikrishna Bangalore Prakash, *Double Duty Across the Magisterial Branches*, 44 J. SUP. CT. HIST. 26, 31–34 (2019).

628 *See* Shugerman, *supra* note 18, at 2096 (suggesting the President could not remove the Chief Justice from the Sinking Fund Commission).

629 *See* Burns v. United States, 501 U.S. 129, 136 (1991) ("In some cases . . . Congress' silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective. An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.").

Presidents claimed and exercised such power.[630] Indeed, we believe that the Chief Justice *was* subject to removal of his executive functions, as Congress cannot nullify the removal power merely by appending executive functions to a judicial office. For instance, if Congress attached the War Secretaryship to the office of Chief Justice, the President would not lose constitutional authority to oust the Chief from his War perch.

To underscore our point about removal, consider Chief Justice Jay's service as treaty negotiator. President Washington clearly could remove Chief Justice Jay from this office. Indeed, Chief Justice Jay's diplomatic commission stated that the President could oust him.[631] Similarly, even though President Washington could not oust Chief Justice Jay from the Court, President Washington could have ousted him from the Mint Board. The executive power of removal does not turn on whether a judge received executive functions via statute or via a new appointment. The President can remove the executive functions either way.

CONCLUSION

Our claim reaches back to the Republic's earliest days, when the First Congress and President George Washington concluded that the President had a constitutional power to remove executive officers. As James Madison trenchantly argued, the removal power arises from the executive power. The absence of constitutional exceptions to that removal power means that the President has an unqualified power to remove executives at pleasure.

Like Madison, we also suppose that Congress lacks a generic power to regulate removals. In this respect, Congress is different from Parliament and many revolutionary state assemblies. Congress does not have express legal authority to modify the separation of powers. Further, the Necessary and Proper Clause does not change the assessment. If the Clause never authorizes Congress to constrain the veto power, the judicial power, or the House's impeachment power, it likewise never authorizes limitations on removals, either by the President or by the Senate, after impeachment and conviction.

The Disunitarians seek to undermine the claim that the President has a constitutional power to remove and to bolster the assertion that Congress can limit presidential removals. Yet they lack a consistent theory of the constitutional text. Further, they fail to explain how to cabin the considerable congressional power they envision to removals.

---

[630] *See supra* sections I.A.4–5, pp. 1773–82.

[631] Commission from George Washington, President of the United States of America, to John Jay (Apr. 19, 1794), https://dlc.library.columbia.edu/jay/ldpd:47484 [https://perma.cc/54CU-APKV] ("I [President Washington] have nominated, and, by and with the advice and consent of the Senate, do appoint you the said John Jay Envoy Extraordinary from the United States of America to the Court of his Britannic Majesty, . . . to hold and exercise *during the pleasure of the President* of the United States for the time being." (emphasis added)).

Disunitarians must grapple with whether Congress may limit pardons or the power of Congress to enact laws, such as by requiring "cause" before their promulgation. Relatedly, attempts to wall off particular executive departments from an alleged congressional power to limit removals are nonstarters, for we fail to see why an otherwise broad legislative power (the Necessary and Proper Clause) is uniquely limited when it comes to certain entities. Finally, some Disunitarians cannot account for early statements and practices.

Disunitarian readings suggest that Congress might replace the State Department with a Foreign Affairs Commission headed up by tenure-protected officers. Likewise, Congress could create an independent Defense Board, with directors shielded by for-cause protection as they wield the power to direct the world's mightiest military. Finally, the Disunitarian reading enables Congress to create a mega-Department that subsumes all the existing departments and agencies, with a Secretary and thousands of officers who are removable only for cause. We would say that these possibilities reflect flaws in the Disunitarian arguments. But judging by some of the claims in that scholarship, some Disunitarians might embrace every float in this parade of horribles.

Even as we believe that ours is the best reading of the original Constitution, we recognize that others will disagree with our claims either on their own terms or because they reject originalism. Although Madison prophesized that the Decision of 1789 would "become the permanent exposition of the constitution,"[632] we harbor no such illusions about our arguments. The debate inaugurated in 1789 will continue, in law reviews and in the courts.

---

[632] 1 CONG. REG. 499 (1789), *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 53, at 904, 921 (statement of Rep. James Madison).