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Special Feature: Must Administrative Officers Serve at the President's Pleasure?

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Congress, The President & The Courts Executive Power

Article II of the Constitution says that "[t]he executive Power shall be vested in a President of the United States of America." Of course, the Framers did not expect the President to do everything personally. They anticipated that Congress would enact statutes creating offices and other positions within the executive branch, assigning particular duties and authorities to the people who held those positions, and generally determining the structure of the government's administrative apparatuses. After all, the Necessary and Proper Clause of Article I empowers Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution" not only Congress's own powers but also "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"—including the executive power vested in the President.

Article II addresses the mechanism for filling whatever offices Congress creates, whether in the executive branch or in the judiciary. In the words of the Appointments Clause,

> **"[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are**

> **not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."**

Aside from its provisions about impeachment, though, the Constitution does not specifically address the *removal* of officers in the executive branch (which, for this purpose, includes the enormous variety of agencies that administer an enormous variety of statutes in an enormous variety of ways). Who gets to fire them and for what reasons?

It would be natural to conclude that as with other issues relating to the structure of the executive branch, Congress has broad authority to address this topic by statute. Given the range of tasks that Congress can authorize different officers to perform (entering into contracts, making grants, issuing licenses, conducting formal adjudications, participating in the promulgation of regulations, and more), and given the variety of things that different statutes require or allow these officers to consider (including legal constraints, technical or scientific expertise, the evidence introduced in adjudicative proceedings, and more), one might not expect a one-size-fits-all approach. For sensible policy reasons, Congress might decide that the President should be able to remove many officers or even lower-ranking employees at will, but that other officers or

employees should be removable only for defined causes and through defined processes. In my view, the Necessary and Proper Clause lets Congress make these judgment calls as it enacts particular statutes that structure particular agencies.

The Supreme Court, however, has interpreted Article II of the Constitution to address the topic of removal itself. Although the case law is still in flux, the Court appears to be moving toward a sweepingly pro-President position: most officers who participate in the exercise of executive power must be removable at will by the President or his direct subordinates. Over the past two decades, the charge has been led by Chief Justice John Roberts, who has written an extraordinary series of majority opinions concentrating ever more power in the President (and also insulating even former Presidents from prosecution for deliberate abuses of power). In *Seila Law LLP v. Consumer Financial Protection Bureau* (2020), he summarized his position on removal this way: "The President's power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers v. United States*, 272 U.S. 52 (1926)."

Let us take these claims in turn. The claim about the text of Article II rests primarily on the Vesting Clause (the opening statement that "[t]he executive Power shall be vested in a President of the United States of America"), supplemented by the Take Care Clause (which says that the President "shall take Care that the Laws be faithfully executed"). Chief Justice Roberts has not spelled out his interpretation of this language, but there are two possible routes to his conclusion.

First, people sometimes argue that the "executive Power" conferred by Article II includes various authorities historically exercised by the king of England, and the king asserted power not only to create and fill offices but also to remove people from them. On this theory, Article II includes an Appointments Clause in order to *limit* the power of appointment that the Vesting Clause would otherwise give the President, but it imposes no limits on the President's power of removal.

This argument is not persuasive. As a historical matter, scholars have pointed out that the English monarch's relationship to offices was more complex than some versions of the argument assume. More important, though, recent scholarship by Professor Julian Davis Mortenson identifies a fundamental distinction between what Article II calls "[t]he executive Power" and the hodgepodge of authorities that English monarchs asserted under the rubric of the royal prerogative. Even if removal authority was part of the royal prerogative, most members of the founding generation did not think that they were giving the President the royal prerogative, and the Vesting Clause of Article II does not do so.

Of course, even if Professor Mortenson is correct that "Article II vests the executive power, not the royal prerogative," one must still figure out what "the executive power" is. At its core, though, executive power entails executing laws and judgments made by others, such as statutes enacted by Congress and judicial judgments rendered by courts. The President is not in charge of the content of those laws and judgments. Nor does the Constitution guarantee the President any particular means of enforcing them. To the contrary, the power to execute the law is itself subject to the law; executive officials are allowed to

use only the resources that the law makes available for this purpose, in the way that the law allows them to be used. If Congress were to give the President removal authority under particular circumstances, then a President who exercised that authority would be executing the law. But it does not follow that Congress *has* to give the President removal authority. Just as the President can have "[t]he executive Power" without being able to structure the executive branch as the President pleases, so too I do not think that the very definition of "[t]he executive Power" includes removal authority.

A second route to Chief Justice Roberts's conclusion rests on claims about the "unitary" executive. Whatever "[t]he executive Power" is, and hence whatever the executive branch can do either by virtue of the Constitution or pursuant to statutory authority, Article II vests that power in a single person—the President. So-called unitarians conclude that the President must therefore be in charge of all exercises of executive power by the federal government. Of course, unitarians do not claim that the President can legitimately direct underlings to violate valid statutory commands (although some unitarians' understanding of the constitutional structure would give the President considerable ability to do so in practice). But to whatever extent Congress's statutes leave policymaking discretion in the hands of the people who execute those statutes, unitarians insist that the President must be able to control how that discretion is used.

Some unitarians would let Congress choose among different means of giving the President such control. But others infer that a specific means of control is constitutionally required: the President must be able to remove all principal executive officers at will. For its part, the Supreme Court speaks as if this idea

extends beyond principal officers. In the words of an order that the Court recently issued on its emergency docket, "Because the Constitution vests the executive power in the President, . . . he may remove without cause executive officers who exercise that power on his behalf, subject to narrow exceptions recognized by our precedents" (some of which the Court seems poised to overrule).

In my view, the Vesting Clause does not carry this hidden but dramatic message. It is true that Article II vests the executive power in the President. But Congress is in charge of creating offices within the executive branch, and the Constitution does not give the President unilateral power to dictate who will fill those offices or what their authorities and duties will be. When officers are duly appointed pursuant to the Appointments Clause, moreover, the Constitution requires the President to "Commission" them—which, in the case of executive officers, entails either conferring executive power on them or attesting to the executive power that their appointments confer. To my way of thinking, neither the Vesting Clause nor anything else in Article II compels the inference that after officers have been duly appointed, and after the President has issued the commissions that the Constitution requires, the President must be able to terminate the appointments and rescind the commissions at will, or to dictate how all such officers must use any discretion that the law attempts to give them.

To be sure, the authority to direct or remove administrative officers (and even civil-service employees) might sometimes be helpful to a President who is trying in good faith to "take Care that the Laws be faithfully executed." But this authority carries obvious dangers too. As Professor

William Van Alstyne pointed out many years ago, the Necessary and Proper Clause generally allows Congress to weigh the costs and benefits of giving the President powers and protections that the Constitution does not itself specify but that might help the President carry out his assigned tasks. Usually, then, the fact that such a power could be helpful to the President means only that Congress could confer it on him, not that the Constitution itself does so. In my view, if Congress reasonably decides that the President should be able to remove some duly appointed officers only for certain causes and through certain processes, the President could discharge his obligations under the Take Care Clause by going through those processes when warranted. Indeed, I am open to the possibility that the President need not be empowered to remove certain officers at all; if the President believes that they are not faithfully executing the law, the President could alert Congress and recommend their impeachment. In any event, the Take Care Clause does not imply that the President must be able to fire all executive officials at will, any more than it guarantees the President the ability to imprison officials who do not do what the President says.

In this light, it is telling that Article II specifically authorizes the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." As many scholars have pointed out, the fact that the Constitution specifies this relatively minor respect in which the President can command principal officers suggests that the Vesting Clause does not give the President a *general* authority to command those officers, or to remove all who displease him.

Apart from invoking contestable interpretations of

the Constitution's text, advocates of presidential removal authority also invoke a decision allegedly reached by the First Congress in 1789, when Congress considered the bill that would establish the Department of Foreign Affairs (now the Department of State). That is the basis for *Seila Law*'s assertion that the First Congress "settled" questions about the President's removal powers. But the historical argument is just as contestable as the textual argument.

Starting with Justice Brandeis and continuing through a litany of scholars (including Professors Edward Corwin, David Currie, Jed Shugerman, and others), many people who have looked closely at the debates and votes in the First Congress have convincingly argued that they do not show a consensus for any particular interpretation of the Constitution. Briefly, the bill to establish the Department of Foreign Affairs initially included a provision granting the President unilateral authority to remove the Secretary. During the debates in the House of Representatives, many speakers argued that the Constitution itself addressed this topic, but they disagreed about what the Constitution meant: some claimed that the Constitution gave the President unilateral authority to remove officers like the Secretary of Foreign Affairs, some claimed that the Constitution allowed the President to do so only with the advice and consent of the Senate, and a few claimed that the Constitution made impeachment and conviction the only permissible means of removal (not just by Congress but by anyone). Other speakers denied that the Constitution has much to say on this topic, and they concluded that the Necessary and Proper Clause allows Congress to specify by statute whether and under what circumstances the President can remove executive officers. The final votes on motions to amend the bill reflected shifting

coalitions, but they did not reflect shifting views. In particular, no majority emerged *either* for the proposition that the Constitution itself authorized the President to remove the Secretary of Foreign Affairs at will *or* for the proposition that Congress can decide by statute whether to grant this power to the President.

In the ensuing years, many people did assume that the First Congress had interpreted the Constitution as giving the President a unilateral power of removal (at least with respect to high-ranking officers like the Secretary of Foreign Affairs). But that assumption was mistaken. In any event, even some members of later Congresses who agreed that the point had been "settled" came to believe that "the original decision was wrong"—and by the 1860s if not before, Congress stopped following the purported decision. For the past century and a half, Congress has been enacting statutes in conflict with the position that unitarians take the First Congress to have settled.

Aside from the precedent allegedly set by the First Congress, the current Supreme Court also invokes *Myers v. United States* (1926). A statute dating back to 1876 had given postmasters a four-year term, and the statute had purported to let the President remove them earlier only if the Senate consented. In my view, this arrangement is unconstitutional because of the power that it tries to delegate to a single House of Congress; under current constitutional doctrine, Congress normally cannot authorize its own subunits to act with the force of law, and making removal depend on action by the Senate violates this principle. But Chief Justice Taft's majority opinion in *Myers* focused instead on the President's powers. According to Taft, the Constitution guarantees the President unilateral authority to remove not only principal executive officers but also inferior officers who were appointed by the President with the advice

and consent of the Senate." (Taft framed the principle this way to accommodate an 1886 Supreme Court decision indicating that when Congress assigns the appointment of inferior officers to the head of a department rather than the President, Congress can restrict removal of those officers "as it deems best for the public interest.")

Chief Justice Taft had previously been President himself, and *Myers* contained broad statements about presidential power. Less than a decade later, however, *Humphrey's Executor v. United States* (1935) "disapproved" some of those statements and limited *Myers*'s holding to officers who are "purely executive," as opposed to those in "quasi-legislative or quasi-judicial agencies." Later precedents, including *Wiener v. United States* (1958) and *Morrison v. Olson* (1988), continued to cabin *Myers*.

Admittedly, the rhetoric and even the analysis of *Humphrey's Executor* conflict with current ideas about the taxonomy of powers that the Constitution recognizes. Under current doctrine, the federal government's legislative powers can be exercised only by Congress (acting through the process of bicameralism and presentment), and what Article III calls "[t]he judicial Power of the United States" can be exercised only by true federal courts (staffed by judges who enjoy life tenure). For purposes of constitutional taxonomy, that leaves the "executive" category for everything else. Thus, the modern Supreme Court has said that even when agency actions resemble legislating or judging, "they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'"

I share that understanding of the taxonomy, but it raises the stakes of the Court's flirtation with strong

versions of the unitary-executive theory. If most of what the federal government currently does on a daily basis is "executive," and if the President must have full control over each and every exercise of "executive" power by the federal government (including an unlimitable ability to remove all or almost all executive officers for reasons good or bad), then the President has an enormous amount of power—more power, I think, than any sensible person should want anyone to have, and more power than any member of the founding generation could have anticipated.

I am an originalist, and if the original meaning of the Constitution compelled this outcome, I would be inclined to agree that the Supreme Court should respect it until the Constitution is amended through the proper processes. But both the text and the history of Article II are far more equivocal than the current Court has been suggesting. In the face of such ambiguities, I hope that the Justices will not act as if their hands are tied and they cannot consider any consequences of the interpretations that they choose.

When the First Congress confronted the same ambiguities, more than one member warned against interpreting the Constitution in the expectation that all Presidents would have the sterling character of George Washington. The current Supreme Court may likewise see itself as interpreting the Constitution for the ages, and perhaps some of the Justices take comfort in the idea that future Presidents will not all have the character of Donald Trump. But the future is not guaranteed; a President bent on vengeful, destructive, and lawless behavior can do lasting damage to our norms and institutions. As one member of Congress argued in 1789, we should not gravitate toward interpretations of the Constitution that "legaliz[e] the full exertion of a tyrannical

disposition."

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