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SUMMARY

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The scope of the President's removal power has been a subject of much interest during the 119th Congress as President Donald Trump has dismissed several officials from independent regulatory commissions. These officials have typically been viewed as insulated from removal by *for-cause tenure protections*—statutory provisions typically providing that officials may be removed by the President before the expiration of their fixed term only for inefficiency, neglect of duty, or malfeasance in office. The Trump Administration contends that the applicable statutory protections infringe on the President's constitutional authority under Article II to remove executive officials. Under the Administration's view, the 1935 decision of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which upheld the use of for-cause removal protections in certain scenarios, either does not apply to modern independent agencies or, if it does, must be overruled. These firings have resulted in significant litigation, including one case, *Trump v. Slaughter*, that is pending before the U.S. Supreme Court. No. 25-332 (U.S. 2025).

In *Slaughter*, the Supreme Court has been asked to consider this constitutional dispute over statutory removal protections. The U.S. Constitution is silent on the removal of executive officers other than through impeachment. As a result, history, tradition, and early understandings of the separation of powers have played a central role in delineating the extent to which Congress can use its legislative authority to protect executive branch officials from removal by the President. The seminal case of *Myers v. United States*, 272 U.S. 52 (1926), is representative in that it relied heavily on the views of the Framers and the Members of the First Congress in striking down a law that required Senate consent to remove a postmaster general. Although most of the Court's subsequent removal cases have discussed sources of Founding-era history, there remains significant ambiguity as to both (1) how the Framers viewed the scope of the President's constitutional authority to remove officials at or near the time the Constitution was ratified and (2) what the First Congress determined during its debates on removal in 1789.

In light of the likelihood that *Slaughter* will grapple with this ongoing historical and interpretive debate, this report highlights some of the available Founding-era perspectives by discussing deliberative debates of the period, which occurred at the Constitutional Convention, in the *Federalist Papers*, and during the First Congress. These debates may inform the disputed junction between the President's power to remove leaders of executive agencies and Congress's power to protect those officials from dismissal through statute. Ultimately, these debates reflect a number of interpretive positions on removal, meaning these early sources may not be dispositive or yield sufficiently clear answers to the questions at issue in *Slaughter* and other cases.

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Over the course of his second Administration, President Donald Trump has removed a number of agency leaders that Congress, through statute, has provided with fixed terms and explicit statutory tenure protections.[1] In doing so, the President has asserted that the applicable statutory removal protection—often referred to as *for-cause provisions* because they permit the removal of an official only for specific reasons such as "inefficiency, neglect of duty, or malfeasance in office"—violates the separation of powers by infringing on the President's Article II powers.[2] The removal of these "independent" officials could be viewed as historically atypical and has been the subject of litigation as a number of removed officials have challenged their termination.[3] One such case, *Trump v. Slaughter*, is pending before the Supreme Court.[4] *Slaughter* presents constitutional issues and could potentially affirm Congress's long-standing legislative authority to ensure that certain governmental functions are carried out by officials with some measure of independence from presidential and partisan influences or, in the alternative, fundamentally alter or perhaps extinguish that authority entirely.

Like other aspects of its separation-of-powers jurisprudence, the Court's assessment of Congress's authority to restrict the President's removal of executive branch officials has been "anchored" in history, tradition, and "evidence from the founding era."[5] This report highlights some of that Founding-era evidence by discussing a pair of deliberative debates of the period—occurring at the Constitutional Convention and in the First Congress—that may inform the disputed junction between the President's power to remove leaders of executive agencies and Congress's power to protect those officials from dismissal through statute. This report begins by briefly describing the basic constitutional framework governing removal—a framework that is in a state of flux. The report then shifts to early American history by looking at how the Framers viewed the removal power during the Constitutional Convention, in the *Federalist Papers*, and during Congress's 1789 debates about removal.

Competing Executive and Legislative Powers over Executive Offices: Removal and Tenure Protection

Current disputes over the dismissal of independent agency leaders implicate two overlapping authorities: the President's power to exert control over executive officials through removal and

[1] *See, e.g.*, Zach Schonfeld, *Fired Democrat NLRB Member Sues Trump over Ouster*, THE HILL (Feb. 5, 2025, at 10:57 ET), https://thehill.com/regulation/court-battles/5127883-donald-trump-ousted-nlrb-member-lawsuit/ [https://perma.cc/F6TB-XFM4]; Nick Niedzwiadek, *Trump Fires 2 More Democratic Labor Regulators*, POLITICO (Feb. 11, 2025, at 17:13 ET), https://subscriber.politicopro.com/article/2025/02/trump-fires-2-more-democratic-labor-regulators-00203667; Jody Godoy, *Trump Fires Both Democratic Commissioners at FTC*, REUTERS (Mar. 19, 2025), https://www.reuters.com/world/us/trump-fires-both-democratic-commissioners-ftc-sources-say-2025-03-18/ [https://perma.cc/2Y8A-LWBF].

[2] The Administration appears to have first articulated this position in a letter from the Department of Justice informing Congress that it would no longer defend the constitutionality of certain for-cause removal provisions in court. *See* Letter from Sarah M. Harris, Acting Solic. Gen., Dep't of Just., to Richard J. Durbin, Ranking Member, S. Comm. on the Judiciary (Feb. 12, 2025), https://fingfx.thomsonreuters.com/gfx/legaldocs/movawxboava/2025.02.12-OUT-Durbin-530D.pdf [https://perma.cc/MC4P-6D5U] (entitled Restrictions on the Removal of Certain Principal Officers of the United States).

[3] *See* CRS Insight IN12673, *Fixed Term and "For Cause" Removal Provisions*, by Henry B. Hogue and Todd Garvey (2026).

[4] Trump v. Slaughter, 146 S. Ct. 18 (2025) (mem.) (granting certiorari and application for stay).

[5] Seila Law LLC v. Consumer Fin. Protec. Bureau, 591 U.S. 197, 241 (2020) (Thomas, J., concurring); Myers v. United States, 272 U.S. 52, 135–36 (1926). The Court has also looked to historical practice in assessing Congress's authority to restrict the removal of executive officers. *See Seila Law*, 272 U.S. at 220. This report focuses only on the early history of the Founding period.

Congress's power to grant executive officials some degree of autonomy from presidential influence through law. These powers are central to a larger struggle over control of the federal bureaucracy and reflect the friction that is often a defining characteristic of the American separation of powers.[6]

The President's Power to Control and Remove

The Supreme Court has interpreted Article II of the U.S. Constitution to provide the President with "general administrative control" of the executive branch.[7] This principle, which has implicit textual roots, is founded in the proposition that the Constitution, by vesting "the executive Power" solely in the President and making it his personal responsibility to "take Care that the Laws be faithfully executed," affords the President both the power and the duty to supervise and control those who exercise executive power.[8] As a practical matter, the President exerts his influence in many ways, but ultimately, his control over subordinates is enforced by either removing, or threatening to remove, executive officials who may not act "in accordance with the policies that the people presumably elected the President to promote."[9]

Although there is no removal clause in the Constitution, modern Supreme Court precedent, as well as some accounts of historical practice, have established a "general rule that the President possesses 'the authority to remove those who assist him in carrying out his duties.'"[10] Presidentially appointed agency leaders are therefore typically "presum[ed]," absent statutory language to the contrary, to "serve[] at the President's pleasure," meaning they can be fired "at will" for any reason, or no reason at all.[11] The reasoning behind this implied power, according to the Court, is that, although Article II vests only the President with "the executive Power," it would be impossible for "one man" to execute the considerable responsibilities of the office.[12] "Lesser executive officers" are therefore necessary to implement the President's powers, but those officers "must remain accountable to the President, whose authority they wield."[13] That accountability, the Court has reasoned, can be assured only if the President retains the ability to freely remove his subordinates, since it is "'only the authority that can remove' such officials that they 'must fear and, in the performance of [their] functions, obey.'"[14]

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[6] *Myers*, 272 U.S. at 293 (explaining that the purpose of the separation of powers was "not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.").

[7] *Id.* at 163–64 ("Our conclusion on the merits . . . is that article 2 grants to the President the executive power of the Government-i, e., [sic] the general administrative control of those executing the laws, including the power of appointment and removal of executive officers.").

[8] U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. II, § 3 ("he shall take Care that the Laws be faithfully executed").

[9] Collins v. Yellen, 594 U.S. 220, 252 (2021) ("The 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, and it works to ensure that these subordinates serve the people effectively and in accordance with the policies that the people presumably elected the President to promote.").

[10] *Seila Law*, 591 U.S. at 215 (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513–14 (2010)).

[11] *Yellen*, 594 U.S. at 246, 248 ("When a statute does not limit the President's power to remove an agency head, we generally presume that the officer serves at the President's pleasure.").

[12] *Seila Law*, 591 U.S. at 213 (quoting 30 WRITINGS OF GEORGE WASHINGTON 334 (J. Fitzpatrick ed., 1939)).

[13] *Id.*

[14] *Id.* (quoting Bowsher v. Synar, 478 U.S. 714, 726 (1986)).

The removal power ensures not only that subordinate officials remain accountable to the President but also that the President remains accountable to the American people. By making the President responsible for the actions of his officials, the removal power prevents the President from "escap[ing] responsibility for his choices by pretending that they are not his own."[15] So long as the President has control over the actions of those in his administration through "at will" removal, the public, the Court has reasoned, is in a position to "pass judgment" on its own government and to know "whom the blame or the punishment of a pernicious measure . . . ought really to fall."[16]

Congress's Power Over Offices

The doctrine of presidential control can sometimes collide with Congress's power over federal offices, a power that arises mainly from the Appointments Clause and the Necessary and Proper Clause.[17] It is Congress, by enacting statutes, that creates executive branch offices, empowers those offices through the delegation of authority, and sets (subject to the constraints of the Appointments Clause) the method by which an office is filled and the required qualifications of an officeholder. When necessary, Congress can also design an office in a way that encourages both reliance on expertise and operational independence from the political influence of the executive branch, including through the use of statutory provisions that directly constrain the President's authority to remove—and therefore control—an official.[18]

These *for-cause provisions* generally assign an office a fixed term (or tenure) during which the officeholder may be removed by the President only for specific reasons. The permissible reasons for removal typically include some variation of "inefficiency, neglect of duty, or malfeasance in office."[19] Congress has enacted these provisions since at least 1887 to advance "the effective and fair administration of the law" by independent, impartial, and expert officials who may "act . . . independently of executive control" and are "free to exercise [their] judgment without the leave or hindrance of any other official or any department of the government."[20]

While the modern for-cause provision can be traced back to the late 19th century, other congressional efforts to insulate certain executive branch officials and decisions from presidential control can arguably be traced to much earlier in American history. There are, for example, historical arguments that a statutory term of years, even without explicit removal protections, may have implicitly restricted the President's authority to remove an official before the expiration of the term.[21] In the seminal 1803 decision of *Marbury v. Madison*, Chief Justice John Marshall suggested as much, reasoning that when the "law creating the office, gave the officer a right to

[15] *Free Enter. Fund*, 561 U.S. at 497.

[16] *Id.* at 498 (quoting THE FEDERALIST NO. 70, at 476 (Alexander Hamilton) (J. Cooke ed. 1961)).

[17] U.S. CONST. art. II, § 2; *id.* art. I, § 8, cl. 18.

[18] Humphrey's Ex'r v. United States, 295 U.S. 602, 625-26 (1935) (describing Congress's desire to create "a body of experts who shall gain experience by length of service — a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government.").

[19] See Hogue & Garvey, *supra* note 3.

[20] *Humphrey's*, 295 U.S. at 624–25, 629. Congress also attempted to require Senate consent to the removal of certain executive officers through statutes that existed prior to 1887. *See* Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 377 (1927). One such statute was invalidated by the Court in *Myers v. United States*, 272 U.S. 52 (1926).

[21] Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 19–27 (2021). Marshall's view no longer appears to be the prevailing judicial interpretation of fixed-terms, at least when a fixed-term is not accompanied by other indicia of independence.

hold for five years, independent of the executive," then the officer was "not removable at the will of the President."[22] Congress also established various commissions in the early 1790s involving, for example, oversight of the U.S. Mint and financing of Revolutionary War debt, that, although not containing removal restrictions, were nonetheless structured in ways that some commentators argue were specifically intended to reduce the President's ability to dictate decisionmaking.[23]

Despite the historical pedigree of tenure protections, the Court has never directly assessed the precise meaning of "inefficiency, neglect of duty, or malfeasance in office" and has therefore never clarified what types of conduct would subject an official with these protections to removal.[24] At the very least, these provisions seek to prevent the President from removing officials for no cause at all or based merely on political disagreements.[25] Even absent clear standards for applying these provisions, tenure protections appear, as a historical matter, to have been effective in dissuading Presidents from attempting to remove covered officials. Prior to President Trump, few Presidents had attempted to remove federal officials with statutory removal protections.[26]

A Brief Introduction to the Supreme Court's Consideration of Statutory Removal Restrictions

The Supreme Court's first thorough assessment of the President's constitutional removal power was in the 1926 decision of *Myers v. United States*.[27] There, the Court invalidated a statutory provision that prohibited the President from removing an appointed executive official—a postmaster—without first obtaining the advice and consent of the Senate. *Myers* recognized that "the executive power" vested in the President by Article II includes "the power of appointment and removal of executive officers," along with "general administrative control" of the executive branch.[28] The Court tied that implied power to historical practice as well as the President's explicit power of appointment and his responsibilities under the Take Care Clause. "[A]s his selection of administrative officers is essential to the execution of the laws by him," the Court reasoned, "so must be his power of removing those for whom he cannot continue to be responsible."[29] To hold otherwise and permit the Senate to effectively control the removal of an executive branch official, the Court concluded, would violate the separation of powers and "make it impossible for the President . . . to take care that the laws be faithfully executed."[30]

[22] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162, 167 (1803).

[23] *See e.g.*, Christine Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 172–75 (2022); Aaron L. Nielson & Christopher J. Walker, *The Early Years of Congress's Anti-Removal Power*, 63 AM. J. LEG. HIST. 219, 224–28 (2023).

[24] The Supreme Court is currently considering a case that may address the specific protections afforded by for-cause provisions. *See* Trump v. Cook, 146 S. Ct. 79 (2025) (mem.).

[25] In the case of William Humphrey, the President gave no reason other than policy difference for the removal. *See Humphrey's*, 295 U.S. at 618–19.

[26] Few officers with removal protections have been successfully removed from office. *See* Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 U. RICH. L. REV. 691 (2018).

[27] 272 U.S. 52 (1926).

[28] *Id*. at 163–64.

[29] *Id*. at 117.

[30] *Id*. at 164.

Myers held that Congress cannot usurp the President's removal power,[31] but it did not directly address lesser statutory constraints, like for-cause removal protections, in which the ultimate power to remove still resides with the President.[32] The Court took up that question in the 1935 case of *Humphrey's Executor*.[33] There, a unanimous Court held that the President's removal power was not "illimitable" and that Congress acted within its authority in restricting the removal of members of the Federal Trade Commission (FTC).[34] In doing so, the Court gave its explicit consent to the use of *for-cause provisions*, at least as applied to a multimember commission like the FTC whose "predominantly quasi judicial and quasi legislative" functions Congress had identified as needing some degree of political independence.[35] The *Humphrey's* Court distinguished between multimember agencies like the FTC that, in the Court's view, did not wield executive power, and the "purely executive" postmaster at issue in *Myers*.[36] The Court has approved of statutorily imposed tenure protections in other cases as well, including as applied to inferior officers like the Independent Counsel in the 1988 decision of *Morrison v. Olson*.[37]

Since 2010, a series of Supreme Court decisions, however, has cast the scope of Congress's authority to use *for-cause provisions* to create independent commissions into a state of some uncertainty. Beginning with *Free Enterprise Fund v. Public Company Accountability & Oversight Board*[38] and continuing in *Seila Law v. Consumer Finance Protection Bureau (CFPB)*[39] and *Collins v. Yellin*,[40] the Court appears to have displayed a growing skepticism of congressional attempts to limit removal of executive officials, describing the President's power as "unrestricted" and "exclusive."[41] In its 2024 decision of *Trump v. United States*, for example, the Court used

[31] Humphrey's Ex'r v. United States, 295 U.S. 602, 626 (1935) ("Nevertheless, the narrow point actually decided [in *Myers*] was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress.").

[32] At the time *Myers* was decided, observers were unsure whether dicta in that case discussing the President's general authority over executive branch officials indicated that for-cause removal provisions were also unconstitutional. Corwin, *supra* note 20, at 358. ("In a word, the logic of the case renders all executive or administrative officers of the United States removable by the President at will."). When Chief Justice Taft shared a draft of what would ultimately become the majority opinion in *Myers*, Justice Stone responded in a letter to the Chief Justice insisting that the Chief Justice's interpretation of the President's removal power be taken to its logical conclusion, writing the following:

> It is the duty of the President to enforce the laws even though little or no discretion is involved. As Chief Executive he is entitled to faithful and efficient services by subordinates charged only with administrative duties. It is for that reason that the power is conferred and the duty imposed on him to exercise the power of removal, and that, to my mind, is just as controlling in the case of officers with little or no discretion as in the case of a cabinet officer.

Robert Post, *Tension in the Unitary Executive: How Taft Constructed the Epochal Opinion of Myers v. United States*, 45 J. SUP. CT. HIST. 163, 175 (2020) (quoting Letter from Harlan Fiske Stone, J., to William Howard Taft, C.J. (Nov. 13, 1925)).

[33] 295 U.S. 602 (1935).

[34] *Id*. at 629 ("We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named.").

[35] *Id*. at 624.

[36] *Id*. at 627–28 (reasoning that "the necessary reach of [*Myers*] goes far enough to include all purely executive officers. It goes no farther; much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.").

[37] 487 U.S. 654 (1988).

[38] 561 U.S. 477 (2010).

[39] 591 U.S. 197 (2020).

[40] 594 U.S. 220 (2021).

[41] *Seila Law*, 591 U.S. at 215; Trump v. United States, 603 U.S. 593, 608–09 (2024).

dicta to characterize aspects of the President's removal power as "preclusive," a label that could "disabl[e]" Congress from meaningfully protecting executive officials from removal.[42]

As part of this transition, the modern Court has stated that it has recognized "only two" specific scenarios in which Congress can insulate a federal officer from at-will removal to encourage agency independence: "one for multimember expert agencies that do not wield substantial executive power" that derives from the Court's holding in *Humphrey's*, "and one for inferior officers with limited duties and no policymaking or administrative authority" that derives primarily from *Morrison*.[43] The Court has described these two scenarios as "the outermost constitutional limits of permissible congressional restrictions on the President's removal power."[44]

Seila Law and *Collins* specifically invalidated for-cause removal protections that Congress had provided to officers individually leading powerful executive branch agencies, as opposed to as members of a commission. Since the laws in question did not fall neatly into either the multimember, politically diverse structure approved in *Humphrey's* or the "sole inferior officer" arrangement upheld in *Morrison*, the Court stated that it was not willing to "extend" its previous cases to cover the "novel" use of tenure protections to a principal officer who individually wields either "significant" or "important" executive power.[45]

Although neither *Seila Law* nor *Collins* "revisited" *Humphrey's*, the opinions appeared to undercut the rationale for that decision by stating that *Humphrey's* "conclusion that the FTC did not exercise executive power has not withstood the test of time."[46] Leaving *Humphrey's* in place, the Court nevertheless confined the opinion to its facts, interpreting the case as applying only when an agency is structured as a "multimember body of experts, balanced along partisan lines, that perform[s] legislative and judicial functions and [is] said not to exercise any executive power."[47] What it means to be an agency that is "said not to exercise any executive power" has become the subject of great uncertainty.[48]

President Trump's Removals and the Path to *Slaughter*

President Trump has dismissed several officials from independent regulatory commissions who are protected by explicit for-cause removal provisions.[49] In one instance, the President asserted that the statutory criteria for removal had been met.[50] The other removals were carried out

[42] *Trump*, 603 U.S. at 608–09 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585, 637 (1952)).

[43] *Seila Law*, 591 U.S. at 218.

[44] *Id*. (citing PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 196 (D.C. Cir. 2018) (Kavanaugh, J., dissenting)).

[45] Collins v. Yellen, 594 U.S. 220, 250–51 (2021).

[46] *Seila Law*, 591 U.S. at 216 n.2.

[47] *Id*. at 216.

[48] *See, e.g.*, Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 91 F.4th 342, 352 (5th Cir. 2024) ("This is not to say that the doctrine is clear. And perhaps clarity will remain a mere aspiration so long as the doctrine's foundation includes a decision proclaiming that the FTC 'exercises no part of the executive power.'"), *cert. denied*, 145 S. Ct. 414 (2024) (mem.).

[49] *See* sources cited *supra* note 1; Jennifer McDermott & Matthew Daly, *Trump Fires Democratic Commissioner of Independent Agency that Oversees Nuclear Safety*, L.A. TIMES (June 16, 2025, at 14:17 PT), https://www.latimes.com/world-nation/story/2025-06-16/trump-fires-democratic-commissioner-of-independent-agency-that-oversees-nuclear-safety [https://perma.cc/5PWV-9J9R]; Zach Schonfeld & Ella Lee, *Trump's Independent Agency Firings Bombard Supreme Court*, THE HILL (Sept. 22, 2025, at 6:00 ET), https://thehill.com/homenews/administration/5513358-trump-supreme-court-firings/ [https://perma.cc/JC4A-WNTB].

[50] See Letter from Donald J. Trump, U.S. President, to Lisa D. Cook, Member, Bd. of Governors of the U.S. Fed. Res. Sys. (Aug. 25, 2025) ("I have determined that there is sufficient cause to remove you from your position."), (continued...)

pursuant to the Administration's legal conclusion that tenure protections unconstitutionally infringe on the President's authority to remove executive officials.[51] *Humphrey's*, the Administration has argued, either does not apply to modern independent agencies that exercise significant executive power or, if it does, must be overruled.[52] Under the Administration's view, existing statutory restrictions on removal are void, and the leaders of independent commissions serve at the pleasure of the President and may, like other agency officials, be removed at will.[53]

Members of at least eight independent agencies filed lawsuits in federal court challenging their removal, including Gwynne Wilcox and Rebecca Slaughter, who were removed from the National Labor Relations Board (NLRB) and FTC, respectively.[54]

A federal district court first issued a decision reinstating Ms. Wilcox, holding that the President's action violated the applicable statutory removal limitation and that, under *Humphrey's*, the limitation did not unconstitutionally infringe on the President's removal power.[55] The government sought a stay of the district court opinion in the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit), which, sitting en banc, held that "[t]he Supreme Court's repeated and recent statements that *Humphrey's Executor* . . . remain[s] precedential" required denial of the motion.[56] The government petitioned the Supreme Court for a stay pending appeal, which that Court ultimately granted. In doing so, the Court appeared to signal that the holding in *Humphrey's* may no longer support the use of tenure protections for modern independent regulatory commissions, at least not those like the NLRB that can be said to exercise executive power. "The stay," the Court stated, "reflects our judgment that the Government is likely to show that . . . the NLRB exercise[s] considerable executive power."[57]

Shortly thereafter, a federal district court ordered the reinstatement of Ms. Slaughter to the FTC.[58] As in *Wilcox*, the government sought a stay of that ruling from the D.C. Circuit, which again

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https://www.presidency.ucsb.edu/documents/letter-federal-reserve-governor-lisa-cook-notifying-her-her-dismissal-from-office [https://perma.cc/HRQ3-HU8T].

[51] *See, e.g.*, Reply in Support of Emergency Motion for a Stay Pending Appeal [hereinafter Harris Reply] at 2, Harris v. Bessent, 160 F.4th 1235 (D.C. Cir. 2025) (No. 25-5055), Dkt. No. 2105397 (asserting the President has the authority to "remove MSPB Members without restriction"), *petition for cert. filed*, No. 25-1110 (U.S. Mar. 17, 2026); Reply in Support of Emergency Motion for a Stay Pending Appeal [hereinafter Wilcox Reply] at 2, *Harris*, 160 F.4th 1235 (No. 25-5057), Dkt. No. 2105565 (same); Memorandum in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment [hereinafter Slaughter Memo], Slaughter v. Trump, 791 F. Supp. 3d 1 (D.D.C. 2025) (No. 25-909), 2025 WL 1443448 (arguing that the FTC "Commissioners' removal protections are unconstitutional"), *cert. granted before judgment*, 146 S. Ct. 18 (2025) (mem.).

[52] Harris Reply, *supra* note 51, at 3; Wilcox Reply, *supra* note 51, at 6; Slaughter Memo, *supra* note 51, at 2.

[53] Harris Reply, *supra* note 51, at 6; Wilcox Reply, *supra* note 51, at 2; Slaughter Memo, *supra* note 51, at 2.

[54] *See, e.g.*, Complaint for Declaratory and Injunctive Relief, *Slaughter*, 791 F. Supp. 3d 1; Complaint for Declaratory and Injunctive Relief, Wilcox v. Trump, 775 F. Supp. 3d 215 (D.D.C. 2025), *hearing en banc denied sub nom.*, Harris v. Bessent, No. 25-5037, 2025 WL 1033740 (D.C. Cir. Apr. 7, 2025), *cert. denied before judgment*, 146 S. Ct. 76 (2025) (mem.), *and rev'd sub nom.*, Harris v. Bessent, 160 F.4th 1235 (D.C. Cir. 2025).

[55] *Wilcox*, 775 F. Supp. 3d at 220 ("The President does not have the authority to terminate members of the [NLRB] at will, and his attempt to fire plaintiff from her position on the Board was a blatant violation of the law.").

[56] *Harris*, 2025 WL 1021435, at *2.

[57] Trump v. Wilcox, 145 S. Ct. 1415 (2025). The Court's order also appeared to create a safe harbor for the Federal Reserve Board of Governors (the Board). The order, the Court explained, did not "implicate the constitutionality" of the for-cause removal provisions of the Board because that agency "is a uniquely structured, quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States." The Board was created by statute in 1913, and, since 1935, all of the members of the Board enjoy *for-cause* removal protections. Federal Reserve Act, ch. 6, 38 Stat. 251 (1913) (codified as amended at 12 U.S.C. §§ 221–522); Banking Act of 1935, ch. 614, § 203, sec. 10, 49 Stat. 684, 704 (codified as amended at 12 U.S.C. § 242).

[58] *Slaughter*, 791 F. Supp. 3d at 6.

denied the stay on the grounds that the issue was foreclosed by *Humphrey's*. According to the D.C. Circuit, the government had "no likelihood of success . . . given controlling and directly on point Supreme Court precedent."[59] As the court explained, a "unanimous Supreme Court" had upheld Congress's use of *for-cause provisions* to limit the President's ability to remove FTC commissioners "ninety years ago," and "[o]ver the ensuing decades—and fully informed of the substantial executive power exercised by the Commission—the Supreme Court has repeatedly and expressly left *Humphrey's Executor* in place, and so precluded Presidents from removing Commissioners at will."[60] Though the Supreme Court may have suggested that *Humphrey's* did not apply to the NLRB in *Wilcox*, the D.C. Circuit determined that the case continued to apply to the FTC.[61] The government again sought a stay from the Supreme Court.

The Supreme Court granted that stay and, treating the application as a petition for a writ of certiorari before judgment, granted the petition, directing the parties to brief and argue "[w]hether the statutory removal protections for members of the Federal Trade Commission violate the separation of powers and, if so, whether *Humphrey's Executor v. United States*, should be overruled."[62] The Court heard oral arguments in *Slaughter* on December 8, 2025, and is expected to issue an opinion before the end of the current term.

Resolving the question presented in *Slaughter* will likely require the Court to grapple with the competing powers of the President and Congress over the control of executive offices and officers. As discussed below, that analysis has traditionally relied heavily on an assessment of history and evidence of how the Founding generation understood the removal power.

Early American History, Removal, and the Separation of Powers

Due in part to the Constitution's silence on the removal of officers other than through impeachment, history and early understandings of the separation of powers have long played a central role in the Supreme Court's treatment of removal. The opinion in *Myers* relied heavily on history, historical practice, and evidence of historical intent. The Court explained that it "devoted much space" to the First Congress's views on the proper structure of government when it created the first agencies.[63] The Court did so "not because a congressional conclusion on a constitutional issue is conclusive," but because the decisions of the First Congress were "made within two years after the Constitutional Convention" by "a considerable number of those who had been members of the convention that framed the Constitution and presented it for ratification."[64] The First Congress, according to the Court, therefore sat in a position of interpretive preeminence because of its role in giving life to the new constitutional structure of government and its proximity and connection to the Convention and the Framers:

[59] Slaughter v. Trump, No. 25-5261, 2025 WL 2551247, at *1 (D.C. Cir. Sep. 2, 2025).

[60] *Id.*

[61] *Id.*

[62] 146 S. Ct. 18 (2025) (mem.). The Court also articulated a second question presented addressing whether the courts have authority to order reinstatement in these cases. *Id.* ("Whether a federal court may prevent a person's removal from public office, either through relief at equity or at law.").

[63] Myers v. United States, 272 U.S. 52, 136 (1926); Seila Law LLC v. CFPB, 591 U.S. 197, 214 (2020) ("Chief Justice Taft, writing for the Court, conducted an exhaustive examination of the First Congress's determination in 1789, the views of the Framers and their contemporaries, historical practice, and our precedents up until that point.").

[64] *Myers*, 272 U.S. at 136.

> It was the Congress that launched the government. It was the Congress that rounded out the Constitution itself by the proposing of the first 10 amendments, which had in effect been promised to the people as a consideration for the ratification. It was the Congress in which Mr. Madison, one of the first in the framing of the Constitution, led also in the organization of the government under it. It was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument.[65]

The views of the Framers and the removal debates in the First Congress have been discussed in most of the Court's subsequent removal cases. There remains, however, significant ambiguity as to both (1) what the Framers believed about the President's constitutional authority to remove officials at or near the time the Constitution was ratified and (2) what the First Congress determined during its debates on removal in 1789. Relying on English and colonial practices, debates during the constitutional convention, and statements made during the ratification debates and in the First Congress, some scholars argue that the Framers all understood the power to remove to be a core part of "executive power."[66] These scholars often turn for support to statements made by Alexander Hamilton and James Madison, who both indicated during the First Congress that the removal power should rest with the President.[67]

Other scholars disagree that the Founding history can be read to imply an indefeasible removal power.[68] These scholars argue that English and colonial practice, debates during the constitutional convention, and statements made during the ratification debates and in the First Congress either have little to say about removal,[69] are too varied to provide evidence of a widely held understanding of what powers were included in the "executive power,"[70] or point away from an absolute and unconditional power of removal.[71]

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[65] *Id*. at 174–75.

[66] *See, e.g.*, Steven G. Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006); Aditya Bamzai & Saikrishna Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023); Aditya Bamzai & Saikrishna B. Prakash, *How to Think About Removal*, 110 VA. L. REV. ONLINE 159 (2024); MICHAEL MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING (2020); STEVEN G. CALABRESI & JOHN S. YOO, THE UNITARY EXECUTIVE, PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997).

[67] Calabresi & Prakash, *supra* note 66, at 644; Bamzai & Prakash, *The Executive Power of Removal*, *supra* note 66, at 1780; Prakash, *New Light on the Decision of 1789*, *supra* note 66, at 1024, 1040.

[68] *See, e.g.*, Jed H. Shugerman, *The Ebb, Flow, and Twilight of Presidential Removal*, ADMIN. & REGUL. L. NEWS, Spring 2024, at 6; JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018); Jonathan Gienapp, *Removal and the Changing Debate over Executive Power at the Founding*, 63 AM. J. LEGAL HIST. 229 (2023); Manners & Menand, *supra* note 21; Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1 (2020); Chabot, *Interring the Unitary Executive*, *supra* note 23; Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175 (2021); Andrea Scoseria Katz & Noah A. Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. F. 404 (2023); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 J. CONST. L. 323 (2016); *see also* Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753 (2023); Jed H. Shugerman, *Presidential Removal: The Marbury Problem and the Madison Solutions*, 89 FORDHAM L. REV. 2085 (2021); Jed H. Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J. L. & HUMANITIES 125 (2022).

[69] *See* Gienapp, *Removal*, *supra* note 68, at 234.

[70] *See* Katz & Rosenblum, *supra* note 68, at 411–15; Andrea S. Katz, Noah A. Rosenblum & Jane Manners, *Disagreement and Historical Argument or How Not to Think About Removal*, 58 U. MICH. J. L. REFORM 555, 561 (2025).

[71] *See* Shugerman, *The Indecisions of 1789*, *supra* note 68, at 860; Jed H. Shugerman, *Venality: A Strangely Practical History of Unremovable Offices and Limited Executive Power*, 100 NOTRE DAME L. REV. 213, 274 (2024); Lawrence (continued...)

This report next turns to some of that Founding history, specifically the views and understandings presented in the Constitutional Convention, the *Federalist Papers*, and the congressional removal debates of 1789.

The Constitutional Convention

Contemporaneous descriptions of the debates of the Constitutional Convention are practically devoid of discussion of removal of subordinate federal officials.[72] When the Convention addressed the topic, the delegates discussed removal of federal officials through impeachment.[73] Like the Constitution, the debates have little explicit to say about the Framers' thoughts on a presidential removal power.[74] Conversely, the debates at the Convention discuss the *appointment* of executive officers at length.[75] Absent clear discussion of a presidential removal power, judges and scholars have tried to infer the intent of the Framers from their debates over the framing of Article II.[76] As with much else surrounding presidential removal, fundamental disagreements over what inferences can be drawn from these debates persist to this day. These arguments tend to focus on the two provisions of Article II previously identified as the source of the President's supervisory power over the executive branch: the Vesting Clause, which vests the "executive Power" in "a President,"[77] and the Take Care Clause which, depending on the views of the particular judge or legal scholar, either imposes a duty or creates a power for the President to "take Care that the Laws be faithfully executed."[78]

In the summer of 1787, delegates from 12 states arrived in Philadelphia to discuss, debate, and ultimately frame a new instrument of government for the 13 fledgling democracies of North America.[79] Early in the Convention the delegates resolved that a national government should consist of "a supreme Legislative, Judiciary, and Executive."[80] One of the first questions that arose over the creation of what would become the presidency was whether the office should consist of one person or multiple people.[81] Edmund Randolph's Virginia Plan, which served as the starting point for the Convention, simply called for a "National Executive . . . to be chosen by the National Legislature . . . and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation."[82] It did not specify

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Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994); Manners & Menand, *supra* note 68, at 18–19; Chabot, *Is the Federal Reserve Constitutional*, *supra* note 68, at 47–48.

[72] *See generally*, 1 THE RECORDS OF THE FEDERAL CONVENTION of 1787, at 44 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS]. The Constitutional Convention was held in secret and kept no official record of its proceedings. James Madison, among several other delegates to the convention, kept private notes of the proceedings. These notes, which were collected into several volumes in the early 20th century, are the primary evidence for the substance of debates at the convention. See *id.*

[73] *See, e.g.*, 1 FARRAND'S RECORDS, *supra* note 72, at 88, 226, 236; 2 FARRAND'S RECORDS, *supra* note 72, at 42, 54, 64.

[74] *See generally*, 1 FARRAND'S RECORDS, *supra* note 72.

[75] *See, e.g.*, *id*. at 63, 67, 107; 2 FARRAND'S RECORDS, *supra* note 72, at 23, 52, 103, 168, 285, 336.

[76] *See, e.g.*, Myers v. United States, 272 U.S. 52, 110–11 (1926); Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 241 (2020); Shugerman, *Vesting*, *supra* note 68, at 1500; Calabresi & Prakash, *supra* note 66, at 607; Bamzai & Prakash, *The Executive Power of Removal*, *supra* note 66, at 1765; Katz & Rosenblum, *supra* note 68, at 415.

[77] U.S. CONST. art. II, § 1, cl. 1.

[78] *Id.* art. II, § 3, cl. 3.

[79] 1 FARRAND'S RECORDS, *supra* note 72, at 1.

[80] *Id.* at 30.

[81] *Id.* at 63, 64–71.

[82] *Id.* at 21.

whether the new "National Executive" would be a single or corporate office.[83] The Virginia Plan also included a "council of revision" to consist of the National Executive and "a convenient number of the National Judiciary" that would exercise a veto power over legislation from both the National Legislature and state legislatures.[84]

Once the delegates turned to the presidency, there was no consensus as to the presidency's structure or powers.[85] James Wilson, Charles Pinckney, and John Rutledge supported a single executive.[86] A single person would, in the words of Wilson, give "the most energy, dispatch and responsibility to the office."[87] Although these delegates favored a single President, they insisted on limits to the power of the presidency.[88] Rutledge did not support allocating the power of war and peace to the President, because, as Pinckney argued, that would create "the worst kind" of monarchy—"an elective one."[89] Wilson went further, explaining that "he was not governed by the British model" and as such did not think the prerogatives of the British monarch were "a proper guide in defining the Executive powers."[90] Instead, Wilson argued, the only powers "he conceived strictly Executive were those of executing the laws, and appointing officers not [appertaining to, and] appointed by the Legislature."[91]

Edmund Randolph was in favor of a plural presidency, believing a single President to be the "foetus of Monarchy."[92] Roger Sherman, conversely, argued that a number should not be fixed but instead chosen by the legislature from time to time given the circumstances.[93] In his view, the "Executive magistracy [is] nothing more than an institution for carrying the will of the Legislature into effect."[94]

Sensing no resolution to the impasse, James Madison proposed postponing the debate over the structure of the presidency and instead determining what powers the presidency ought to have.[95] To this end, Madison proposed three powers:

- "to carry into effect the national laws"
- "to appoint to offices in cases not otherwise provided for," and
- "to execute such other powers ('not Legislative nor Judiciary in their nature') as may from time to time be delegated by the national Legislature."[96]

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[83] *Id.*

[84] *Id.*

[85] *Id.* at 63, 64–71, 88–89, 96–97.

[86] *Id.* at 63.

[87] *Id.* at 65.

[88] *Id.* at 64–66.

[89] *Id.* at 64–65.

[90] *Id.* at 65–66.

[91] *Id.*

[92] *Id.* at 66.

[93] *Id.* at 65. Roger Sherman also thought a single executive (i.e., one without a governing council) not dependent on the legislature was "the very essence of tyranny." *Id.* at 68. Even the British monarch, Sherman argued, "has a council" of advice. *Id.* at 97. Sherman was the only man to sign the Continental Association, the Declaration of Independence, the Articles of Confederation, and the Constitution. He also served as a Representative and later Senator from Connecticut in the First Congress. Debates in the First Congress will be discussed in "The Debates of 1789," *infra*.

[94] 1 FARRAND'S RECORDS, *supra* note 72, at 65.

[95] *Id.* at 66–67.

[96] *Id.* at 67.

The third category was ultimately dropped because delegates thought it was redundant given the first category,[97] and no delegate raised the issue of removal in regard to the second category.[98]

Although the delegates resolved to postpone discussion of the structure of the presidency, the issue arose several more times in the following days. On June 4, the delegates voted on the structure of the presidency, with seven states in favor of a single person and three against.[99] The final debate leading up to the vote centered almost entirely on the administrability of a plural executive.[100] Wilson argued that three executives (the number favored by Randolph) would create "nothing but uncontrouled, continued, & violent animosities" that would corrupt the other branches of government, the state governments, and the people.[101] Others, such as Elbridge Gerry and Pierce Butler, worried that a triumvirate would be impractical for military purposes, creating a "general with three heads."[102]

Although the delegates settled on a single executive, the text of the Vesting Clause itself continued to develop over the course of the Convention. The current text of the Clause ("The executive Power shall be vested in a President of the Unites States of America") was reported out of the Committee of Style on September 12, several months after the initial vote on the structure of the executive branch and just days before the Convention broke.[103] The question of a plural executive was not seriously debated for the remainder of the Convention. The June 4, 1787, vote, then, appears to have been the seminal decision that led to the Constitution vesting executive power in a single person—the President. Between the June vote and the end of the Convention, delegates debated the length of the President's term, the manner of selection, various powers the President would have, like the commander-in-chief power, and the appointment of subordinate officials.[104] Whether the President would have the power to remove those officials did not arise in the existing documentation of the debates.

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[97] *Id.* at 67; Some argue that Madison intended this third category to apply to "administrative" power as opposed to "executive" power. In this view, administrative power was the power to supervise and administer the executive branch. Lessig & Sunstein, *supra* note 71, at 62. As discussed below, some argue that administrative power was ultimately given to Congress via the Necessary and Proper Clause. *See infra* notes 162 and 164 and associated text.

[98] 1 FARRAND'S RECORDS, *supra* note 72, at 67–68. Near the end of the Convention, Gouverneur Morris introduced a resolution creating Cabinet offices in the Constitution and designating the officeholder as serving at the pleasure of the President. 2 FARRAND'S RECORDS, *supra* note 72, at 337–42. The resolution received no debate and appeared to die in the Committee of Style. *Id.* Because the resolution received no debate, it is difficult to understand exactly why Morris proposed these offices with at-pleasure tenure. One possible reading is that Morris did not think the President would otherwise have the power to remove Cabinet officials (or it was at least unclear whether he would have that power), and therefore it needed to be specified in the Constitution.

[99] 1 FARRAND'S RECORDS, *supra* note 72, at 97.

[100] *Id.* at 96–97.

[101] *Id.* at 96.

[102] *Id.* at 97.

[103] 2 FARRAND'S RECORDS, *supra* note 72, at 585, 597. An earlier version appeared in the draft completed by the Committee of Detail. That version read: "The Executive power of the United States shall be vested in a single person. His title shall be, 'The President of the United States of America." *Id.* at 572.

[104] *See, e.g.*, *id.* at 98–106, 108–16, 118–20. The appointment power followed an elaborate trajectory throughout the Convention. Although Madison proposed that it should rest with the President alone, later in the Convention it was split by office between Congress as a whole and the President, with Congress having sole authority to appoint federal judges and the President having sole authority to appoint subordinate executive officials, then to the Senate alone to appoint judges, before coming to rest as it appears today split between nomination by the President by and with the advice and consent of the Senate. *Id.* at 38 (passing unanimously appointment of judges by Congress); *id.* at 41–44 (proposal to vest appointment of judges with the Senate alone and debate over splitting appointment of judges between the President and the Senate); *id.* at 72 (passing a resolution vesting appointment of judges with the Senate); *id.* at 80–83 (debating the mode of appointment for judges); *id.* at 121 (approving resolution vesting the appointing of "offices . . . not (continued...)

The Take Care Clause, the second site of contestation over removal, arose out of Madison's first category of power in his proposal for a national magistrate. There was, however, no reported debate over that category of power. The Clause as it appears in the Constitution emerged from the work of the Committee on Detail (Committee), whose task it was to compose a single document incorporating the resolutions of the delegates up to that point in the convention.[105] There are no records of the debates of the Committee, but the Committee's work product survives. The Committee transformed the language of Madison's original proposal. Unlike Madison's initial proposal, which was phrased as a grant of power, the Clause as it emerged from the Committee is phrased as a duty—"he shall take care that the laws of the United States be duly and faithfully executed."[106] The Committee's work was further revised in the Committee of Style,[107] which reported to the Convention on September 12, five days before the delegates signed the final draft of the Constitution.[108] It was in this draft of the Constitution that the Take Care Clause emerged in its final form: "he shall take Care that the Laws be faithfully executed." In addition to dropping "duly" from the formulation, the Committee of Style placed the Take Care Clause among other presidential duties in Section 3 of Article II, potentially indicating its status as a duty and not another grant of authority.[109]

Judicial and Scholarly Reception of the Convention Debates

Judges and legal scholars have drawn several conflicting inferences from these debates. Turning to the executive vesting clause first, the debate centers on exactly what powers the Framers thought were included in "the executive power." Given that the Constitution does not contain an explicit grant of removal power (outside of impeachment), scholars and judges continue to debate whether the term "executive power," as understood at the time of the framing, implies a power to remove subordinate officials.

Beginning with the Supreme Court case *Myers v. United States* and continuing to cases decided in the 2020s, the Supreme Court has inferred that, because the Framers chose a single executive over a plural one and vested a single president with "the executive power," all executive power must be vested with the President, to include an implicit grant of removal authority.[110] Executive power, the Court held in *Myers*, must include an "illimitable power to remove" subordinate

otherwise provided for"); *id.* at 132 (draft of Committee of Detail including provision vesting appointment of executive officers with the President alone and the appointment of federal judges with the Senate alone); *id.* at 144, 168, 169, 171 (draft of the Committee on Detail vesting the power to appoint a treasurer in Congress, the power to appoint other executive officials in the President and the power to appoint judges in the Senate); *id.* at 183 (report of the Committee on Detail vesting the Senate alone with the authority to appoint judges *and* ambassadors); *id.* at 392 (debate over provision vesting the Senate with the power to appoint judges *and* ambassadors); *id.* at 405–06 (general debate about whether the legislature or the executive ought to have the power or appointment); *id.* at 495 (report of the Committee of Postponed Parts vesting appointments of judges, ambassadors, and executive officials in the President and Senate); *id.* at 538–39 (further debate on who should appoint executive officers and ambassadors in particular); *id.* at 614 (voting to remove the provision vesting Congress with the power to appoint a treasurer); *id.* at 627–28 (voting to include the excepting clause of the appointment clause).

[105] *Id.* at 95, 129–33.

[106] *Id.* at 185. The final language of the Take Care Clause that appears in Article II, section 3 was drafted by the Committee of Style. *Compare, id.* at 574 ("[The President] shall take care that the laws of the United States be duly and faithfully executed."), *with id.* at 600 ("[The President] shall take care that the laws be faithfully executed.").

[107] *Id.* at 564.

[108] *Id.* at 585.

[109] *Id.* at 600; Lessig & Sunstein, *supra* note 71, at 62.

[110] Myers v. United States, 272 U.S. 52 (1926); Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 203 (2020).

executive officials.[111] This view of executive power grants the President and only the President vast supervisory powers over the executive branch. The *Myers* Court grounded this view of executive power, in part, on its view of the British constitution.[112] The Court assumed that British monarchs enjoyed the prerogative to both appoint *and* remove executive officers and that the Framers understood and incorporated this background into the grant of executive power in the Constitution.[113] Some scholars support this view, sometimes referred to as the "royal residuum" thesis.[114] Scholars who hold this view argue that when the Framers did not explicitly allocate executive authority to some other branch in the Constitution (as they did with coining money or declaring war, for example), that power is implied by vesting the President with "the executive power."[115] Under this theory, the Framers understood the category of "executive power" to generally include the power to remove.[116]

Other scholars deny that the executive vesting clause allocates an unlimited and absolute power to remove subordinates. As an initial matter, the delegates to the Convention did not discuss who could remove subordinate executive officials, even though they debated at length the process for appointing those officials.[117] In addition, when the subject of British monarchy arose in debates over framing Article II, James Wilson (a vigorous proponent of a single executive) disclaimed any reliance on or attempt to copy the British system.[118] No other delegate rose to support importing the powers of the British monarch to the presidency.[119] Instead, those delegates that did speak all opposed using the British system as a model for the presidency.[120]

Even if the presidency inherited some "royal residuum" of prerogative powers, some scholars argue that those powers do not include an unlimited and absolute power to remove subordinate officials. Scholars who hold the view that the President inherited removal authority from royal prerogative often turn to *Blackstone's Commentaries on the Laws of England* for support.[121] William Blackstone published *Blackstone's Commentaries* between 1765 and 1769 and were

[111] *Myers*, 272 U.S. 52; *see also* Bamzai & Prakash, *The Executive Power of Removal*, *supra* note 66, at 1769.

[112] *Myers*, 272 U.S. at 118 ("In the British system, the crown, which was the executive, had the power of appointment and removal of executive officers, and it was natural, therefore, for those who framed our Constitution to regard the words 'executive power' as including both."); *see also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 859–60 (1989); Bamzai & Prakash, *The Executive Power of Removal*, *supra* note 66, at 1791. *But see* Corwin, *supra* note 20, at 383; Shugerman, *Removal of Context*, *supra* note 68, at 156; Birk, *supra* note 68, at 199; Ilan Wurman, *In Search of Prerogative*, 70 DUKE L. J. 93, 121 (2020).

[113] *Myers*, 272 U.S. at 118.

[114] Julian Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative,* 119 COLUM. L. REV. 1169, 1172 n.8 (2019) (calling the view that "executive power" vests some remainder of royal power the "Royal Residuum Thesis"); Bamzai & Prakash, *The Executive Power of Removal*, supra note 66, at 1791; Andrew Kent, *Executive Power, the Royal Prerogative, and the Founder's Presidency*, 2 J. AM. CON. HIST. 403, 559 (2024); Brief for Separation of Powers Scholars as *Amici Curiae* in Support of Petitioner at 11 n.1, *Seila Law*, 591 U.S. 197 (2020) (No. 19-7).

[115] Bamzai & Prakash, *The Executive Power of Removal*, *supra* note 66, at 1791.

[116] *Id*. The authors go on to argue that, even if it was the case that the British monarch did not have the power to remove all subordinate royal officials, it was the perception of the Framers that removal fell within the general category of executive power. The Framers "abstracted" the "notion of executive power from British, and other foreign, and domestic practices." *Id.*

[117] *See* Gienapp, *Removal*, *supra* note 68, at 234.

[118] 1 FARRAND'S RECORDS, *supra* note 72, at 65–66.

[119] *Id.*

[120] *Id.*

[121] Brief for Separation of Powers Scholars as *Amici Curiae* in Support of Petitioner at 11 n.1, *supra* note 114; *see* 1 WILLIAM BLACKSTONE, COMMENTARIES (Prest ed. 2016).

widely read in late 18th-century America.[122] In the *Commentaries*, Blackstone attempted to treat the entirety of British common law, including the power of the king and his relationship to subordinate royal officials.[123] The problem, some scholars argue, with relying on Blackstone to support claims of a presidential removal power inherited from British practice is that Blackstone does not list a general power of removal held by the king.[124] Blackstone treats at length the king's prerogative powers, but none of them is the power to remove subordinate officials.[125] The closest Blackstone comes is the royal prerogative of "erecting and disposing of offices," but in identifying this prerogative, he does not mention how an incumbent in an office once created and distributed (or disposed) could be removed.[126] A modern legal historian has also pointed out that, in 18th-century England, the creation and distribution of offices was not the king's exclusive right. Parliament also created and distributed offices, thus potentially adding to the confusion regarding the appointment and removal of officials in 18th-century Britain.[127]

Some officials identified by Blackstone held their offices "at pleasure," such as privy counselors[128] and sheriffs,[129] but other officials he discussed held their offices with different tenures, including some with life tenure and for-cause removal protections like coroners and

[122] BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 31 (50th Anniversary ed. 2017) (calling *Blackstone's Commentaries* "standard authorit[y]" for American revolutionaries); Mortenson, *supra* note 114, at 1220–21 & n.189 ("But for Americans like James Madison, Blackstone's treatise was the 'book which is in every man's hand'—central to pedagogy, drafting, and litigation alike as the standard restatement of the formal constitutional law of England." (quoting Remarks at the Virginia Convention Debates (June 18, 1788), *reprinted in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1371, 1382 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter DOCUMENTARY HISTORY OF THE RATIFICATION] (statement of James Madison))); Calabresi, & Prakash, *supra* note 66, at 607–08 (calling Blackstone's view of executive power "orthodox" for the delegates to the Convention); AKIL R. AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760–1840, at 439 (2021) (*calling Blackstone's Commentaries* a "runaway best-seller in eighteenth century America").

[123] 1 BLACKSTONE, *supra* note 121, at ix (explaining that Blackstone intended "to lay down a general and comprehensive Plan of the Laws of England").

[124] *See id*. at 230–70 (listing prerogatives such as "generalissimo" of the armed forces; and issuing proclamations to aid the execution of laws passed by Parliament); Shugerman, *Removal of Context*, *supra* note 68, at 156.

[125] 1 BLACKSTONE, *supra* note 121. Except for those powers not suitable to a republican form of government (e.g., powers as the head of the Anglican Church or the power to call for and prorogue the legislature), many of the powers on Blackstone's list of prerogative powers were allocated to one branch or another in the Constitution. On some accounts, there is no reason to read into the vesting clause implied powers derived from royal prerogatives because the delegates to the Convention explicitly allocated them to the various branches. Wurman, *supra* note 112.

[126] 1 BLACKSTONE, *supra* note 121, at 262 (noting that, while the king may create new offices, he cannot create new fees to go along with that office or annex new fees to an old office because that would amount to a tax that only Parliament could levy). In a Supreme Court brief and subsequent law review article, some scholars appear to interpret "dispose" to mean "remove." Brief for Separation of Powers Scholars as *Amici Curiae* in Support of Petitioner at 11, *supra* note 114; Wurman, *supra* note 112. Relying on that interpretation, these scholars argue that Blackstone did include removal as one of the king's prerogative powers. Read in context, however, Blackstone's use of "dispose" appears to mean "distribute" and not abolish. In the same passage just after discussing who should be selected for certain honors (e.g., hereditary titles such as earldoms and knighthoods) and what duties came along with those honors, Blackstone explains that "[f]or the same reason therefore that honours are in the *disposal* of the king, office ought to be so likewise." 1 BLACKSTONE, *supra* note 121, at 262 (emphasis added). Another scholar argues that even if "dispose" meant to abolish the office, that interpretation still does not address how the officeholder could be removed without abolishing the office altogether. Shugerman, *Removal of Context*, *supra* note 68, at 162.

[127] Birk, *supra* note 68, at 217–20.

[128] 1 BLACKSTONE, *supra* note 121, at 223 (Privy counsellors' terms extended to the life of the king that appointed them unless sooner removed by the king).

[129] *Id.* at 331. Blackstone recounts the origins of the office of sheriff (a portmanteau of the Anglo-Saxon words "shire" and "reeve"). *Id.* at 328-29.

judges.[130] Blackstone never mentions a general backdrop of royal removal for royal officials.[131] Rather, the appointment, tenure, and removal of royal officials was, at least according to Blackstone, based on the tradition and needs of the particular office.[132]Also, in Blackstone's time, judges were officers of the king—that is, they were "executive officers."[133] England had no "judicial branch"; instead, judges were appointed by the king and, until 1701, removable by the king at will.[134] To Blackstone, they were royal officials as much as sheriffs or coroners.[135] Despite their status as executive (or, more precisely, royal) officials, in 1701 Parliament granted judges tenure during good behavior, although their tenure lasted only as long as the monarch that appointed them.[136] Parliament extended their tenure to life during good behavior in 1761.[137] In Blackstone's understanding, Parliament during the 18th century retained the authority to protect royal officials from removal by the king.

Blackstone also references "great officers of state," such as "the lord treasurer, lord chamberlain, [and] the principal secretaries," but he declines to describe their powers and duties or anything about their tenures because, as he puts it: "I do not know that they are in that capacity [i.e., as officers of state] in any considerable degree the objects of our laws, or have any very important share of magistracy conferred upon them."[138] At bottom, although Blackstone was widely read by

[130] *Id.* at 336–37 (identifying coroners as enjoying life tenure but removable for certain specified causes); *id.* at 258 (identifying judges as enjoying life tenure during good behavior). Not all of these officers were appointed by the king. Some, like coroners and verderers, were elected, and some that had come to be appointed by the king started out as elective (see the discussion of sheriffs in note 129, *supra*). *Id*. at 335–36. Coroners, unlike in modern America, were judicial officials that presided over murder trials, the allocation of the goods from a shipwreck, and the determination of the location and finders of a "treasure trove." *Id.* at 337. Verderers were officers of the king who enforced forest laws. *Id.* at 335. Blackstone explains that these offices were still elective in his time because they were "concerned in matter that affected the liberty of the people" and, specifically as to verderers, "whose business it is to stand between the prerogative and the subject in the execution of the forest laws." *Id.* A coroner was chosen for life, but a king could remove a coroner for cause, including "that he is engaged in other business, incapacitated by years of sickness," or "extortion, neglect, or misbehaviour." *Id.* at 336–37.

[131] *See id.* at 258, 327–53.

[132] *See, e.g.*, *id.* at 327–53 (cataloging all of the different methods of appointment, tenure, and removal of royal officials).

[133] *Id.* at 258 (noting that in "very early times" the king himself would adjudicate disputes, but now kings delegate that duty to their judges); Shugerman, *Venality*, *supra* note 71, at 230.

[134] 1 BLACKSTONE, *supra* note 121, at 258. Some have argued that courts, as much as executive officials, were associated with law execution in the 18th century. Shugerman, *Venality*, *supra* note 71, at 230 & n.84.

[135] *See* 1 BLACKSTONE, *supra* note 121, at 258 (treating the appointment and tenure of judges in his chapter on royal prerogatives). Blackstone further explained that because the king could not personally execute the laws of England, "*courts* should be erected to assist him in executing this power." *Id.* at 257 (emphasis added).

[136] *See* Act of Settlement 1701, 12 & 13 Will. 3 c. 2, § 3 (Eng.). Tenure for the life of the appointing monarch was not uncommon at this time. Blackstone identifies several other officers who held such tenure, such as justices of the peace, sheriffs, and privy counselors. 1 BLACKSTONE, *supra* note 121, at 223 (privy counsellors), 331 (sheriffs), 341 (justices of the peace). Although their tenures were the same as judges (until 1760), these officers had different removal provisions—good behavior for judges versus at pleasure for sheriffs and justices of the peace. *Id.* at 223, 331, 341.

[137] 1 Geo. 3 c. 23 (Eng.). Blackstone recounts that, upon his accession to the throne, George III requested that Parliament adopt this provision. 1 BLACKSTONE, *supra* note 121, at 258. The king "looked upon the independence and uprightness of the judges as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects and most conducive to the honour of the crown." *Id.* at 258 (citing JOURNAL OF THE HOUSE OF COMMONS (Mar. 3, 1761)).

[138] *Id.* at 327–28. It is unclear how similar these "great officers of state" are to cabinet secretaries. While Congress has delegated significant legal authority to cabinet secretaries (and other agency heads), Blackstone's description of the great officers of state indicates that they may not have wielded much or any legal authority. Nonetheless, some scholars have argued that this quote indicates that the great offices of state were beyond legislative control, thus indicating that the king, as the embodiment of executive power in the British constitution, had plenary power over them. Brief for (continued...)

the Framers at the time of the drafting of the Constitution, he does not declare a uniform rule of removal. Among the various tenure and removal conditions he does discuss, it is unclear which, if any, were a model for the Framers when they drafted Article II.[139]

A separate but related line of argument claims that, in the late 18th century, the term "executive power" was not synonymous with the slate of powers considered to be part of the royal prerogative.[140] Rather, executive power was one power among others that the British monarchy wielded.[141] This view is often known as the "Law Execution Thesis."[142] The Constitution's executive vesting clause was, accordingly, not a catch-all for general royal power.[143] Instead, it was limited to the power the British monarchs held to execute the law.[144] It was, according to one scholar, an "empty vessel," since the power only became active when there was a law to enforce.[145] This view is one possible explanation for Madison's inclusion of a power to appoint along with a power to execute the laws in his initial proposal for the powers to be assigned to the President.[146]

Separation of Powers Scholars as *Amici Curiae* in Support of Petitioner at 8, *supra* note 114. Blackstone, however, is careful to remind his readers in several places that the king himself and his ministers are subject to the laws of Parliament. 1 BLACKSTONE, *supra* note 121, at 230–32; 243, 254, 255–56, 261, 262, 322–23. Blackstone's treatment of sovereign immunity illustrates this point. In that discussion, he explains that, in the courts of England, a British monarch can do no wrong. *Id.* at 235–37. That does not mean, he explains, that a king can do what he pleases. BLACKSTONE, *supra* note 120, at 236–37. Instead, the courts will assume that if a king violates the law, he must have been defrauded or misled by his "wicked ministers" and "evil counselors." *Id.* at 237–39. The king's officials—not the king—could then be punished through impeachment or other legal process for the alleged violation of law. *Id.* Blackstone's treatment of royal succession is an even starker example of Parliamentary supremacy: since the Glorious Revolution of 1688–89 (and arguably since the Restoration of 1660), Parliament, not the king, determined who should be king. 1 BLACKSTONE, *supra* note 121, at 181.

[139] The privy council appears to be an attractive analogue to the President's Cabinet, but during the Convention, the delegates rejected a privy-counsel-like entity several times. 1 FARRAND'S RECORDS, *supra* note 72, at 28, 66, 70–71 (Madison arguing for a single executive but with an executive "Council"), *id.* at 74 (Madison again arguing for a single executive with an advisory executive council); 2 FARRAND'S RECORDS, *supra* note 72, at 337–42 (Gouverneur Morris's proposal for constitutional cabinet officers removable at will by the President), *id.* at 537 (George Mason arguing for a six-member "privy Council").

[140] *See* Mortenson, *supra* note 114, at 1230–31.

[141] *See* 1 BLACKSTONE, *supra* note 121, at 255–56 (discussing the king's power to issue proclamations to execute laws passed by parliament); Mortenson, *supra* note 114, at 1230–34.

[142] Mortenson, *supra* note 114; Kent, *supra* note 114.

[143] Mortenson, *supra* note 114, at 1173.

[144] *See Chapter the Seventh: Of the King's Prerogative*, *in* 1 BLACKSTONE, *supra* note 121 (listing thirty-nine different prerogatives); Mortenson, *supra* note 114, at 1230–43.

[145] Mortenson, *supra* note 114, at 1237–43. There is an ongoing and sometimes contentious debate about whether in the 18th century the term "executive power" included a well-defined set of other powers, like removal. *See* Bamzai & Prakash, *The Executive Power of Removal*, *supra* note 66, at 1764–82, 1790 (arguing that "executive power" included a suite of other powers in addition to law execution); Katz & Rosenblum, *supra* note 68, at 406–15, 423–24 (arguing evidence in the Executive Power of Removal does not support the claim that "executive power" included the power to remove subordinate officials); Bamzai & Prakash, *How to Think about Removal*, *supra* note 66, at 170–74 (responding to the arguments in Katz & Rosenblum, *supra* note 68); Katz, Rosenblum & Manners, *supra* note 70, at 562–66 (responding to Bamzai & Prakash, *How to Think about Removal*, *supra* note 66); Shugerman, *Venality*, *supra* note 71, at 215, 227 (challenging the claims made in the Bamzai & Prakash, *The Executive Power of Removal*, *supra* note 66).

[146] 1 FARRAND'S RECORDS, *supra* note 72, at 67. Madison's initial proposal did not include a role for the Senate in appointments. *Id.* An inference could be drawn that, at least for Madison, the power to execute the laws might not include a power to appoint. Rather, in Madison's proposal, the appointment power is presented as a conceptually separate power. *Id.* at 67. When introducing his proposal, Madison equivocated about whether the appointment power was needed as a separate power because it might be redundant with the executive power. *Id.* Madison "did not however see any inconveniency in retaining them, and cases might happen in which they might serve to prevent doubts and (continued...)

Similar debates have arisen over how to interpret the meaning of the Take Care Clause. On one side of the debate are those who read the clause to both impose a duty and to imply some other power not already specified in Article II, such as the power to remove subordinate officials.[147] On the other side are those who interpret the clause to impose a duty on the President but not any additional powers.[148] As with the Vesting Clause, the Supreme Court's decision in *Myers* is a useful starting point. *Myers* was one of the first Supreme Court cases to present the view that the Take Care Clause carried with it the implied power to remove subordinate officials.[149] In reasoning that has now become familiar in Supreme Court cases evaluating presidential removal authority, *Myers* explained that as a single person, the President cannot be expected to carry out the functions of government alone, and[150] the President must therefore appoint subordinates to help execute federal law.[151] To give effect to his duty to ensure that federal law is "faithfully executed," the theory posits that the Clause must, accordingly, imply some kind of supervisory power over subordinate officials—namely, the power to remove them at will.[152] Subsequent Supreme Court cases have reasoned that the Framers adopted this interpretation, as later articulated in *Myers*, to ensure presidential control over the executive branch.[153]

In response, some scholars argue that it is not clear that the Take Care Clause's meaning can be understood to include a general power of removal.[154] This argument proceeds from an observation that the delegates to the Convention do not appear to have discussed removal outside of impeachment.[155] To the extent that the Framers discussed how the laws should be executed, it was predominantly in the context of *who* would assist the President in doing so, not how those

misconstructions." *Id.* One could contrast Madison's apparently weakly held assumption that appointment could be a distinct power with Blackstone's stark treatment of erecting and disposing of offices and the proclamation power (executive power). *Chapter the Seventh: Of the King's Prerogative*, *in* 1 BLACKSTONE, *supra* note 121. *But see* Bamzai & Prakash, *The Executive Power of Removal*, *supra* note 66, at 1765 (arguing that Madison's equivocation should be understood to mean that Madison thought that the appointment power was included in his conception of "executive power"). Notwithstanding this particular dispute, Madison's views about appointment may not be representative of the delegates to the Convention. The appointment power took a long and circuitous route through the debates in the Convention before it ultimately landed split between the President and Senate. *See supra* "The Constitutional Convention."

[147] *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484 (2010); Myers v. United States, 272 U.S. 52, 117 (1926); MCCONNELL, *supra* note 66, at 262; Bamzai & Prakash, *The Executive Power of Removal*, *supra* note 66, at 1775; Ilan Wurman, *The Original Presidency: A Conception of Administrative Control*, 16 J. LEGAL ANALYSIS 26, 37 (2024); Saikrishna B. Prakash, *Faithless Execution*, 133 HARV. L. REV. F. 94, 97–99 (2020); Calabresi & Prakash, *supra* note 66, at 583.

[148] Ethan J. Leib, Jed H. Shugerman & Andrew Kent, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2178 (2019); Lessig & Sunstein, *supra* note 71, at 61–70.

[149] *Myers*, 272 U.S. at 117 (citing 1 ANNALS OF CONG. 474 (1789) (statement of Fisher Ames) ("As he is charged specifically to take care that they be faithfully executed, the reasonable implication . . . must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.")), 122 ("[W]hen the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.").

[150] *Id.*; *see also Free Enter. Fund*, 561 U.S. at 484; Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 203–04 (2020).

[151] *Myers*, 272 U.S. at 117.

[152] *Id.*

[153] *Id.* at 117–123; *Free Enter. Fund*, 561 U.S. at 483–84; *Seila Law*, 591 U.S. at 203–04.

[154] Leib, Shugerman & Kent, *supra* note 148, at 2178; Lessig & Sunstein, *supra* note 71, at 61–70; Chabot, *Interring the Unitary Executive*, *supra* note 23, at 142–43, 182; Corwin, *supra* note 20, at 384.

[155] *See supra* "The Constitutional Convention."

individuals were to be removed.[156] The delegates similarly did not debate what, if any, powers were included in the execution of laws.[157] Pursuant to this reasoning, these scholars reason that if removal is so central to fulfilling the duty of faithful execution, as some claim it is, then it is odd that the delegates to the Convention did not mention it.[158] Rather, some scholars argue, the Take Care Clause imposes a fiduciary duty on the President cabining the President's discretion when executing the laws that Congress has enacted.[159]

More fundamentally, some argue that the shift in wording from Randolph's and Madison's original proposals granting the President the power to carry into effect federal law to the actual Take Care Clause, which is phrased as a duty, indicates that the delegates were wary of providing the President the power to determine for himself by what means he would execute the law.[160] In debating the Randolph/Madison formulation, Dr. James McClurg, another delegate from Virginia, asked the Convention by what means the President would execute the law: "Is he to have a military force for the purpose, or to have the command of the Militia, the only existing force that can be applied to that use?"[161]

Rather than specifying how the President was to execute the laws in the text of the Constitution, the Committee of Detail drafted the Take Care Clause. The Take Care Clause rephrased Madison's power as a duty and allocated the power to determine the means of executing federal law to Congress through the Necessary and Proper Clause.[162] The Necessary and Proper Clause declares that Congress "shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[163] On this reading of the Constitution, the delegates allocated to the President the duty to execute federal law and to Congress the power to determine the ends and means by which the President is to carry out his duty.[164] This interpretation of the interplay between the Necessary and Proper Clause and the Take Care Clause has roots dating back to at least 1789.[165] In an 1835 debate in

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[156] *See* 2 FARRAND'S RECORDS, *supra* note 72, at 69 (debating exactly who would execute the laws).

[157] *See supra* "The Constitutional Convention."

[158] Katz, Rosenblum & Manner, *supra* note 70, at 562–63.

[159] Leib, Shugerman & Kent, *supra* note 148, at 2178; Chabot, *Interring the Unitary Executive*, *supra* note 23, at 142-43.

[160] Lessig & Sunstein, *supra* note 71, at 61–70.

[161] 2 FARRAND'S RECORDS, *supra* note 72, at 69. Under the Constitution, states appoint officers of their own militias, and Congress has the power to call "forth the Militia to execute the Laws of the Union." U.S. CONST. art. I, § 8.

[162] Lessig & Sunstein, *supra* note 71, at 68; Gary Lawson & Jed H. Shugerman, *Presidential Removal as Article I, Not Article II*, 121 NW L. REV. 3 (forthcoming Fall 2026).

[163] U.S. CONST. art. I, § 8.

[164] Lessig & Sunstein, *supra* note 71, at 66–68. Lawson & Shugerman, *supra* note 162, at 3. It was not unusual for the delegates at the Convention to divide powers that were unified under the British monarchy as prerogative powers. For example, the power to appoint officials was considered a royal prerogative (1 BLACKSTONE, *supra* note 121, at 262), but the Framers divided the power between the President (nomination) and the Senate (advice and consent). U.S. CONST. art. II, § 2, cl. 2.

[165] DAILY ADVERTISER (June 19, 1789), *reprinted in* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 888 (Charlene Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds. 1992) [hereinafter FIRST CONGRESS DOCUMENTS] (statement of Rep. John Laurance) ("From all these circumstances, he concluded that the Congress had the right and that it was their duty to supply the deficiency in the constitution. The same constitution, which had given them the power of establishing offices, had given them a right of making all the particular provisions, whenever the constitution was silent, which were necessary to carry that general power into effect."); CONG. REG. (June 17, 1789), *reprinted in* 11 FIRST CONGRESS DOCUMENTS, *supra* at 906 (statement of Rep. Thomas Hartley) ("I look upon it that the legislature have therefore a right to exercise their discretion on such questions; and however attentively gentlemen may (continued...)

the Senate over presidential patronage and tenure of office for executive officials, Senator John C. Calhoun gave a speech laying out this argument in some detail. He declared the following:

> Well, then, as there is none such [power to remove expressly provided for in the Constitution], if it exists at all, it must exist as a power necessary and proper to exercise some granted power; but if it exists in that character, it belongs to Congress and not to the Executive. It follows, of course, to whatever express grant of power to the Executive the power of dismissal may be supposed to attach, whether to that of seeing the law faithfully executed, or to the still more comprehensive grant, as contended for by some, vesting executive powers in the President, the mere fact that it is a power appurtenant to another power, and necessary to carry it into effect, transfers it, by the provisions of the Constitution cited, from the Executive to Congress, and places it under the control of Congress, to be regulated in the manner which it may judge best.[166]

Calhoun's fundamental point was that there are no "implied" powers in the Constitution—there are only expressly granted powers and powers that are necessary and proper to "execute some power expressly granted."[167] If that is the case, he reasoned, then, by virtue of the Necessary and Proper Clause, Congress is vested with the authority to enact laws that grant powers necessary and proper to carrying out powers expressly granted in any other part of the Constitution and regulate how those powers are to be used.[168] Since all agree, he went on, that removal is not expressly granted in the Constitution, it is left to Congress to determine whether and how that power is to be used.[169] This reading presumes that removal power may be necessary (and proper) for the President to fulfill the duty assigned to him by the Take Care Clause but also understands the Necessary and Proper Clause as granting Congress (and not the President) the power to legislate how the President is to supervise subordinate officials, including the removal of those officials.[170] The result of this reading is that, while the Constitution *may* vest the President with the ultimate authority to decide which particular executive official to remove, Congress is vested with the power to regulate under what circumstances removal may occur and what process the President must observe in exercising removal power conferred by Congress.

Publius's Views on Removal: The Federalist Papers

Several statements made in the *Federalist Papers* appear to support the proposition that the Constitution either left the regulation of the tenure of executive officials to congressional regulation or required Senate approval to remove an official. The *Federalist Papers* were a series of essays published in 1787 and 1788 by James Madison, Alexander Hamilton, and John Jay

have examined the constitution on this point, I trust they have discovered no clause which forbids this house from interfering in business necessary and proper to carry the government into effect."); *id.* at 938 (statement of Rep. John Vining) (noting that the power to remove, if not prohibited by the Constitution must be "either . . . incidental to the executive department, or under that clause which gives to congress all the power necessary and proper to carry the constitution into effect."); CONG. REG. (June 18, 1789), *supra* at 962 (statement of Rep. Richard Bland Lee) ("the constitution vests in congress power to make all laws necessary and proper to carry into executive to the powers vested by the constitution in the government of the United States, or in any department or officer thereof. Have not congress, therefore, the power of making laws [regarding removal] they think proper.").

[166] 11 REG. DEB. 553 (1835). Two years earlier, a similar and much lengthier debate broke out in the Senate in response to President Andrew Jackson's removal of his treasury secretary. 10 REG. DEB. 1187 (1834) (the Senate resolved to censure Jackson for the removal).

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] Lessig & Sunstein, *supra* note 71, at 66–68; Corwin, *supra* note 20, at 384.

under the pen name "Publius" to urge the adoption of the newly drafted Constitution.[171] For many judges, the *Federalist Papers* are persuasive evidence of the meaning of the Constitution presented by authors (Madison and Hamilton, in particular) who were delegates to the Convention.[172]

In *The Federalist No. 39*, James Madison set out to describe the republican, federal, and national aspects of the new Constitution.[173] In a passage discussing the tenure of the President (a four-year term) and federal judges (good behavior), Madison noted that "The 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."[174] In an earlier passage and in support of an argument that the new Constitution does not create an aristocracy or monarchy, Madison explained that a republic derives all of its power from the people and that a republican government is "administered by persons holding their offices during pleasure, for a limited period, or during good behavior."[175]

Some scholars have examined these passages in an attempt to ascertain Madison's views on removal during the ratification debates. They assert that the passages show Madison's belief that Congress could regulate terms of offices for executive officials, including their removal, and that, as shown by his reference to three different tenures, there was no default or background rule that all executive officers served at the pleasure of the President.[176] As noted above, historians have catalogued several offices in the British government that historically were not held at the pleasure of the monarch.[177]

In *The Federalist No. 77*, Alexander Hamilton surveyed the "structure and powers" of the executive branch.[178] He explained that Congress would play a role in removals[179] but, unlike Madison, took the position that Senate consent would be required to remove executive officials.[180] The Senate, he asserted, would serve an important stabilizing function for the executive branch, explaining the following:

> The consent of [the Senate] would be necessary to displace as well as to appoint. A change of [the President] therefore would not occasion so violent or so general a revolution in the officers of the government, as might be expected if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new president would be restrained from attempting change, in favour of a person more agreeable to him, by the apprehension that the discountenance of the senate might frustrate the attempt, and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration will be most disposed to prize a provision, which connects the official existence of public men with the approbation or disapprobation of that

[171] THE FEDERALIST PAPERS vii–viii (Pocket Books ed. 2004).

[172] *See, e.g.*, NLRB v. Noel Canning, 527 U.S. 513, 523 (2014) (relying on the Federalist Papers for interpreting the Appointments Clause); Bamzai & Prakash, *The Executive Power of Removal*, supra note 66, at 1771–72, 1785 (discussing the Federalist Papers as evidence of the founders views on removal); Menand & Manners, *supra* note 68, at 20; Shugerman, *Venality*, *supra* note 71, at 237, 240–42.

[173] THE FEDERALIST NO. 39 at 269 (James Madison).

[174] *Id.* at 272.

[175] *Id.* at 270.

[176] Shugerman, *The Indecisions of 1789*, *supra* note 68, at 773–74; Shugerman, *Venality*, *supra* note 71, at 241–42; Manners & Menand, *supra* note 68 at 20–21.

[177] *See supra* notes 68–74, 121–146, and accompanying text.

[178] *Id.* at 552.

[179] THE FEDERALIST NO. 77 at 547 (Alexander Hamilton).

[180] *Id.*

> body, which from the greater permanency of its own composition, will in all probability be less subject to inconstancy than any other member of the government.[181]

This passage highlights the value Hamilton placed on stability and continuity that could be attained, in his view, only by retaining officials from one presidential administration to the next.[182] Hamilton then asserted that, when presidential abuse of powers is most feared, the President is "subjected to the controul" of the Senate.[183] One potential way to understand Hamilton's argument is as a refutation of anti-federalist arguments that the Constitution created an overbearing executive.[184] As with Madison's statements in *The Federalist No. 39*, some scholars see Hamilton's statements as persuasive evidence that the Framers either expected the President and the Senate to share the power of removal or, at the very least, that Congress would play a role in regulating removal.[185] In either case, Hamilton, like Madison, did not appear (at the time of writing the *Federalist Papers*) to believe that the President would have sole and unlimited power to remove executive officials.

For some scholars, however, these statements in the *Federalist Papers* do not settle the matter of the Founder's views on executive removal power. For one, these scholars argue, Hamilton and Madison later recanted their views during the debates over removal in the First Congress, discussed below.[186] These scholars also observe that several other prominent writers of the time contended that "executive power" carried with it the power of removal.[187] For example, Thomas Jefferson, while governor of Virginia, wrote that the "power of appointing and removing executive officers [is] inherent in [the] Executive."[188] Luther Martin, a Maryland delegate to the Convention writing during debates over the ratification of the Constitution, assumed the Constitution would make those appointed by the President "dependent on his will and pleasure" and be "subservient to his wishes."[189] Although Martin was a delegate to the Convention, he did not sign the Constitution and became a "bitter opponent" of its ratification.[190] His statements alluding to the power to remove were in service of his warning to the Maryland legislature of the

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[181] *Id.* at 547–48.

[182] *See id.*

[183] THE FEDERALIST NO. 77 at 552 (Alexander Hamilton).

[184] *See, e.g.*, 3 FARRAND'S RECORDS, *supra* note 72, at 172 (Luther Martin's Genuine Information); Cato No. III (Oct. 25, 1787), *reprinted in* 19 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 122, at 125–30; Cato No. IV (Nov. 8, 1787), *reprinted in* 19 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 122, at 195–99; Cato No. V (Nov. 22, 1787), *reprinted in* 19 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 122, at 276–81; An Old Whig No. V (Oct. 1787-Feb. 1788), *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 34–38 (Herbert J. Storing, ed. 1981).

[185] Lessig & Sunstein, *supra* note 71, at 25, n.114; Shugerman, *The Indecisions of 1789*, *supra* note 68, at 758 n.11, 774 n.106. Justice Joseph Story, in his *Commentaries on the Constitution of the United States*, takes a similar view. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1538 (1833).

[186] Prakash, *New Light on the Decision of 1789*, *supra* note 66, at 1038 n.121 (discussing Hamilton's views in No. 77 and his contrary views in a letter sent to a Member of Congress during the First Congress); Bamzai & Prakash, *supra* note 65, at 173–74 (discussing Madison's statements during the First Congress); Shugerman, *The Indecisions of 1789*, *supra* note 68, at 778–79 (discussing instances where Madison and Hamilton depart from their statements in the *Federalist Papers* during the First Congress).

[187] Bamzai & Prakash, *The Executive Power of Removal*, supra note 66, at 1773–75; Bamzai & Prakash, *How to Think about Removal*, *supra* note 66, at 171.

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

[189] Luther Martin, *Genuine Information*, *in* 3 FARRAND'S RECORDS, *supra* note 72, at 172, 218.

[190] GIENAPP, THE SECOND CREATION, *supra* note 68, at 64.

dangers of the presidency created by the Constitution.[191] Lastly, these scholars point to early presidential and congressional practice in the years following the ratification of the Constitution.[192] Even if the meaning of the Constitution on this point was ambiguous, these scholars argue, the debates and legislative decision of the First Congress and the opinions and actions of the Washington and Adams Administrations established a practice that the President wielded unrestricted power to remove subordinates.[193] Both Hamilton's and Madison's views continued to be the subject of extensive debate throughout the rest of the 18th and 19th centuries.

The Debates of 1789

In the spring of 1789, the First Congress elected under the newly ratified Constitution met in Federal Hall on Wall Street in lower Manhattan. Less than a year had passed since the ratification of the Constitution, and the First Congress was meeting to create a new government from scratch. After electing the officers of each chamber, certifying the election of George Washington as President, and debating and passing revenue bills, Congress turned to expanding the executive branch.[194] By June, Congress was debating the creation of the first executive departments. The debate opened over whether to address the treasury department first and deal with others later or whether to determine how many departments there should be.[195] Ultimately, the House resolved to create three departments: Foreign Affairs, Treasury, and War.[196] James Madison proposed that each should be headed by a secretary, nominated and appointed by the President by and with the advice and consent of the Senate and to be removable by "the president alone."[197] Debate immediately erupted over the removal provision.[198] This debate "has been many times described as one of the ablest constitutional debates which has taken place in congress since the adoption of the constitution."[199]

[191] 3 FARRAND'S RECORDS, *supra* note 72, at 172. Taken as a whole, Luther Martin's speech appears to link his fear of a tyrannical presidency to the President's control of the army and navy through the commander in chief clause. *Id.* at 218. He appears to assume that the commander in chief clause brings with it the power to remove officers of the armed forces who do not follow his commands. *Id.* He does not refer to the Take Care Clause or the Vesting Clause when inveighing against the presidency. *Id.* At least one scholar, however, has taken the view that the Commander-in-Chief Clause does not grant the President the power to remove military officers, instead ascribing the power to remove civil and military officers to the Vesting Clause. Saikrishna B. Prakash, *Deciphering the Commander in Chief Clause*, 133 YALE L. J. 1 (2023). According to this argument, although Martin's object of scorn was presidential control over the military, that control comes from the same source as control over civil executive officers. Bamzai & Prakash, *How to Think About Removal*, *supra* note 66, at 171–72.

[192] Calabresi & Prakash, *supra* note 66, at 646; Bamzai & Prakash, *The Executive Power of Removal*, *supra* note 66, at 1802–23.

[193] Bamzai & Prakash, *The Executive Power of Removal*, *supra* note 66, at 1802–23.

[194] Subjects Debated in the House of Representatives, *reprinted in* 10 FIRST CONGRESS DOCUMENTS, *supra* note 165, at lxi–lxii.

[195] *See* DAILY ADVERTISER (May 19, 1789), *reprinted in* 10 FIRST CONGRESS DOCUMENTS, *supra* note 165, at 718 ("[Benson] seconded the general propositions, but did not agree in the propriety of entering into the particulars of the arrangement, till the house had determined the general question, how many departments should be established.").

[196] *Id.*

[197] GAZETTE OF THE UNITED STATES (May 20, 1789), *reprinted in* 10 FIRST CONGRESS DOCUMENTS, *supra* note 165, at 720–21.

[198] *Id.*

[199] Parsons v. United States, 167 U.S. 324, 329 (1897).

The House took up the proposal creating the Department of Foreign Affairs first.[200] Four loose factions quickly arose around different views of the President's removal authority.[201] Historians have labeled the four factions as the "presidential" faction, the "congressional" faction, the "senatorial" faction, and the "impeachment" faction.[202] The "congressional" faction believed that Congress could set the terms of removal of officers; the "presidential" faction believed that Article II created an implied presidential removal power; the "senatorial" faction believed that the Senate must consent to removal of officers appointed with Senate confirmation; and the "impeachment" faction believed that the Constitution provided only one way to remove officials—impeachment.[203] As some have noted, these factions were fairly fluid, and some Members did not fit neatly into one or the other faction.[204] Over the course of four days of debate, the House wrangled over whether to include explicit presidential removal authority in the bill creating the Foreign Affairs department.[205]

James Madison's views appear to have shifted during the course of the debate.[206] He first declared that he thought it "absolutely necessary that the president should have the power of removing from office."[207] Later that same day, he said of the tenure of officers: "Congress may establish offices by law . . . . [I]t is in the discretion of the Legislature to say upon what terms the office shall be held, either during good behaviour or during pleasure."[208] Madison's views, however, appear to have shifted toward the presidential faction over the course of the debate and later votes. In one exchange, Madison explained that he had taken the time to examine the Constitution more closely and "acknowlege[d] that it does not perfectly correspond with the ideas I entertained of it from the first glance."[209] "By a strict examination of the Constitution," Madison said, "the executive powers are . . . unabateable . . . and inasmuch as the power of removal is of an executive nature, and not affected by any constitutional exception, it is beyond the reach of the

[200] DAILY ADVERTISER (June 17, 1789), *reprinted in* 11 FIRST CONGRESS DOCUMENTS, *supra* note 165, at 842.

[201] Corwin, *supra* note 20, at 361; Shugerman, *The Indecisions of 1789*, *supra* note 68, at 776; Prakash, *New Light on the Decision of 1789*, *supra* note 66, at 1034.

[202] Corwin, *supra* note 20, at 361; Shugerman, *The Indecisions of 1789*, *supra* note 68, at 776; Prakash, *New Light on the Decision of 1789*, *supra* note 66, at 1034.

[203] Corwin, *supra* note 20, at 361; Prakash, *New Light on the Decision of 1789*, *supra* note 66, at 1034.

[204] Prakash, *New Light on the Decision of 1789*, *supra* note 66, at 1034.

[205] 1 ANNALS OF CONG. 455–577 (1789).

[206] Although this section primarily focuses on statements made by James Madison, he is not necessarily representative of the views of all the other Members of the House. Due to his shifting views, however, his statements appear to capture a fairly broad swath of the arguments. As noted above, scholars have identified at least four loose factions that formed in the House, each with distinct views about the President's power to remove. By way of example, there were those like Representative Egbert Benson, who appeared to be more presidentialist than Madison and stated that, because the Constitution specifically set the tenure of judges for life during good behavior, "it follows that the other officers of the government should hold them only at pleasure." Others, like Representative Theodorick Bland, asserted that if the President did have the power to remove without the Senate's consent, it would "render[] almost nugatory" the Senate's power "respecting the appointment to office." Echoing *The Federalist No. 77*, Bland, along with Alexander White, thought that Senate consent was needed to remove. Still others, like Representative John Laurance, argued that "the constitution had certainly intended that congress should define the tenure of office, or it would never have declared the judges should continue during good behaviour; this constitutional provision in their favor, as to render them independent of the legislature."

[207] CONG. REG. (May 19, 1789), *reprinted in* 10 FIRST CONGRESS DOCUMENTS, *supra* note 165, at 724.

[208] *Id.* at 730. This statement largely reflects his views in *Federalist No. 39*. *See supra* notes 173–175 and accompanying text.

[209] CONG. REG. (May 19, 1789), *reprinted in* 10 FIRST CONGRESS DOCUMENTS, *supra* note 165, at 867.

legislative body."[210] Later, when debating the bill that would create the Department of the Treasury, his views appeared to shift again back toward the congressional faction.[211]

Like Madison, Alexander Hamilton's views on removal also appear to have shifted. At the outset of the debate over the removal language in the foreign affairs bill, Representative William Loughton Smith rose to argue that, outside of impeachment, he could see only one other avenue to removal: Senate consent.[212] In his speech, Smith quoted directly from Hamilton's *Federalist No. 77* to support his views.[213] Smith later recounted in a letter that the day after his speech:

> [Representative Egbert] Benson sent me a note across the house to this effect: that Publius [Hamilton] had informed him since the preceding day's debate, that upon more mature reflection he had changed his opinion & was now convinced that the [President] alone [should] have the power of removal at pleasure; [h]e is a Candidate for the office of Secretary of Finance![214]

After days of vigorous debate in the House, sitting as the Committee of the Whole, the "presidential" and "congressional" factions that supported including explicit removal language (i.e., "to be removable by the President") overcame the "senatorial" and "impeachment" factions and voted, by a majority vote of 33 (or 34) to 20, to amend the foreign affairs bill to include such explicit removal language.[215] This outcome was short-lived, however. When the House took up the bill just days after the committee vote, and potentially because of Senate opposition or concerns that the language as passed favored a "congressional" view, Madison and Benson proposed new language for the foreign affairs bill.[216] The new amendments deleted the explicit

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[210] *Id.* at 869. What Madison appears to have meant by "beyond the reach of the legislative body" is that removal is beyond regulation by statute, but not impeachment. During the debates, Madison, among others, argued the following:

> The danger then consists merely in this, that the President can displace from office a man whose merits require that he should be continued in it. What will be the motive which the President can fell for such abuse of his power, and the restraints that operate to prevent it? In the first place he will be impeachable by the House, for such an act of mal-administration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust.

Id. at 924**.** John Vining and John Laurance expressed similar views. *Id.* at 889, 936.

[211] CONG. REG. (June 29, 1789), *reprinted in* 11 FIRST CONGRESS DOCUMENTS, *supra* note 165, at 1080.

Regarding his proposal for a comptroller within the treasury department, Madison explained his view of Congress's authority to limit removal of officials with a "judicial character":

> The principal duty [of the comptroller] seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and the particular citizens; this partakes strongly of the judicial character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the government. . . . Whatever, mr. chairman, may be my opinion with respect to the tenure by which an executive officer may hold his office according to the meaning of the constitution, I am very well satisfied, that a modification by the legislature may take place in such as partake of the judicial qualities, and that the legislative power is sufficient to establish this office on such a footing, as to answer the purposes for which it is prescribed.

Id.

[212] CONG. REG. (June 16, 1789) *reprinted in* 11 FIRST CONGRESS DOCUMENTS, *supra* note 165, at 861.

[213] *Id.*

[214] Letter from William Smith (S.C.) to Edward Rutledge (June 21, 1789), *reprinted in* 16 FIRST CONGRESS DOCUMENTS, *supra* note 165, at 832–33. Smith appears to ascribe Hamilton's change of heart to personal ambition in gaining a position within the Washington administration.

[215] 1 ANNALS OF CONG. 576 (1789) (reporting a vote of 34–20); GAZETTE OF THE UNITED STATES (June 20, 1789), *reprinted in* 11 FIRST CONGRESS DOCUMENTS, *supra* note 165, at 993 (reporting a vote of 33–20).

[216] *See* GAZETTE OF THE UNITED STATES (June 22, 1789), *reprinted in* 11 FIRST CONGRESS DOCUMENTS, *supra* note 165,

(continued...)

language regarding the President's power to remove and inserted a new clause stating that, if the Secretary were removed, a subordinate would take charge of the records of the department until the secretary position was filled.[217] This new version passed the House over the course of three votes, each with a shifting coalition in the majority.[218] The first vote approved an amendment adding the new language about custody of the department's papers in the event of a vacancy.[219] The second vote approved an amendment deleting the explicit removal language.[220] The third vote approved the final bill as amended.[221] The Senate then deadlocked 10-10. John Adams (who, as Vice President, was President of the Senate) cast the deciding vote in favor of the bill.[222]

At first glance, these events show a decision by the House to replace clear language about removal with an ambiguous clause about the fate of the department's records were a Secretary to be removed. On closer inspection, however, the explicit language about removal was itself ambiguous about the source of the power to remove. As a result, the debate appears to trigger a number of interpretive questions: By referencing removal in the bill in any way, was Congress asserting its authority to define the terms and limits of an office? Or was Congress simply restating what it believed the Constitution implied? Similarly, by replacing the removal language with the apparently more ambiguous clause referencing the possibility of removing the Secretary, was Congress implying that the Constitution vested removal power with the President? Or was the House introducing ambiguity strategically so that the various factions could read the language as they liked without resolving the question of the President's removal power? While more than two centuries separate the First Congress from modern debates about presidential removal authority, the question of what, if anything, that Congress decided and whether it was a correct interpretation of the Constitution began prompting disputes among judges and scholars almost immediately that continue to the 21st century.

Reception of the Debates of 1789

For much of the two centuries since the initial debates over and amendments of the bill, scholars have proposed opposing views as to what inferences to draw regarding the President's removal authority. In the early decades of the 19th century, two of America's most prominent legal commentators of the time—Chancellor James Kent of New York and Justice Joseph Story—

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at 1027 (statement of Rep. Benson) (conceiving that the amendment "would more fully express the sense of the committee, as it respected the constitutionality of the decision which had taken place"); CONG. REG. (June 22, 1789), *reprinted in* 11 FIRST CONGRESS DOCUMENTS, *supra* note 165, at 1029 (statement of Rep. Madison) (admitting "the objection made by the gentleman near him (Mr. Benson) to the words in the bill; they certainly may be construed to imply a legislative grant of the power. He wished every thing like ambiguity expunged, and the sense of the house explicitly declared"); Shugerman, *The Indecisions of 1789*, *supra* note 68, at 779–84 (discussing the potential of Senate opposition to the House language); Prakash, *New Light on the Decision of 1789*, *supra* note 66, at 1025 (ascribing the new proposal to desires by the presidential faction to remove any doubt about whether congress could regulate removal).

[217] GAZETTE OF THE UNITED STATES (June 22, 1789), *reprinted in* 11 FIRST CONGRESS DOCUMENTS, *supra* note 165, at 1027.

[218] JOURNAL OF THE FIRST SESSION OF THE HOUSE OF REPRESENTATIVES (June 22, 1789), *reprinted in* 3 FIRST CONGRESS DOCUMENTS, *supra* note 165, at 91–93; *id.* (June 24, 1789) at 95; *see also* Shugerman, *The Indecisions of 1789*, *supra* note 68, at 864 (including a table of which representatives voted for which provisions).

[219] JOURNAL OF THE FIRST SESSION OF THE HOUSE OF REPRESENTATIVES (June 22, 1789), *reprinted in* 3 FIRST CONGRESS DOCUMENTS, *supra* note 165, at 91–92.

[220] *Id.* at 93.

[221] JOURNAL OF THE FIRST SESSION OF THE HOUSE OF REPRESENTATIVES (June 24, 1789), *reprinted in* 3 FIRST CONGRESS DOCUMENTS, *supra* note 165, at 95.

[222] The Diary of William Maclay and Other Notes on Senate Debates (July 16, 1789), *reprinted in* 9 FIRST CONGRESS DOCUMENTS, *supra* note 165, at 115 (recording the vote on July 16).

published their commentaries on American law, both of which addressed the meaning and significance of the debates of 1789. Both took the view that the debates of 1789 could be understood as a sense of Congress that the President held the power to remove subordinate officials, although they differed on whether the Constitution in fact vested such a power with the President. Relying on *The Federalist No. 77*, Chancellor Kent recognized that the view of commentators at the time of the ratification debates was that Senate consent would be needed to remove executive officials.[223] Kent observed, however, that the First Congress's view was different. In his understanding, the enactment of the bills creating the first federal departments represented Congress's construction of the Constitution that the President wielded the power to remove federal officials.[224] This construction, he noted, "has ever since been acquiesced in, and acted upon, as decisive authority in the case."[225]

Justice Story's commentaries largely mirrors Kent's account. Story also refers to *The Federalist No. 77* (and Senate approval of removal) as the prevailing view prior to ratification but then explains that the House's ultimate passage of the foreign affairs bill "was affirmative of the power of removal in the president, without any co-operation of the senate."[226] "The public," he later writes, "acquiesced in this decision," which "has not been questioned on many other occasions."[227]

Chancellor Kent and Justice Story both seemed surprised that the important constitutional practice of removal appeared to be settled by legislative action and general acquiescence. Kent wrote the following:

> It is, however, a striking fact in the constitutional history of our government, that a power so transcendent as that is, which places at the disposal of the president alone, the tenure of every executive officer appointed by the president and senate, should depend upon inference merely, and should have been gratuitously declared by the first congress, in opposition to the high authority of the *Federalist*; and should have been supported or acquiesced in by some of those distinguished men who questioned or denied the power of congress, even to incorporate a national bank.[228]

Similarly, Story reflected that the events of 1789 "constitute[], perhaps, the most extraordinary case in the history of the government of a power, conferred by implication on the executive by the assent of a bare majority of congress."[229]

Kent and Story diverged, however, over the original meaning of the Constitution and the desirability of Congress's decision. Kent "entertain[ed] no manner of doubt of the good sense and practical utility of the construction."[230] He reasoned that the President ought to have the power to remove because "he is invested generally with the executive authority, and every participation in

[223] 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 288–90 (1826).

[224] *Id*.

[225] *Id*. at 289.

[226] 3 STORY, *supra* note 185, § 1536.

[227] *Id*. § 1537.

[228] 1 KENT, *supra* note 223, at 290.

[229] 3 STORY, *supra* note 185, § 1537.

[230] 1 KENT, *supra* note 223, at 290. Chancellor Kent's views are complicated somewhat by an 1830 letter he wrote to Sen. Daniel Webster. In that letter, he expressed "doubt" about his views in his Commentaries. Kent wrote that he began "to have a strong suspicion that Hamilton [in *The Federalist No. 77*] was right." He later goes on to express dismay that the "the President grossly abuses the power of removal" but that, "after a declaratory act of Congress and an acquiescence of half a century," it would "hurt the reputation of our government with the world" to require Senate consent to remove. 1 THE PRIVATE CORRESPONDENCE OF DANIEL WEBSTER 486–87 (Fletcher Webster ed. 1857).

that authority by the senate was an *exception* to a general principle."[231] He added that the President was also responsible for faithfully executing the law "and the power of removal was incidental to that duty, and might often be requisite to fulfil it."[232]

Although Story agreed with Kent on how to understand the debates of the First Congress, he did not interpret the Constitution to vest the President alone with the power to remove. In his view, because the Constitution split appointment authority between the Senate and the President, the power to remove "belong[ed] conjointly" to the President and the Senate.[233] It would be "unjustifiable," Story thought, to hold otherwise.[234]

Story also took a more constrained view of the President's removal power. He noted that, during the ratification debates, none of the supporters of ratification (e.g., the authors of the *Federalist Papers*) claimed that the President would have the power to remove.[235] Rather, it was *opponents* of ratification—broadly known as Anti-Federalists—that argued that such a power existed as a reason for *rejecting* the Constitution. The Anti-Federalist fears, Story worried, had come true. Not even the monarchies of Europe, Story argued, had an "unlimited power" to remove subordinates.[236]

Both the courts and legal scholars have continued to dispute the proper inferences to draw from the debates of 1789. For its part, the Supreme Court's engagement with the events surrounding the passage of the foreign affairs bill in 1789 waxed and waned over the course of the 19th and 20th centuries. Beginning around the mid-19th century, the Supreme Court articulated the view that passage of the Foreign Affairs bill in 1789 constituted a decision that, in the view of Congress, the Constitution vested the President with the power to remove subordinate officials.[237] The Court's most extensive treatment of the debates of 1789, however, appeared more than 100 years later in *Myers* when the Court struck down a statute that required Senate consent to remove postmasters.[238] In the Court's view, this outcome flowed directly from the First Congress's enactment of the foreign affairs bill in 1789. The *Myers* Court understood the debates of 1789 as "clear . . . that the exact question which the House voted upon was whether it should recognize and declare the power of the President under the Constitution to remove the Secretary of Foreign Affairs without the advice and consent of the Senate. That was what the vote was taken for."[239] Congress's "decision" in 1789, according to the Court, determined that the President had an unlimited power of removal, thereby excluding the Senate from removal decisions. Invalidating a congressional statute to the contrary was the natural consequence of what Congress had decided roughly 150 years earlier.

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[231] 1 KENT, *supra* note 223, at 289 (emphasis added).

[232] *Id.*

[233] 3 STORY, *supra* note 185, § 1532.

[234] *Id*. § 1533.

[235] *Id*. §§ 1533–34.

[236] *Id*. § 1533 ("Indeed, it is utterly impossible not to feel that, if this unlimited power of removal does exist, it may be made, in the hands of a bold and designing man, of high ambition, and feeble principles, an instrument of the worst oppression, and most vindictive vengeance.").

[237] *See In re* Hennen, 38 U.S. (13 Pet.) 230, 259 (1839) (concluding that "it was very early adopted, as the practical construction of the Constitution, that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution.").

[238] Myers v. United States, 272 U.S. 52 (1926).

[239] *Id*. at 114.

For the rest of the 20th century, however, the Court paid comparatively little attention to the events of the First Congress.[240] When the Court did discuss the debates in the First Congress, it was to opine that the debates shed relatively little light on the issues before the Court (whether removal provisions were constitutional) or to opine that even Madison expressed "congressional" views when debating the creation of the Treasury Department just weeks after the foreign affairs bill.[241]

In the 21st century, the Court has revived its interest in the events surrounding the passage of the foreign affairs bill and, in particular, demonstrated a renewed commitment to the account of the debates in *Myers*. Beginning with the 2010 decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Court's majority, relying on *Myers*'s account of the events, held that "[s]ince 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary."[242] *Seila Law* and *Collins* then reinforced the Court's view that Congress in fact made a "decision" in 1789 in favor of presidential removal.[243]

For scholars supportive of reading Article II to include an implied power to remove, the deletion of the explicit removal language from the bill, coupled with the reference to the possibility of removal in the replacement language, is clear evidence that Congress decided through the passage of the bill that the President's removal power is constitutionally based and, as such, should be free of congressional regulation.[244] According to these scholars, Congress was aware that the explicit inclusion of removal language in the bill might suggest that Congress—not the Constitution—was the source of the President's removal authority.[245] By deleting that language and inserting the possibility of removal by the President, these scholars (consistent with *Myers*) argue that Congress was recognizing a constitutional basis for the President's power to remove officers uninhibited by congressional interference.[246]

Questioning the "Decision of 1789"

Other scholars question whether Congress made any decision at all in 1789. These scholars contend that the House passed the first version of the bill, which contained explicit removal language, in large part due to a coalition between the "presidential" and "congressional" factions.[247] These factions were not well defined, with Members expressing a mix of arguments in favor of a constitutional source of removal authority with arguments favoring a congressional delegation of removal authority.[248] According to this view, it does not appear to be possible to identify a single, uniform view among those who voted for the first version of the bill.[249]

The circumstances surrounding Madison's proposal—that is, revising the foreign affairs bill to state only that a subordinate would take charge of the records of the department if the Secretary of Foreign Affairs was removed—may further complicate attempts to draw inferences from the

[240] The Debates of 1789 were not, for example, discussed in either *Wiener v. United States*, 357 U.S. 349 (1958), or *Morrison v. Olson*, 487 U.S. 654 (1988).

[241] *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 630–31 (1935).

[242] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483 (2010) (emphasis added).

[243] Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 214 (2020); Collins v. Yellen, 594 U.S. 220, 252 (2021).

[244] Bamzai & Prakash, *The Executive Power of Removal*, *supra* note 66, at 1773–75.

[245] *Id.* at 1775.

[246] *Id.*

[247] Corwin, *supra* note 20, at 377; Shugerman, *The Indecisions of 1789*, *supra* note 68, at 779.

[248] Corwin, *supra* note 20, at 361; Shugerman, *The Indecisions of 1789*, *supra* note 68, at 784.

[249] Corwin, *supra* note 20, at 361; Shugerman, *The Indecisions of 1789*, *supra* note 68, at 778–83.

debates of 1789.[250] Madison's new language appeared to respond to a lack of votes in the Senate to pass the original version of the bill with the explicit removal language in it, indicating that the Senate may have believed that the Constitution required its consent for removal of officers.[251] Debates in the House and Senate over the new language show that several Members in both chambers criticized Madison's new language as being intentionally ambiguous on the question of the President's power to remove in an attempt to gain votes.[252]

Further uncertainty may arise from the fact that the House passed the bill over three separate votes with shifting majorities in each vote. By the count of some scholars, there is no clear majority for the "presidential" faction's view across the three votes.[253] At best, these scholars argue, the historical record demonstrates the most support for the "congressional" faction's view and, at worst, reveals that, with the height of summer approaching and under enormous public pressure to address pressing national problems (e.g., debating the bill of rights, funding the new government, paying down debt, and creating the remaining executive departments), Members sought to sidestep the question of removal altogether.[254]

Conclusion

The modern dispute over the President's power to remove executive branch officials has developed over nearly 250 years of American history. It is a dispute that cannot be resolved by reliance on constitutional text alone, as the Constitution is silent on the issue of removal from office except through impeachment. In the absence of clearly defined roles, the branches have pursued their own constitutional positions, with Congress generally viewing itself as having the authority to restrict, though not eliminate, the President's power to remove those that implement the law through statutory provisions, including language that limits the President's ability to remove certain independent agency leaders except for cause.

In *Slaughter*, the Supreme Court has been asked—consistent with a line of cases interpreting the removal power including *Myers*, *Humphrey's*, *Seila Law*, and others—to decide the constitutional dispute over some of these statutory removal protections. That decision, which may have a significant impact on the President's ability to supervise and Congress's authority to create independent agencies, is likely to involve a discussion of history, including the views expressed during the constitutional convention, within the *Federalist Papers*, and during the First Congress. Records of the historical debates during this period reflect a number of interpretive positions on removal. Ultimately, however, these early sources may not be dispositive or yield sufficiently clear answers to the questions modern judges and scholars ask of them.

[250] Shugerman, *The Indecisions of 1789*, *supra* note 68, at 785.

[251] *Id.* at 783.

[252] *Id*. at 790.

[253] *Id*. at 864.

[254] *Id*. at 839–40; Katz & Rosenblum, *supra* note 68. A related argument questions whether the events of 1789 matter at all to the question of the President's removal authority. Katz & Rosenblum, *supra* note 68. As even supporters of strong presidential removal authority admit, Congress cannot change the meaning of the Constitution by statute alone, nor is it obvious why one Congress's view should be given precedence over the views of other Congresses. Calabresi & Prakash, *supra* note 66, at 570. Lastly, some historians have argued that the debate about removal was wholly unexpected by Members, indicating that there was no background consensus left over from the debates surrounding the ratification of the Constitution. Gienapp, *Removal*, *supra* note 68, at 232. The removal question was new, and Members did not know how to resolve it. Katz & Rosenblum, *supra* note 68.

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