

REMOVAL AND TENURE IN OFFICE

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CONVENTIONAL wisdom supposes that the President enjoys a power to remove all presidentially appointed officers, save for judges. A corollary of this belief is that neither Congress nor the judiciary may remove such officers, for when the Constitution grants the President a power, it often follows that no one else can enjoy that power. This Article argues that these orthodoxies are false. First, contrary to the Supreme Court’s hasty conclusion in *Bowsher v. Synar*, Congress can pass statutes that remove officers. Congress can terminate offices, thereby removing incumbent officers; it can set tenure limits for officers, thus mandating their eventual removal; and it can make removal a consequence of a criminal conviction. Most importantly, Congress can pass statutes that directly and immediately remove officers. Second, the conventional wisdom overstates presidential removal authority in some respects while perhaps understating it in others. On one hand, the accepted view overstates presidential power because it supposes that the President may remove all presidentially appointed officers. If the Constitution grants the President a distinct removal power, that power only encompasses executive officers. Any removal power would not extend to the quasi-legislative, quasi-judicial officers that populate the independent agencies. On the other hand, the orthodoxy arguably understates presidential power because it supposes that all executive officers must have tenure merely at the President’s pleasure. It may well be that the President may grant executive officers a more secure tenure, such as tenure during good behavior. Third, federal courts may remove all inferior judicial officers, however they were appointed. Each inferior judicial officer receives an implicit grant of authority from the court she serves. When a court retracts all of its authority from an inferior judicial officer, the court has removed the officer. In this way, each branch may remove officers, albeit in different ways and to different degrees.

INTRODUCTION

Removal¹ is an under-theorized and relatively unexamined area of constitutional law. What little scholarship there is has its limitations. Existing works focus almost solely on the President's removal power.² Scholars quietly assume that Congress cannot remove officers, except by impeachment.³ Most also say nothing about whether the judiciary may remove officers.⁴ Finally, scholars make few claims about the Constitution's original meaning. Constitutional text supposedly does not address removal, leading many to believe that any quest for original meaning will be fruitless. Hence claims about sound policy, prior practice, and judicial opinions dominate the undersized removal literature.

Given the history of famous removal clashes, the dearth of scholarship is somewhat remarkable. The first Congress debated

¹ The Article uses "removal" and "remove" to mean nothing more than the ousting of an officer from her office. This is the same sense in which the Constitution uses the word. See, e.g., U.S. Const. art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office . . .").

² See, e.g., 1 Corwin on the Constitution 317 (Richard Loss ed., 1981); Charles E. Morganston, *The Appointing and Removal Power of the President of the United States* (Greenwood Press 1976) (1929); Steven Breker-Cooper, *The Appointments Clause and the Removal Power: Theory and Séance*, 60 *Tenn. L. Rev.* 841 (1993); Jonathan L. Entin, *Synecdoche and the Presidency: The Removal Power as Symbol*, 47 *Case W. Res. L. Rev.* 1595 (1997); Martin S. Flaherty, *Relearning Founding Lessons: The Removal Power and Joint Accountability*, 47 *Case W. Res. L. Rev.* 1563 (1997).

The best articles dealing with executive branch removal practice are: Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945–2004*, 90 *Iowa L. Rev.* 601 (2005); Christopher S. Yoo et al., *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 *Notre Dame L. Rev.* 1 (2004); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 *Harv. J.L. & Pub. Pol'y* 667 (2003); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 *Case W. Res. L. Rev.* 1451 (1997).

³ See, e.g., Symposium, *Bowsher v. Synar*, 72 *Cornell L. Rev.* 421, 421–597 (1987) (containing many articles discussing *Bowsher*, none of which contested the Supreme Court's assertion that Congress could not remove officers).

⁴ For a sample of the few exceptions, see Karen Orren, *Officers' Rights: Toward a Uniform Field Theory of American Constitutional Development*, 34 *Law & Soc'y Rev.* 873, 881 (2000) (discussing judicial power to remove in passing); Daniel J. Balhoff, Note, *Bowsher v. Synar: Separation of Powers, the Removal of Officers, and the Administrative State*, 47 *La. L. Rev.* 617, 624 (1987) (same).

whether the President had a right to remove.⁵ The Senate censured Andrew Jackson for his removal of the Treasury Secretary, the only such censure by a house of Congress.⁶ Andrew Johnson was impeached because he dismissed his War Secretary, and he came within one vote of being removed.⁷ Presidential removals also led to famed cases like the mammoth *Myers v. United States*⁸ and the stunted *Humphrey's Executor v. United States*.⁹ More recently, the quarrels over the Independent Counsel were, in no small measure, about whether Congress could create a prosecutor insulated from presidential removal.

A wag might say that a dearth of scholarship in an area of constitutional law makes it more likely that the area is basically sound. When it comes to removal, however, the wag would be wrong. In fact, methodical and comprehensive scholarship is sorely needed because in its absence, incompatible claims have flourished. On one hand, *Bowsher v. Synar* declares that Congress cannot have a power to remove officers by statute.¹⁰ On the other hand, the 1802 Repeal Act, which removed judges when it terminated their underlying offices, suggests otherwise.¹¹ Or consider the intuition that because the President has a removal power, no one else may remove officers. No less than the Supreme Court has held that courts may remove officers they appoint, thereby ensuring that the President lacks a removal monopoly.¹²

The want of a comprehensive analysis of removal has also left basic questions about the President's ability to remove unanswered. For instance, does his removal authority extend to all executive officers, to all those whom he actually appoints, or to all officers of the United States (save for federal judges)? Similarly,

⁵ See generally Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021 (2006) [hereinafter Prakash, *Decision of 1789*] (discussing those debates and their meaning).

⁶ 10 Reg. Deb. 1187 (1834) (statement of Henry Clay).

⁷ 1 Trial of Andrew Johnson 6–10 (1868) (articles of impeachment); 2 Trial of Andrew Johnson 486–87, 496–98 (Senate votes).

⁸ 272 U.S. 52 (1926).

⁹ 295 U.S. 602 (1935).

¹⁰ 478 U.S. 714, 726 (1986).

¹¹ The Repeal Act, ch. 8, 2 Stat. 132 (1802). In the Act, a Republican Congress removed federal judges by terminating the judgeships created by the previous Federalist Congress.

¹² *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 261 (1839).

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scholarship has inadequately addressed whether Congress may constrain the President's ability to remove, even though this very question has arisen in famous cases.

This Article¹³ seeks to fill the gaps in the literature, addressing questions long neglected.¹⁴ Consider Congress. Despite the prevailing intuition that Congress cannot remove officers, the case for a congressional removal power is a compelling one. Where offices and officers are concerned, Congress is not merely some bystander. Congress's powers over offices are extensive—it creates offices, specifies their duties, and sets their salaries. Indeed, it has long been understood that Congress can remove officers. Congress can terminate offices, thereby ousting incumbent officers; Congress can enact tenure limits, thereby decreeing the future removal of officers; and Congress can mandate the removal of officers who have been convicted of civil or criminal offenses. Although the Supreme Court and the executive branch have drawn the line when it comes to statutes that do nothing more than remove incumbent officers, nothing in the Constitution supports this artificial line drawing. Like other removal statutes, these “simple removal statutes” can be necessary and proper for carrying federal powers into execution.

Consider the President. In recent times, executive branch lawyers have claimed that the President's appointment power is the source of his removal power, the theory being that whoever appoints may remove.¹⁵ This seemingly reasonable argument is mistaken. First, it greatly overstates presidential power because it supposes he may remove non-executive officers merely because he appointed them. Properly understood, any distinct removal power

¹³ This Article is part of a three-part series on removal authority. See Prakash, Decision of 1789, *supra* note 5; Saikrishna Prakash & Steven Douglas Smith, How to Remove a Federal Judge, 116 *Yale L.J.* 72 (2006) (arguing that good behavior tenure permits removal of federal judges upon a judicial finding of misbehavior and that impeachment is not the sole means of removing judges).

¹⁴ The claims made here are meant to appeal to those who take text, structure, and history seriously. For textualists, the argument is that the Constitution's original public meaning supports the notion of a shared removal power. For intentionalists, the argument is that the Constitution's founders implicitly granted each of the branches the wherewithal to remove officers. For others who use original meaning as a factor in determining what the Constitution means today, the claim is that originalist factors point toward a shared removal power.

¹⁵ See, e.g., 7 *Op. Off. Legal Counsel* 95, 97–100 (1983).

arises from the grant of executive power. Although one might argue that the President's executive power enables him to remove all officers (other than judges), the Constitution is better read as granting him a power to remove executive officers only. It follows that the President has no constitutional right to remove presidentially appointed non-executive officers. Most importantly, the Constitution does not grant him the authority to remove the quasi-judicial and quasi-legislative officers who control the independent agencies. If the President's removal power arises from the grant of executive power, the President has far less removal authority than is commonly supposed.

Second, in a different sense, the appointment argument may understate the President's power over officers. If we look to England and her colonies as a guide, the President's executive power may not grant a distinct "removal power" at all. Instead, the President might have the ability to set the tenure of executive officers. Rather than granting all executive officers tenure during pleasure,¹⁶ the President might use his discretion to grant some officers good behavior tenure. Much as English monarchs did, the President might constrain his future ability to remove in order to attract those who would shun an insecure appointment during pleasure. In other words, perhaps the President may impose an *ex ante* limit on his ability to remove in order to attract superior officers.

Finally, consider the federal judiciary. In *Ex parte Hennen*, the Supreme Court held that federal courts could remove clerks because the courts had appointed them.¹⁷ If this argument is to be believed, it means that the President could remove all presidentially-appointed inferior judicial officers, even though such officers perform vital judicial functions for Article III courts. Once again, the appointment argument is misguided. Inferior judicial officers, such as the clerks of the court, exist to help carry into execution the judicial power of federal courts. To perform that function, inferior judicial officers likely receive an implicit delegation of judicial power from an Article III court. A court may remove its inferior

¹⁶ When an officer holds tenure "during pleasure," the President may remove that officer for any reason at any time. Hence, an office held during pleasure is held at the President's whim.

¹⁷ 38 U.S. (13 Pet.) 230, 259, 261 (1839).

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judicial officer by retracting its grant of judicial power.¹⁸ This conception of a judicial removal power makes the appointer irrelevant, as he or she should be.

Appendix A illustrates this Article's claim that the Constitution establishes a system of shared removal powers.¹⁹ The Executive can remove all executive officers, civil and military, however appointed. Collectively, the federal judiciary can remove all inferior judicial officers, however appointed. Congress can remove all officers whose offices it created by statute. Finally, the Senate may remove all civil officers, including judges, the President, and the Vice President, by a conviction on articles of impeachment brought by the House.

Part I tackles the controversial topic of a congressional power to remove. Part II considers a presidential power to remove. Somewhat predictably, Part III discusses a judicial power to remove.

I. A CONGRESSIONAL REMOVAL POWER

It is a fair guess that the few scholars who have even considered whether Congress can remove officers have concluded that Congress cannot enact a statute that does nothing more than remove an officer. Yet there is no methodical study of this question, let alone a "congressional removal literature." So why is this question widely assumed to be an easy one, unworthy of scrutiny?

One reason could be that the Supreme Court has said as much. In *Bowsher v. Synar*²⁰ and *Myers v. United States*,²¹ the Supreme Court asserted that Congress could not remove officers charged with executing the law. Another reason for the conventional view might be that many regard the impeachment provisions as implying that impeachment and conviction is the only way Congress can remove officers. Indeed, the impeachment provisions are the only place the original Constitution mentions "removal" of officers

¹⁸ Although this Article develops the idea of removal as a retraction of authority, credit for its genesis goes to Professor Akhil Amar, who suggested it over a decade ago. Inexplicably, Steven Calabresi and I failed to credit Professor Amar in our previous piece. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 *Yale L.J.* 541, 597–99 (1994).

¹⁹ See *infra* Appendix A.

²⁰ 478 U.S. 714, 726 (1986).

²¹ 272 U.S. 52, 161 (1926).

other than the President.²² The *Bowsher* Court relied on this argument when it insisted that “the Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment by the House of Representatives and conviction by the Senate.”²³

A more obscure reason could be that the executive branch has had much the same view. President Woodrow Wilson said that he could not “escape the conclusion that the vesting of [a] power of removal in the Congress is unconstitutional.”²⁴ Later, President Richard Nixon conceded that Congress could abolish an office and thereby remove the incumbent. Yet he cautioned that “the power of the Congress to terminate an office cannot be used as a back-door method of circumventing the President’s power to remove.”²⁵ In other words, though Congress may terminate an office and thereby oust the incumbent, it cannot enact a simple removal statute. Nor can Congress terminate an office and recreate an identical office, for that would be, in substance, a simple removal statute. Nixon’s nuanced position presumably remains the view of the executive branch.²⁶

²² U.S. Const. art. I, § 3, cl. 7 (“Judgment in Cases of Impeachment shall not extend further than to removal from Office”); id. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”). The original Constitution, Article II, Section 1, also mentioned what would happen upon the “removal” of the President. This provision likewise referred to the impeachment process, for the impeachment process is the Constitution’s only means of removing the President.

²³ *Bowsher*, 478 U.S. at 723. The Court cited two decisions to support its conclusion: the Decision of 1789 and *Myers v. United States*. In the Decision, Congress supposedly determined that it lacked constitutional authority to play a “role in the . . . removal process.” *Bowsher*, 478 U.S. at 723. In *Myers*, the Court concluded that for Congress “to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power. . . . would be . . . to infringe the constitutional principle of the separation of governmental powers.” 272 U.S. at 161 (1926).

²⁴ 59 Cong. Rec. 8609–10 (1920). Attorneys General and the Office of Legal Counsel have come to the same conclusion. See 11 Op. Off. Legal Counsel 25, 26 (1987) (“[T]he power to remove officers of the Executive Branch is vested exclusively in the President”); 7 Op. Att’y Gen. 242, 248 (1855) (“Congress cannot, by legislative act, appoint or remove consuls any more than ministers”).

²⁵ Veto of a Bill Requiring Senate Confirmation of the Director and Deputy Director of the Office of Management and Budget, 159 Pub. Papers 539, 539 (May 18, 1973).

²⁶ 12 Op. Off. Legal Counsel 286, 287, 288 n.4 (1988) (“The Department has consistently maintained that Congress cannot terminate the terms of incumbent officehold-

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The Supreme Court and President Nixon got it wrong. The Constitution's Necessary and Proper Clause²⁷ makes Congress the creator, provider, and terminator of offices. Using this powerful authority, Congress can enact removal statutes of various sorts. Indeed, Congress has long removed incumbents by way of statutes that (a) terminate their underlying offices, (b) make removal the consequence of official lawbreaking, or (c) enact tenure limits. Like these other removal statutes, simple removal statutes can be necessary and proper for carrying federal powers into execution.²⁸

Relying upon textual and structural arguments, Section A of this Part argues that congressional removals are necessary to implement federal powers. Section B considers history. Early congresses enacted statutes requiring the removal of officers for various reasons. The ubiquity of these removal provisions suggests that Congress was understood to have broad removal power. Section C considers whether removal statutes must be improper.

*A. Congressional Removals Are Necessary to Implement
Federal Powers*

When it comes to offices and officers, the Constitution is explicit in some ways and silent in others. The Constitution makes clear that the President nominates, commissions, and, with the Senate's advice and consent, appoints officers. At the same time, the Constitution says little about the creation of offices and nothing about who shall fix official duties or whether any entity besides the Senate may remove officers. In particular, it never expressly denies Congress a power to remove officers via statute.

Notwithstanding the Constitution's relative silence on these latter matters, Congress is widely acknowledged to have great authority over offices and officers, an authority that points to the consti-

ers," but "Congress can, of course, enact legislation permanently abolishing an office, in which case the incumbent would no longer have a position to occupy.").

²⁷ U.S. Const. art. I, § 8, cl. 18.

²⁸ This Section defends a congressional power to remove officers without any emphasis on the precise removal mechanics. On one hand, one might conclude that while the Constitution grants Congress the power to compel the removal of officers, only the President can actually remove them. On the other hand, one might suppose that presidential action is not necessary to remove an officer. This Article takes no position on this question.

tutionality of a congressional removal power. Consider the creation of offices. Some have imagined that the President could establish an office through the act of appointment.²⁹ Yet the Constitution strongly implies that Congress must create all offices that the Constitution itself does not establish.³⁰ Consistent with that reading, Congress has created the vast majority of federal offices.³¹

As part of its authority to create offices, Congress can delimit an office's authority and duties. Rather than creating generic offices and permitting the President (or someone else) to determine the functions of each, Congress almost always sets an office's jurisdiction. In so doing, Congress determines whether an office is an executive or judicial office. It decides that a particular office shall help the President conduct our nation's foreign affairs (the Secretary of State) and that another will adjudicate monetary claims against the United States (a judge on the Court of Claims). Of course, Congress also is at liberty to add to and subtract from an office's jurisdiction. For instance, in 1789, Congress added domestic functions to the office of the Secretary of Foreign Affairs and rechristened it the "Secretary of State."³² Likewise, Congress may

²⁹ In 1789, Senator William Maclay claimed that offices should be created thusly: "the President communicates to the Senate that he finds, such & such officers necessary in the Execution of the Government[,] and nominates the Men. [I]f the Senate approve," the office is created. "[T]he President in like Manner communicates to the H[ouse] of R[e]presentatives that such appointments have taken place & requires adequate Salaries. [T]hen the House of Representatives might shew their concurrence or disapprobation by providing for the Officer or not." The Diary of William Maclay (July 14, 1789), in 9 Documental History of the First Federal Congress of the United States of America 3, 110 (Kenneth R. Bowling & Helen E. Veit eds., 1988) [hereinafter *Diary of William Maclay*].

³⁰ See U.S. Const. art. II, § 2, cl. 2 ("[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which *shall be established by Law . . .*") (emphasis added). The italicized language strongly implies that officers not specifically mentioned in the first part of the Appointments Clause must be established by law.

³¹ The only exception would appear to be diplomatic and consular postings, where the President created the office merely by deciding where to station diplomats and consuls. Generally speaking, no one could occupy such posts until the Senate confirmed the President's nominations. See Saikrishna B. Prakash & Michael D. Ramsey, The Executive Power over Foreign Affairs, 111 Yale L.J. 231, 305 (2001) [hereinafter *Prakash, Executive Power over Foreign Affairs*].

³² Act of Sept. 15, 1789, ch. 14, § 2, 1 Stat. 68, 68–69 (creating duties for the newly christened "Secretary of State"); see also An Act providing for the enumeration of

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curb the authority of specific offices, as it did to the Director of the Central Intelligence Agency in the National Security Intelligence Reform Act of 2004.³³

Though some might demur, Congress can limit an office's duration and the tenure of officers. Unsure of whether an office's functions should be carried out indefinitely, Congress can decree that the office cease to exist in the future. For instance, Congress could create an office charged with building a post road and provide that the office will expire upon the road's completion. The Constitution does not require Congress to maintain offices that have outlived their purposes. Likewise, Congress can limit the tenure of officers, whether or not the office itself sunsets in the future. The first Congress set tenure limits for some offices,³⁴ and congresses ever since have followed suit by enacting tenure limits for officers like the FBI Director.³⁵

Finally, Congress finances official salaries and expenses. By providing that no funds may be removed from the Treasury except by reason of an appropriation made by law, the Constitution provides that only Congress may authorize the expenditure of funds.³⁶ While Congress almost always funds the offices it creates, the Constitution does not require such support. If it so chose, Congress could wholly de-fund an incumbent officer.³⁷

the Inhabitants of the United States, ch. 2, § 1, 1 Stat. 101, 101 (1790) (adding taking of census to the duties of marshals).

³³ Pub. L. No. 108-458, 118 Stat. 3638 (to be codified at 50 U.S.C. § 402 et seq.). Though the President has significant powers over offices, such as nomination and appointment, he has no constitutional authority to set or alter any office's functions. These powers belong to Congress.

³⁴ See Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87 (limiting marshals to four-year terms). Occasionally, the executive branch has questioned the ability of Congress to establish terms of office for executive officers. See, e.g., 11 Op. Off. Legal Counsel 25, 27 (1987) (stating that if a bill limited terms of future (non-incumbent) officers it "would be subject to serious constitutional doubt").

³⁵ See Crime Control Act of 1976, § 203, 90 Stat. 2407, 2427.

³⁶ U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .").

³⁷ See *Embry v. United States*, 100 U.S. 680, 685 (1879) ("Wherever the power of removal from office may rest, all agree that Congress has full control of salaries, except those of the President and the judges of the courts of the United States."). But see *United States v. Lovett*, 328 U.S. 303, 305, 315 (1946) (concluding that an appropriations act cutting off salaries of alleged communists was an unconstitutional bill of attainder).

The Necessary and Proper Clause authorizes Congress to exercise most of these powers over offices. When Congress creates offices and sets their powers, duties, and salaries, Congress enacts necessary and proper statutes designed to carry federal powers, such as the commerce and taxing powers, into execution. In this way, Congress enjoys many of the executive powers over offices that had been enjoyed by the English Crown.³⁸

That same Necessary and Proper authority over offices enables Congress to effectively remove officers in a number of ways. First, as members of the executive branch have recognized and as James Madison concluded almost two centuries ago, Congress may remove an incumbent officer by terminating the office.³⁹ This form of removal is generally well-accepted because it seems reasonable to suppose that Congress can terminate the offices it creates, even when these offices are occupied by incumbent officers.⁴⁰ We can call this form of congressional removal a “termination removal.”

Second, Congress may compel future removals. Sometimes such removals will occur on a particular date, as when Congress pro-

³⁸ In England, the Crown created offices, specified their functions, and funded them from the civil list provided by Parliament. 1 William Blackstone, *Commentaries on the Laws of England* *261–62. Of course, because Parliament was supreme in the late eighteenth century, it could and did exercise such authorities as well.

³⁹ While often resisting the notion that Congress can enact simple removal statutes, members of the executive branch have conceded that Congress can remove an officer by terminating the office. See, e.g., Letter from Norbert A. Schlei, Asst. Att’y Gen., Off. of Legal Counsel, to William H. Josephson, General Counsel, Peace Corps (June 18, 1965), *in* 111 Cong. Rec. 17597–98 (1965) (arguing that Congress can “oust” officer by “abolishing the office”); Veto of a Bill Requiring Senate Confirmation of the Director and Deputy Director of the Office of Management and Budget, 159 Pub. Papers 539, 539 (May 18, 1973) (admitting that Congress could abolish an office and thereby terminate the tenure of incumbent); 12 Op. Off. Legal Counsel 286, 288 n.4 (1988) (accepting that Congress can oust incumbent by permanently abolishing an office); see also Letter from James Madison to President James Monroe (Dec. 28, 1820), *in* 3 Letters and Other Writings of James Madison 199, 200 (New York, R. Worthington 1884); Letter from James Madison to Thomas Jefferson (Dec. 10, 1820), *in* id. at 196, 196.

⁴⁰ It is possible to suppose that Congress can terminate an office only when the office is vacant. Hence, Congress could provide that an office will cease to exist when the incumbent has departed from office (for reasons of death, resignation, impeachment removal, or presidential removal). This position adopts the consistent position that Congress may not remove officers while preserving a congressional power (however drastically limited) to terminate offices. To my knowledge, no one has made such an argument.

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vides that an officer's term expires four years from appointment.⁴¹ We can call these "delayed removals." Other times, Congress might provide that, upon the occurrence of some event (for example, the election of a new President, the realization of a congressional objective, or an officer's criminal conviction), either an office terminates or an officer's tenure ends.⁴² We can call these "contingent removals."

Though other removal statutes might be more controversial, they nonetheless seem constitutionally authorized. Congressional authority over an office's jurisdiction suggests that, by eliminating an office's jurisdiction, Congress removes the incumbent. Should Congress strip away the Attorney General's entire authority, the incumbent effectively has been removed, even if she continues to receive a salary. Someone with a title who lacks the ability to perform functions or satisfy duties seems to be more an honoree than an officer.⁴³ For lack of a better phrase, we can call these "jurisdiction-stripping removals."

⁴¹ Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87. At least one opinion of the Office of Legal Counsel has expressed "serious constitutional doubt" about statutes that limit terms of prospective officers. 11 Op. Off. Legal Counsel 25, 27 (1987). Yet this opinion did not go so far as declaring that tenure limits for officers were unconstitutional. *Id.* The Office's tentative misgivings are misplaced. First, such statutes date back to the Judiciary Act of 1789. As is well-known, early practices are good indications of original meaning. Second, because Congress can accomplish much the same end by creating office sunsets, it is hard to believe that the Constitution precludes the creation of tenure limits for officers while permitting Congress to engage in frequent office terminations.

⁴² See, e.g., An Act regulating the Tenure of certain Civil Offices, ch. 154, § 1, 14 Stat. 430 (1867) ("[T]he Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster-General, and the Attorney-General, shall hold their offices respectively for and during the term of the President by whom they may have been appointed and for one month thereafter . . .").

⁴³ Cf. *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868) ("An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.").

From time to time, the executive branch's attorneys have suggested that legislation abolishing an office and then recreating it would be unconstitutional. See 11 Op. Off. Legal Counsel 25, 26 (1987) (regarding such "ripper legislation" as unconstitutional). These attorneys might say the same about statutes that completely strip away an officer's jurisdiction, but their arguments assume that simple removal statutes are unconstitutional and then try to draw connections between such a statute and a statute stripping jurisdiction. The problem with this is twofold. First, the executive branch has never adequately explained why Congress cannot enact simple removal statutes. Having never made the argument, they cannot rely upon the point to prove that extreme

Similarly, legislative control over salaries and funds, coupled with the Anti-Deficiency Act, gives Congress a means of “removing” officers without passing a statute. Under the Act’s bar on the receipt of voluntary services, unfunded officers cannot perform their statutory functions.⁴⁴ Should Congress never again appropriate funds for an office’s salary and expenses, Congress will have relieved the incumbent of all her duties. Again, someone incapable of performing functions or satisfying duties hardly seems to be an officer. We can call this “an appropriations removal.”⁴⁵

Just as the Necessary and Proper Clause authorizes the creation of offices and the specification of their functions, so too does the

forms of jurisdiction stripping are unconstitutional. Second, though the executive branch has accepted that Congress may terminate the office (and thereby terminate the officer), it has never explained why jurisdiction stripping is different in kind from terminating the office. As explained earlier, if one strips away all the jurisdiction of an office, one has terminated the office.

⁴⁴ See 31 U.S.C. § 1342 (2000) (barring voluntary services to federal government and barring acceptance of personal services “exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property”); see also 5 Op. Off. Legal Counsel 1, 8 (1981) (noting that the original purpose of the Anti-Deficiency Act was to avoid unauthorized claims to compensated labor). The existence of the Anti-Deficiency Act is crucial to the argument. In its absence, one might suppose that, notwithstanding the failure to appropriate funds, Congress permitted (or indeed wanted) officers to continue with their functions and duties without the assistance of governmental funds.

⁴⁵ An appropriations removal might not be a true removal because by denying funds, Congress might not have formally dismissed the officer. Should Congress, after a gap of a month, appropriate funds for an officer’s salary and expenses, the furloughed officer most likely could resume her official functions. If the officer were truly removed, however, the appropriation would not make a difference. The former officer would require a reappointment before taking up official matters. However, a longer gap before the resumption of funding might lead to the conclusion that Congress had removed the unfunded officer.

Apart from the Anti-Deficiency Act, the Constitution itself strongly implies that when Congress does not appropriate funds for officers, the officers cannot function. This intuition comes from the bar against army appropriations lasting longer than two years. U.S. Const. art. I, § 8, cl. 12 (Congress may “raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.”). This provision was clearly not meant to help save funds. Rather, it was designed to give Congress a chokehold over the Army. Implicit in this provision is the background assumption that the Army cannot function in any way without a congressional appropriation. The Executive cannot fund the Army itself, nor can the Army fund itself by expropriating property. As long as there is no appropriation for the Army, it ceases to function, at least in the eyes of the Constitution. Applying the same robust background assumption to other officers suggests that they too cannot function when Congress does not fund operational expenses.

Clause authorize almost all of the aforementioned forms of congressional removals.⁴⁶ Congress could conclude that it ought to terminate an office and distribute its functions to other officers on the ground that such termination would better implement federal powers. Similarly, Congress may conclude that creating finite terms for officers helps carry into execution federal powers. A term limit guarantees a periodic evaluation of an officer's performance and also makes it more likely that the President will consider whether new blood might better serve the implementation of federal power. Finally, the same authority that permits Congress to add to an officer's jurisdiction also enables Congress to entirely retract an officer's jurisdiction.

The Necessary and Proper Clause that sanctions all these other forms of removal likewise sanctions simple removal statutes. A simple removal statute is "necessary" in the same sense that all of Congress's exercises of powers over offices are necessary. In the opinion of Congress, a statute removing an officer or officers embodies a congressional judgment that the removal would be useful in carrying federal powers into execution. Likewise, a simple removal statute helps "carry into execution" federal powers because it removes an officer whom Congress regards as an impediment to the sound implementation of the federal government's powers.⁴⁷

Because all removal statutes must be necessary and proper for carrying federal powers into execution, not all removal statutes will necessarily be constitutional. For instance, if Congress tried to remove an officer based on arbitrary grounds, such as the color of his hair or his astrological sign, it would be difficult to conclude that such a removal was in any way necessary to carry into execution federal powers. Despite such constraints, Congress clearly would enjoy broad authority to make responsible, rational decisions about the removal of officers, just as it enjoys wide latitude to make such decisions about offices. While Congress lacks a *carte blanche* authority to remove (of the type the President arguably

⁴⁶ The Necessary and Proper Clause is not needed as a means of authorizing "appropriation removals." When Congress chooses not to fund something, it does not need an affirmative grant of authority.

⁴⁷ Part I.C completes the Necessary and Proper inquiry, discussing whether removal statutes are proper. See *infra* Part I.C.

has), it likely has something almost as far-reaching: a power to oust an officer based on sound administrative reasons.⁴⁸

B. Early Congressional Removal Statutes

Early American history supports the idea that Congress may remove officers.⁴⁹ Though the Articles of Confederation did not expressly grant the Continental Congress removal power over national officers, the first Congress enjoyed such power. Sometimes statutes would note explicitly that Congress could remove certain officers.⁵⁰ At other times, a congressional commission noted that an officer served at Congress's pleasure.⁵¹ Although the Continental Congress apparently never justified its removal power, it seems likely that one source of its authority was its power to create offices and set their powers and duties.⁵²

Hardly any writings from the Constitution's creation relate to a congressional removal power. The Federalist Papers contain what

⁴⁸ Those familiar with the Act of Settlement, 1701, 12 & 13 Will. 3, c. 2, § III (Eng.), might wonder whether the statutory removal power defended here differs from the removal by address mentioned in the Act of Settlement. It surely does. Removal by address was (and is) the right of Parliament to request that the Crown remove a judge. Parliament need not supply any reason for its removal request and may make a request based on purely arbitrary reasons. The Crown may act on the request, or not, as it sees fit. A congressional removal statute, on the other hand, is not a request for removal. Rather, it is a command that some officer should no longer serve in office. Once a removal bill becomes law, either with the President's signature or over his veto, the officer has been removed.

⁴⁹ There seems to be little in English history, however, that speaks to simple removal statutes. To my knowledge, Parliament never attempted to enact such statutes. Given parliamentary supremacy, however, there is little doubt that Parliament could have removed officers via a simple removal statute had it wanted to do so. That is why some regard the Act of Settlement's discussion of removal by address as merely declarative of the existing constitutional scheme. See C.H. McIlwain, *The Tenure of English Judges*, 7 *Am. Pol. Sci. Rev.* 217, 225 (1913). Parliament already had the power to remove officers and also certainly had the power to request that the Crown remove an officer.

⁵⁰ See, e.g., Northwest Ordinance, July 13, 1787, 1 Stat. 51 note (a), *reenacted by Act of Aug. 7, 1789*, ch. 8, 1 Stat. 50.

⁵¹ See, e.g., Commission to Thomas Barclay, Esquire (July 10, 1781), in *20 Journals of the Continental Congress 735, 735* (Gaillard Hunt ed., 1912).

⁵² The Continental Congress did not have to dwell on the source of its removal power because its removal authority was greatly overdetermined. In addition to the power to create and terminate offices, Congress also enjoyed the executive power of superintending officers. Nonetheless, one source of the Continental Congress's removal power was likely its power to create and structure offices.

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may be the lone exception. In Federalist No. 39, James Madison observed that “[t]he tenure of the ministerial offices [i.e., the executive offices] generally will be a subject of legal regulation, conformably to the reason of the case and the example of the State constitutions.”⁵³ While Madison’s statement is ambiguous, it could be read as supporting the idea that Congress would have some authority to set tenures for offices.

Whatever the best reading of Madison, Congress under the new Constitution certainly believed it had extensive powers over offices and officers. Early congresses created almost all offices, established their duties and responsibilities, and generally set their salaries. More to the point, early congresses enacted numerous statutes that required the removal of incumbent officers.

Beginning in 1789, Congress enacted a number of contingent removal provisions. In the Treasury Act, Congress ordered that officers who violated certain prohibitions would be “guilty of a high misdemeanor,” would have to pay a three thousand dollar penalty to the United States, and “shall upon conviction be removed from office, and forever thereafter incapable of holding any office under the United States.”⁵⁴ While evocative of the Constitution’s impeachment provisions, removals under the statute clearly would not have to satisfy the requirements for an impeachment removal.⁵⁵

At least three other early acts included contingent removal provisions. One act provided that officers convicted of taking bribes would “be forever disabled from holding any office of trust or profit under the United States.”⁵⁶ Another act provided that certain officers convicted of misappropriating funds (among other things) were “rendered incapable of serving in any office of trust or profit under the United States.”⁵⁷ Finally, an act provided that federal judges convicted of receiving bribes “shall forever be disqualified to hold any office of honor, trust, or profit under the United States.”⁵⁸ Although one might argue that these provisions merely

⁵³ The Federalist No. 39, at 210 (James Madison) (Clinton Rossiter ed., 1999).

⁵⁴ Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67.

⁵⁵ Any Treasury Act removal would have occurred upon a simple criminal conviction and would lack a House impeachment, a Senate trial, and a two-thirds Senate vote.

⁵⁶ Act of July 31, 1789, ch. 5, § 35, 1 Stat. 29, 46.

⁵⁷ Act of Sept. 1, 1789, ch. 11, § 34, 1 Stat. 55, 64–65.

⁵⁸ Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, 117.

barred future office holding, these statutes are better read as mandating the immediate removal of convicted officers. Such officers were immediately “disabled,” “disqualified,” or “rendered incapable” of serving in office.⁵⁹

At least one act removed officers for nothing more than negligence. Mint officers were to strike coins that met certain standards. Various federal officials, including the Chief Justice and the Treasury Secretary, would episodically judge whether randomly selected coins had met the minimum statutory standards. If these officials certified negative results to the President, then the mint officers would be “deemed disqualified to hold their respective offices.”⁶⁰

Early congresses also established tenure limits for officers. In the Judiciary Act of 1789, Congress provided that the thirteen marshals would serve four-year terms.⁶¹ In an act regulating the military, Congress legislated that commissioned officers “shall be raised for the service” for a period of three years.⁶² The Act thereby implied that such officers could not serve longer than three years, absent additional legislation. Postal statutes had the same feature. Over the course of several years, Congress authorized the Post Office with extremely short sunset periods.⁶³ Finally, the Act concerning the District of Columbia empowered the President to create justices of the peace with five-year terms.⁶⁴ This fixed tenure

⁵⁹ It is worth noting that there are currently dozens of provisions in the U.S. Code that either provide for the removal of officers upon conviction for some offense, or disqualify them from holding federal office. Though these statutes hardly prove that congressional removal statutes are constitutional, their ubiquity and staying power (from 1789 onwards) at least suggests that congresses (and perhaps presidents) have long believed that Congress could enact statutes that provide for the removal of officers upon the occurrence of some contingency. A longstanding practice that dates back to the founding is some evidence that the Constitution may be read to countenance that practice. See, e.g., 25 U.S.C. § 2704(b)(5)(A) (2000) (providing for removal of members of National Indian Gaming Commission upon conviction of a felony or gaming offense).

⁶⁰ Act of Apr. 2, 1792, ch. 16, § 18, 1 Stat. 246, 250.

⁶¹ Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87.

⁶² Act of Apr. 30, 1790, ch. 10, § 1, 1 Stat. 119, 119.

⁶³ See Act of Sept. 22, 1789, ch. 16, 1 Stat. 70 (authorizing the appointment of a Postmaster General “until the end of the next session of Congress, and no longer”); Act of Aug. 4, 1790, ch. 36, 1 Stat. 178 (same); Act of March 3, 1791, ch. 23, 1 Stat. 218 (same). Although Congress always reauthorized the Post Office, by authorizing the Postmaster General for short periods, Congress effectively legislated short terms of office for the Postmaster General.

⁶⁴ Act of Feb. 27, 1801, ch. 15, § 11, 2 Stat. 103, 107.

led John Marshall to deny that Thomas Jefferson could remove William Marbury.⁶⁵

In 1820, Congress imposed tenure limits on certain current and future officeholders.⁶⁶ For appointments made after the statute's enactment, numerous vital officers, such as district attorneys and custom collectors, were limited to four-year terms.⁶⁷ More importantly, Congress terminated the commissions of existing officers, mandating that some commissions would expire in less than five months.⁶⁸ Congress clearly believed that when an officer's commission expired, his tenure in office ceased. Hence, by decreeing the expiration of commissions, Congress removed many executive officers.⁶⁹ Apparently, Congress believed such legislation benefited incoming presidents.⁷⁰

If Congress could decree that existing commissions would expire in five months, Congress could have terminated existing commissions much sooner, including immediately upon the Act's enactment. Congress probably did not take this drastic step because it would have immediately cast so many out of office. Apart from the difficulties that the federal government would face, there would

⁶⁵ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803).

⁶⁶ Tenure in Office Act, ch. 102, 3 Stat. 582 (1820).

⁶⁷ *Id.* § 1.

⁶⁸ *Id.* § 2.

⁶⁹ The reaction of executive branch officials to such legislation has been inconsistent. In modern times, officials have claimed such legislation is an unconstitutional removal of an officer by Congress. See, e.g., 12 Op. Off. Legal Counsel 286, 287 (1988) (claiming that the Department of Justice "has consistently maintained that Congress cannot terminate the terms of incumbent officeholders" and citing a number of letters). But opinions of the Attorneys General tell a different story. Attorney General John G. Sargeant, writing an opinion to the Postmaster General, concluded that Congress could impose new term limits on existing officers. As support for his conclusion, he cited Supreme Court cases discussing the power of legislatures to control the features of offices. 35 Op. Att'y Gen. 309, 314 (1927). Similarly, Acting Attorney General Robert H. Jackson read a statute permitting Congress to remove members of the Tennessee Valley Authority Board by concurrent resolution as allowing "a method of removal by the legislative branch in addition to the more cumbersome method of removal by impeachment." 39 Op. Att'y Gen. 145, 147 (1938). Jackson's failure to question the constitutionality of this provision suggested that he saw nothing wrong with such a removal mechanism.

⁷⁰ Rather than having to face a phalanx of incumbent officers, newly elected presidents could appoint on a blank slate without being tied, in any way, to incumbents. Presumably, Congress concluded that a general statutory removal would be easier on the President than a presidential decision to remove hundreds.

have been a devastating personal toll on the officers themselves. Congress's sensible forbearance, however, does not undermine the notion that Congress could have immediately terminated existing commissions. In imposing tenure limits for incumbent officers, Congress asserted a right to remove officers.

Congress also terminated offices. In 1792, Congress terminated the office of the Assistant to the Secretary of Treasury.⁷¹ Ten years later, Congress infamously terminated judgeships created by the Judiciary Act of 1801.⁷² Though members of Congress contested the legality of the latter removals, their claim rested on the grounds that the removal of judges violated the constitutional guarantee of good behavior tenure; the members apparently did not challenge Congress's generic authority to terminate offices and thereby remove officers.⁷³

While Congress was busy enacting such removal statutes, presidents regularly signed them without expressing any qualms. In fact, an episode during George Washington's presidency reveals that he understood that Congress could remove officers. In the twilight of his administration, Congress sought to terminate two recently created companies of light dragoons. President Washington vetoed the bill, arguing that it was unfair and unwise to discharge the dragoons. Nonetheless, in his veto message, he admitted that the dragoons "may be discharged at the pleasure of Congress."⁷⁴

President Washington's veto message is quite informative. First, he clearly agreed that Congress had the authority to terminate offices and thereby remove the officers of the dragoon companies. Despite objecting to the Act on policy grounds, Washington apparently found nothing about it unconstitutional. Second, his broad language arguably bespoke a general congressional removal power.

⁷¹ Act of May 8, 1792, ch. 37, §6, 1 Stat. 279, 280.

⁷² The Repeal Act, ch. 8, 2 Stat. 132 (1802) (repealing the judgeships created by the Judiciary Act of 1801, ch. 4, § 21, 2 Stat. 89, 96).

⁷³ See, e.g., 11 *Annals of Cong.* 25, 33 (1802) (statement of Mr. Mason) (describing the terminations as "in direct violation" of the Good Behavior Clause). Nowhere in the debate is a more general concern with removal by statute voiced. See generally *id.* at 25–145.

⁷⁴ Letter from George Washington to House of Representatives (Feb. 28, 1797), in 35 *The Writings of George Washington from the Original Manuscript Sources 1745–1799*, at 405, 405 (John C. Fitzpatrick ed., 1940), available at <http://gwpapers.virginia.edu/documents/presidential/veto.html>.

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“Discharge,” when used in the military context, is a releasing of duty. Military officers are discharged all the time without the termination of their office (for example, “honorable discharges”). Likewise, by using “pleasure”—a term clearly evocative of the Crown’s and the President’s ability to remove—President Washington may have been suggesting that all officers served at Congress’s discretion.⁷⁵

President Washington clearly had the motive and opportunity to denounce the Act as an unconstitutional attempt by Congress to exercise removal authority. Arguing that the Act was not only unjust but also unconstitutional would have made his arguments against the Act all the more powerful. President Washington never made this argument, presumably because he agreed that Congress could pass termination removals. Indeed, he signed other bills that contained term limits and contingent removals. Given his famous fidelity to the Constitution, his failure to denounce this Act as unconstitutional, coupled with his approval of other removal statutes, counts as good evidence of an early consensus that Congress could remove officers.

Despite passing many sorts of removal statutes, early congresses apparently never enacted simple removal statutes. One might regard the lack of such statutes as an indication that statesmen of the era understood them to be unconstitutional. Yet, given that there is no sound reason to distinguish simple removal statutes from other removal statutes, the general acceptance of the latter counsels in favor of the constitutionality of the former. As discussed below,⁷⁶ the differences between these removal statutes are constitutionally insignificant.

C. Congressional Removals Can Be Proper

This Part considers reasons why removal statutes might be thought improper and therefore unconstitutional. A statute is im-

⁷⁵ One might suppose that Washington’s language can be explained by Congress’s power to “raise and support Armies.” See U.S. Const. art. I, § 8, cl. 12. Yet, despite this grant of authority, Congress has no sounder claim to the power to terminate military offices than it does with respect to the power to terminate civilian offices. The Constitution does not explicitly sanction either power. As a result, the Necessary and Proper Clause either authorizes both or fails to authorize either.

⁷⁶ See *infra* Part I.C.4.

proper—and thus not sanctioned by the Necessary and Proper Clause—if it transgresses some express limit on federal power or contravenes an implied constraint on congressional power, such as the Constitution’s system of separated powers.⁷⁷ While a few of the arguments discussed below are quite plausible, none of them establishes the impropriety of all removal statutes. In other words, none of the arguments considered below proves that Congress cannot use the Necessary and Proper Clause to enact removal statutes of various sorts.

1. Express Constitutional Restrictions

As noted earlier, no constitutional provision expressly forbids congressional removals. Even so, some might believe that seemingly extraneous clauses somehow bar such removals. In *United States v. Lovett*, the Supreme Court treated an appropriations statute barring salaries for particular officers as an unconstitutional bill of attainder.⁷⁸ Based on *Lovett*, some might imagine that statutory removals also run afoul of the Bill of Attainder Clause. If depriving someone of her salary punishes, perhaps all removal statutes violate the attainder bar because such statutes divest incumbents of salary *and* office.

Lovett should not be read as establishing a general principle that failure to appropriate an official’s salary is a form of punishment.⁷⁹ *Lovett* painstakingly attempted to prove that members of Congress voted to bar salaries because members suspected that the officers were Communists.⁸⁰ The supposed congressional desire to punish these alleged Communists clearly drove the Court’s decision. This

⁷⁷ See Gary Lawson & Patricia B. Granger, The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 *Duke L.J.* 267, 273–74 (1993).

⁷⁸ 328 U.S. 303, 305, 315 (1946).

⁷⁹ As argued earlier, see *supra* note 46, the Constitution clearly implies that it is acceptable for Congress to defund governmental officers when it limits appropriations for the army to two years. The idea is that Congress cannot fund a standing army indefinitely. Because it must revisit the question of appropriations every two years, Congress may choose at some point to stop funding an existing army, thereby defunding existing army officers. What is permissible with respect to army officers seems equally permissible for all officers, civil and military, save for those with constitutional salary protections (for example, the judiciary).

⁸⁰ See *Lovett*, 328 U.S. at 308–13.

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limited reading of *Lovett* makes sense. The Bill of Attainder Clause should bar only those removals where Congress actually intended to punish an officer.

On the other hand, Congress does not enact a bill of attainder when it enacts a removal statute that does not attempt to punish anyone. Experience in the private sector bears this out. Someone dismissed or demoted for incompetence may suffer greatly. Yet we do not typically regard such decisions as forms of private punishment. Rather, most understand that a company usually makes such decisions to shore up its bottom line, improve productivity, and recruit better talent. Similarly, when Congress, in the absence of a climate of fear and loathing, removes an officer or reduces her salary for reasons of incompetence, it has not attained the employee. Likewise, when Congress eliminates an office after concluding that the execution of the law would be better served without the office, the removal of the incumbent officer is not a bill of attainder. In both situations, Congress furthers its entirely legitimate interest in ensuring that federal powers are better carried into execution.

Besides the Bill of Attainder Clause, other restrictions on federal power certainly constrain congressional removals. For instance, given the Constitution's ban on religious tests as qualifications for office,⁸¹ it would seem to be unconstitutional for anyone to remove an officer merely because of his religion. Applying these and other restrictions on federal power (such as the Bill of Rights and the prohibitions in Article I, Section 9) to removal statutes merely subjects such laws to the same limitations applicable to all federal statutes. These express restrictions on federal power merely constrain the circumstances in which Congress can remove an officer, just as they constrain how Congress may legislate generally. These restraints certainly do not bar all congressional removals. If the Constitution bars some or all forms of removal statutes, it must be because of something implicit in the Constitution's structure.

2. Implied Structural Restrictions

Arguments based upon implied constraints on congressional power are far weightier. Indeed, many may suppose that such con-

⁸¹ U.S. Const. art. VI, cl. 3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

straints forbid Congress from removing officers via statute. First, removal upon an impeachment conviction might be the exclusive means by which Congress can remove officers. Second, the President's power of removal (assuming he has such power) might be an exclusive power, such that only he can remove officers. Third, a congressional removal power might so undermine the President as to cast grave doubt on the likelihood that the Constitution's makers would have granted Congress such a power. Finally, one might suppose that while certain forms of removal are permissible (for example, termination removals and contingent removals), other forms, such as simple removal statutes, are unconstitutional.

a. Impeachment As the Sole "Congressional" Means of Removal

The only time the original Constitution expressly mentions removal is in the impeachment provisions of Articles I and II.⁸² To some, these provisions indicate that Congress may remove officers only via impeachment.⁸³ Others might suppose that any power to remove via statute would render the impeachment provisions superfluous because Congress would always choose to remove via statute rather than going through an arduous House impeachment and Senate trial. Finally, some might claim that the drafting history of the impeachment clauses proves that Congress was not meant to have a removal power.

We should not read too much into the impeachment provisions because they are a rather poor candidate for the application of the *expressio unius est exclusio alterius* maxim. For instance, though the impeachment provisions only mention removal of civil officers, no one infers that the Constitution implicitly prohibits the removal of other types of officers. With good reason, each legislative chamber claims the right to unilaterally remove its legislative officers.⁸⁴ Likewise, no one should conclude that impeachment is the only

⁸² U.S. Const. art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States . . ."); U.S. Const. art. II, § 4 ("[A]ll civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

⁸³ See *Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

⁸⁴ See, e.g., Rules of the House of Representatives, H.R. Doc. No. 107-284, at 354 (2003) (providing that the House may remove its own officers).

means of removing the officers actually subject to impeachment. At least since the Decision of 1789, it has been well understood that the President unilaterally may remove executive officers.⁸⁵

More relevant, we should not suppose that impeachment is the only way Congress can remove officers. To begin with, under the impeachment provisions, Congress does not impeach, convict, or remove. In contrast to the grants of lawmaking authority in Article I, Section 8 and elsewhere, each of which grant “Congress” power, the impeachment clauses never empower Congress. They instead authorize the individual chambers—the House may impeach and the Senate may convict and remove.⁸⁶ Because Congress as an entity does not impeach and remove, there is little reason to suppose that the impeachment provisions imply that Congress lacks a statutory removal power.

The history of the impeachment power likewise suggests that it is wrong to infer that the *Senate’s* ability (or perhaps obligation⁸⁷) to remove after an impeachment conviction means that *Congress* has no other means of removing officers. Originally, the impeachment power was a much broader power than the one found in our Constitution. In England and in a few revolutionary state constitutions, anyone could be impeached and convicted, and persons so convicted could be punished with fines, imprisonment, and execution.⁸⁸ Under these regimes, impeachment clearly had no necessary connection to the removal of officials because private citizens might be impeached and convicted. Likewise, impeachment was not something inevitably associated with the components of the legislative branch. In some states, other institutions and branches tried impeachments. In Pennsylvania, the executive council tried impeachments.⁸⁹ In New York, the impeachment court was composed

⁸⁵ See Prakash, Decision of 1789, *supra* note 5, at 1069–70.

⁸⁶ Of course, each constitutional provision that empowers “Congress” requires identical actions from the House and the Senate. The point is that when the Constitution grants powers to an individual chamber, it clearly is not empowering Congress at all.

⁸⁷ See U.S. Const. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, *shall* be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”) (emphasis added).

⁸⁸ See Peter Charles Hoffer & N.E.H. Hull, *Impeachment in America, 1635–1805*, at 3 (1984).

⁸⁹ Pa. Const. of 1776, § 20.

of senators and supreme court judges.⁹⁰ The modern view—the assumption that impeachment is and always was about legislative removal of officers—stems from a mistaken assumption about impeachment. Once one understands the history of impeachment, one recognizes that the Constitution’s impeachment provisions, standing alone, do not preclude a distinct legislative power to remove officers.

For two reasons, a congressional removal power does not render impeachment redundant. First, impeachment is the only means of removing certain crucial officers. In particular, impeachment is the sole means of removing the President, the Vice President, and particular Article III judges. Not having created the offices of President and Vice President, Congress cannot eliminate these offices or remove their incumbents. Likewise, impeachment is the only means by which members of Congress may target specific judges for removal. While Congress may have a power to eliminate judicial offices and thereby remove incumbent judges,⁹¹ it cannot target particular judges for removal, for that would violate the Article III guarantee of good behavior tenure. If members of Congress wish to remove particular judges, they must do so by impeachment. Because impeachment is the only means by which members of Congress may remove some officers, a congressional removal power does not make impeachment superfluous.⁹²

Second, statutory removals are quite different from impeachment. The impeachment provisions contemplate a solemn public trial (Senators are under oath) meant to determine whether an officer has committed “high crimes and misdemeanors.” Officers

⁹⁰ N.Y. Const. of 1777, art. XXXII.

⁹¹ See Judiciary Act of 1802, ch. 31, 2 Stat. 156 (1802) (abolishing sixteen judgeships created by the Judiciary Act of 1801).

⁹² One might suppose that it is unlikely that the Constitution grants Congress two ways of removing officers (assuming, for a moment, that impeachment is a means by which Congress removes, as opposed to the Senate alone). But there is nothing odd about constitutions that provide two means of accomplishing the same end. In fact, plenty of state constitutions contain two methods of removal. In some state constitutions, judges were subject to removal by impeachment for certain offenses and also were subject to removal by address of the legislature to the governor. See, e.g., Mass. Const. of 1780, pt. 2, ch. I, § 2, art. 8 (discussing impeachment); *id.* pt. 2, ch. III, art. 1 (discussing address as a means of removing judges). Hence, the existence of one cumbersome means of removal does not mean that removals may occur only through that procedure.

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convicted by the Senate are likely to be regarded as having committed some infamous offense against the public. On the other hand, when Congress removes an officer, the removal does not signify that the officer has violated any law. Congress does not need to issue a “judgment” or “convict” the officer. Instead, a congressional removal decision may reflect a need to save funds, a desire to reorganize the executive branch, or a lack of confidence in an incumbent officer’s abilities. Moreover, removal statutes are subject to the presentment requirement. That is to say, the President may veto removal statutes whenever he would like to retain the incumbent. Of course, neither impeachments nor convictions need be presented to the President. Hence, while the impeachment process occurs without any presidential involvement, statutory removals will occur, if at all, only if the President approves or the Congress overrides his veto. Because impeachment removals and statutory removals are carried out by different entities, occur via different processes, reach different officers, and have different consequences, a congressional removal statute is not a substitute for an impeachment removal.

The legislative history of the Constitution’s impeachment provisions does not undermine the case for a congressional removal power. It is true that delegates at the Constitutional Convention rejected an attempt to make maladministration an impeachable offense,⁹³ but their failure to do so does not mean that officers may only be removed for the listed impeachable offenses. First and foremost, a limitation on what is an impeachable offense does not affect the bases upon which Congress as a whole may remove an officer. Once again, the impeachment provisions relate to what the individual chambers may do. They do not limit what Congress can enact as part of its power to take necessary and proper measures for carrying into execution federal powers. Second, delegates never discussed whether Congress possessed a power to remove officers as part of its power to create, regulate, fund, and terminate offices of the United States. Not having systematically thought about Congress’s broad powers over offices (indeed, not having finalized the Constitution), we should not read too much into their discus-

⁹³ 2 The Records of the Federal Convention of 1787, at 64–69 (Max Farrand ed., 1966).

sions about impeachment. Third, while the views of the Philadelphia delegates help us identify the generic meaning of words found in the Constitution, the views and understandings of those who ratified the Constitution in the states ought to matter more. As James Madison noted, the framers were mere draftsmen. The ratifiers are the ones who actually purported to make the Constitution law.⁹⁴

Perhaps the most powerful reason for rejecting the notion that impeachment is the only means by which Congress may remove officers is the general acceptance of many forms of congressional removal. As previously discussed, Congress can terminate an office and thereby remove an incumbent, and it can enact tenure limits on an officer and thereby require her future ouster. Unless one rejects all removal statutes as unconstitutional, one cannot believe that impeachment is the only “congressional” means of removing officers.

b. The President’s Removal Power Is Exclusive

If the Constitution grants the President a removal power, one might reason that Congress cannot also have a removal power. First, one might believe that removal is an executive power, and hence Congress cannot enjoy that power. Second, one might suppose that most, if not all, of the President’s powers belong exclusively to the President, such that no one else can exercise the powers that the Constitution grants to the President. Finally, even if one admitted that Congress could pass some types of removal statutes, one might believe that any congressional removal authority must be circumscribed, lest Congress enjoy the same removal power that the President enjoys. Because each of these claims assumes that the President may remove executive officers, this Part takes that for granted.⁹⁵

⁹⁴ Madison argued that “if a key is to be sought elsewhere [other than the text], it must be . . . in the sense attached to it by the people in their respective State Conventions where it rec^d [sic] all the Authority which it possesses.” Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), in 9 *The Writings of James Madison* 71, 71–72 n.1 (Gaillard Hunt ed., 1910).

⁹⁵ Part II discusses whether the President actually has the ability to remove officers. See *infra* Part II.

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In the debates preceding the Decision of 1789, Oliver Ellsworth claimed that because removal was an executive power, no one else could remove:

I buy a Square Acre of land. I buy the Trees[,] Waters[, and] every thing belonging to it. [T]he executive power belongs to the president. [T]he removing of officers is a Tree on this Acre. The power of removing is therefore his, it is in him, it is nowhere else.⁹⁶

In the wake of the 1820 Tenure in Office Act, James Madison made a similar claim. Madison argued that the Act

overlook[ed] the important distinction between repealing or modifying the office and displacing the officer. The former is a legislative, the latter an Executive function; and even the former, if done with a view of re-establishing the office and letting in a new appointment, would be an indirect violation of the theory and policy of the Constitution.⁹⁷

Madison also attacked the notion that Congress could set term limits for officers, arguing that if Congress could do that, it could terminate officers at the beginning of every meeting of Congress, effectively making the officer serve at the Senate's pleasure.⁹⁸ Although more recent presidents and their legal advisers seem unaware of Madison's argument (and of the 1820 Act), some have articulated the same distinction.⁹⁹ Office termination removals, they

⁹⁶ This account of Senator Ellsworth's speech in the Senate comes from Senator William Maclay's diary. See *Diary of William Maclay*, supra note 29, at 113. Senator William Patterson supplies a different account of Ellsworth's speech:

To turn a man out of office is an exercise neither of legislative nor of judicial power; it is like a tree growing upon land that has been granted [to the President]. The advice of the senate does not make the appointment; the president appoints: there are certain restrictions in certain cases, but the restriction is as to the appointment and not as to the removal.

² George Bancroft, *History of the Formation of the Constitution of the United States of America* 192 (1882).

⁹⁷ Letter from James Madison to Thomas Jefferson (Dec. 10, 1820), in *3 Letters and Other Writings of James Madison* 196, 196 (1884).

⁹⁸ *Id.*; see also Letter from James Madison to James Monroe (Dec. 28, 1820), in *3 Letters and Other Writings of James Madison* 199, 200 (1884).

⁹⁹ See 59 Cong. Rec. 8609, 8609-10 (1920) (message of President Woodrow Wilson); Veto of a Bill Requiring Senate Confirmation of the Director and Deputy Director of the Office of Management and Budget, 159 Pub. Papers 539, 539 (May 18, 1973) (veto)

argue, are generally permissible so long as they are not attempts to exercise a generic power to remove. Other forms of congressional removal, because they come too close to approximating a power to enact simple removal statutes, are unconstitutional.

The Ellsworth/Madison argument is suspect for two reasons. First, it assumes that because the removal power is an executive power, it cannot also be regarded as any other type of power. Yet, even if removal is an executive power, it does not follow that removal cannot also be regarded as a judicial or legislative power. Their argument suggests that because the Senate may remove officers after an impeachment conviction, we ought to regard removal as something of an exclusive judicial power. To paraphrase Ellsworth, removal clearly is a “tree” on the Senate’s “acre.” Second, Ellsworth and Madison assumed that only the President may exercise executive powers. But this is clearly wrong. Congress has many executive powers, at least if we use the English system as a baseline. For instance, Congress may declare war.¹⁰⁰ More relevant, Congress may modify and terminate offices, powers that were regarded as executive powers in England. If Congress has these executive powers, it is hardly far fetched to suppose that Congress might also have the power to remove officers. Put another way, the question is not whether Congress has some executive power over offices. It clearly does. Rather, the question is whether Congress’s executive power over offices encompasses a removal power.

The claim that the President has an exclusive removal power relies on the intuition that when the Constitution grants the President a power, it implies that no one else can exercise that power. It makes sense to regard certain presidential powers, like the power to make treaties, as exclusive. Having more than one entity in charge of negotiating and ratifying treaties would generate chaos in foreign affairs.

message of President Richard Nixon); 11 Op. Off. Legal Counsel 25 (1987) (claiming that Congress cannot directly remove officers but can disestablish an office and thereby remove officers).

¹⁰⁰ Mike Ramsey and I have argued elsewhere that the Constitution allocates the Congress several powers that were regarded as executive powers, such as the power of war. See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 *Yale L.J.* 231, 347 (2001); Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 *Minn. L. Rev.* 1591, 1653–55 (2005).

Where removal is concerned, exclusivity could mean three things.¹⁰¹ First, exclusivity could signify that only the President can remove officers of the United States. This extreme claim of exclusivity is certainly misguided. As noted earlier, the Constitution expressly declares that the Senate may remove officers. Moreover, members of the executive branch have admitted that Congress can enact office termination removals and tenure limits for officers. As discussed later, federal courts may remove inferior judicial officers. The President clearly does not enjoy a removal monopoly.

Second, exclusivity might mean that only the President may remove certain executive officers. In other words, even if Congress may remove officers of various sorts, perhaps there is a set of officers that only the President may remove. This second form of exclusivity is mistaken because Congress clearly can remove all those officers the President may remove. Because Congress has the power to terminate offices and thereby remove incumbents, and because Congress may establish term limits for all executive officers, Congress already has the ability to remove all statutorily created executive officers. Moreover, Congress likely has a more extensive removal power than the President. While the President's ability to remove is best read to encompass only executive officers,¹⁰² Congress can remove all statutorily created officers, save for Article III judges.

Third, one might suppose that the President's removal power is exclusive, in the sense that only the President can remove for any reason whatsoever.¹⁰³ This form of exclusivity poses no difficulties for the congressional removal power advanced here. When the President grants an officer tenure "during pleasure,"¹⁰⁴ the President may remove at his whim. The President may remove based on nothing else than a desire to reward a supporter with an office or a personal dislike of the incumbent. However arbitrary the President's reasons might be, his removals cannot be questioned when

¹⁰¹ The three forms of exclusivity discussed below are not addressed in the scholarly literature or in judicial opinions. Rather, these theories are an attempt to make sense of the widespread intuition that the President enjoys an exclusive removal power.

¹⁰² See *infra* Part II.B.1.

¹⁰³ Over a series of helpful conversations, Professor Mike Rappaport brought this possibility to my attention.

¹⁰⁴ Part II discusses this type of tenure at great length.

he grants tenure during pleasure. In contrast, Congress does not have the generic power to remove officers at pleasure. Instead, all congressional removals must be necessary and proper for carrying federal powers into execution.¹⁰⁵ Hence, if all one means by exclusivity is that Congress's removal power must be narrower than the President's (in some sense), that poses no difficulties for the congressional removal power defended here.

c. A Congressional Removal Power Undermines the President

If a congressional removal power enabled Congress to dominate executive officers, perhaps that would be a reason to doubt the constitutionality of such a power. Indeed, some have claimed that the Decision of 1789 rested on a concern that a congressional role in removals would weaken the President.¹⁰⁶ During that debate, James Madison suggested that such a role would so undermine the President that it was unlikely that the Constitution granted Congress any such role.¹⁰⁷ Much later, Madison and Thomas Jefferson made a similar claim. Madison said the Tenure in Office Act of 1820¹⁰⁸ ensured that all officers would serve during the Senate's pleasure.¹⁰⁹ Jefferson claimed that the Act "sap[ped] the constitutional and salutary functions of the President This places, every four years, all appointments under [the Senate's] power."¹¹⁰

The apprehension that a congressional removal power would undermine the President overstates the influence Congress would enjoy if it could enact simple removal statutes and ignores the influence Congress already has over officers. First, a power to enact simple removal statutes is no more potent than any of the other removal powers (for example, office termination and term limits) that Congress enjoys. If one rejects a simple removal statute be-

¹⁰⁵ Recall the constraints on congressional removal authority discussed *supra* in notes 47–48 and accompanying text.

¹⁰⁶ *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986).

¹⁰⁷ 1 *Annals of Cong.*, *supra* note 73, at 495–96.

¹⁰⁸ Act of May 15, 1820, ch. 102, 3 Stat. 582 (1820).

¹⁰⁹ See Letter from James Madison to Thomas Jefferson (Dec. 10, 1820), in 3 *Letters and Other Writings of James Madison* 196, 196 (1884).

¹¹⁰ Letter from Thomas Jefferson to James Madison (Nov. 29, 1820), in 15 *The Writings of Thomas Jefferson* 294, 294 (Albert Ellery Bergh ed., 1907).

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cause it undermines the President, all removal statutes must be rejected. This proposition is untenable.

Second, all removal statutes, including simple removal statutes, must undergo bicameralism and presentment. Presentment enables the President to check any removal bill. If the President chose to use his veto to protect those officers who enjoyed his confidence, then Congress could remove only by mustering two-thirds majorities in both chambers. Because Congress could remove only in the case of widespread disapproval of some officer, a power to enact simple removal statutes would not transform the relationship between the Chief Executive, executive officers, and Congress. It certainly would not so undercut the executive's influence that it is impossible to suppose that the Constitution's makers would have ceded to Congress a removal power.¹¹¹

Third, Congress already wields immense influence over officers, even if it cannot enact any form of removal statute. Congress has the power of the purse, it sets the jurisdiction of offices, and its committees hold daunting oversight hearings. Because Congress already has ample means of influencing officers, a power to enact simple removal statutes does not greatly empower Congress.

¹¹¹ One might suppose that Congress's ability to bundle disparate pieces of legislation makes it easy to pass simple removal statutes. For instance, Congress might bundle a simple removal statute with other provisions the President desperately desires, giving the President a Hobson's choice. But Congress already has the ability to present a President with such a choice even if it cannot enact simple removal statutes. Even in the absence of a congressional power to remove, Congress could approach the President and give him an equivalent offer: "We will pass a statute you desire only if you first remove a particular officer." The only difference is that one deal is codified into law, and the other deal is informal. Both deals promise desired legislation only if an officer is removed. Hence, the ability to bundle a removal statute with other legislation does not really grant Congress some extraordinary means of compelling an officer's removal.

Alternatively, one might wonder whether Congress can delegate the power to terminate officers, for if it could delegate this authority, it might seem rather easy to terminate an officer. Exercises of delegated power are not subject to bicameralism and presentment. Yet if Congress can delegate the power to make simple removals, it can also delegate the powers to terminate an office or set term limits. The possibility of delegation as a means of undermining the Executive's control is a possibility that exists for anyone who admits that Congress has some ability to remove officers. Unless one is willing to say that Congress can never pass a statute that operates to remove an officer, there is no reason to single out simple statutory removals on delegation grounds.

Finally, Jefferson's and Madison's concerns apply equally to statutes that contain office sunsets. Once one admits that Congress can terminate offices, Congress need only provide that an office will cease to exist in a year. After its expiration, Congress can revive the office. Should the President re-nominate the former officer to the revived office, the Senate can decide whether to consent based on its evaluation of the officer's previous tenure. This strategy of office sunsets enables Congress and the Senate to enjoy the very same influence that Jefferson and Madison deplored. The only difference between this scheme and the 1820 Act is that this scheme requires Congress to reauthorize the office, while the Act left the office intact. This difference is not constitutionally meaningful, suggesting that Jefferson and Madison had not completely thought out their objections to tenure limits.¹¹² While the 1820 Act may have been bad policy, it was constitutional. The same should be said of simple removal statutes.

d. Distinguishing Amongst Forms of Removals

One might be tempted to distinguish a simple removal statute from the other forms of congressional removal. The theory might be that the Constitution somehow bars simple removal statutes but permits some (or all) of the other removal statutes.¹¹³ In particular, one might argue that differences in form provide a reason to distinguish amongst removals.

It is a mistake to attach any constitutional significance to the form of a removal statute. Form ought to trump substance only when the Constitution suggests that form matters. If the Constitution expressly sanctioned certain forms of congressional removal, then perhaps there would be a good reason to distinguish simple removal statutes from the sanctioned forms of removal. Yet nothing in the Constitution comes close to expressly sanctioning termi-

¹¹² The fact that neither objected to earlier statutory established tenure limits lends some weight to the claim that their denunciations of the Act of 1820 were made without sufficient reflection.

¹¹³ President Nixon clearly thought that form mattered when it came to removal because while he was untroubled by removals via office termination, he opposed statutes that removed an officer while leaving the office intact. See Veto of a Bill Requiring Senate Confirmation of the Director and Deputy Director of the Office of Management and Budget, 159 Pub. Papers 539 (May 18, 1973).

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nation, delayed, or contingent removals. They are on the same footing as simple statutory removals. Hence, if the former are constitutional, the latter should be so as well.

To be clear, the argument is not that form never matters. Form certainly matters sometimes, as when the Constitution forbids certain confiscations without compensation (takings of private property), yet clearly authorizes other confiscations in which no compensation need be paid (taxes). The argument made here is that the Constitution gives us no reason to suppose that the form matters in judging the constitutionality of removal statutes.

Indeed, the Necessary and Proper Clause—the source of any congressional removal authority—supplies no basis for distinguishing amongst forms of congressional removal. Simple removal statutes are not any less “necessary and proper” than termination, delayed, or contingent removals. For all these reasons, the Constitution does not regard simple statutory removals as beyond the constitutional pale while at the same time authorizing some or all of the other forms of removal statutes. The Constitution is better read as authorizing all removal statutes.¹¹⁴

* * *

Many scholars have a powerful intuition that Congress cannot remove officers. Some might say that removal just seems like an executive power and thus cannot be exercised by the legislature. Others might add that impeachment must be the sole congressional means of removing officers, for it makes no sense to suppose that Congress has an additional, implicit power to remove officers by statute.

¹¹⁴ Nonetheless, if one believes that form matters with respect to removal statutes, then Congress can engage in all sorts of artful schemes to realize the substance of their removal preferences while respecting the form. For instance, rather than enacting a simple removal statute, Congress could terminate an office and constitute a new one, all in the same statute. So, if Congress wishes to remove a slothful or sloppy Secretary of Defense, it will terminate the office of Secretary of Defense (thereby ousting the incumbent), create a new office (call it the Secretary of Offense) and grant this new office all the powers of the former office. In form, this is not a simple removal statute. Yet, in substance, it is indistinguishable. Likewise, if one accepts that Congress can impose tenure limits on incumbent officers, Congress can enact a statute providing that an incumbent officer’s tenure expires one minute from enactment. In form the statute does not immediately remove, but in substance that statute seems virtually indistinguishable from a statutory removal.

Yet many of these scholars likely regard certain forms of congressional removal as entirely constitutional. Most will agree that Congress can terminate offices, even when the termination removes incumbent officers. Similarly, most likely regard congressionally imposed term limits for non-judges as entirely appropriate. These beliefs point toward the constitutionality of removal statutes, including simple removal statutes.

One of these two contradictory intuitions must give way. This Article has argued that the first intuition, although reasonable enough, is ultimately wrong. Any account of the President's removal power cannot be exclusive because the Constitution expressly grants the Senate the power to remove upon an impeachment conviction. Hence, the mere fact that the President may remove executive officers does not mean that Congress cannot. Moreover, the impeachment provisions do not have negative implications for a congressional removal power any more than they do for an executive removal power. The impeachment provisions establish procedures for a grand, public inquest where an officer is accused of some great public offense. Statutory removals are not about guilt or innocence but are far less solemn decisions that an officer should no longer serve. Finally, text, structure, and history clearly favor the second intuition. Using its Necessary and Proper Clause authority, Congress has long enacted removal statutes of various sorts. Congress's power over offices extends to removing officers, so long as these removals are necessary and proper for carrying federal powers into execution.¹¹⁵

¹¹⁵ Given the emphatic statement in *Bowsher* that Congress may not remove officers, one may wonder whether this Part of the Article fits the classic definition of an academic discussion: all talk with little consequence. One should never discount that possibility. On the other hand, there are reasons to think that *Bowsher* may not be the final word on this matter. First, a plethora of statutes require removal upon conviction for a federal offense, which arguably implies a general congressional power to remove. Second, no one in *Bowsher* argued that Congress could remove officers of the United States. Instead, all seemed to agree that if *Bowsher* was an officer, the removal provision at issue was unconstitutional. Hence, the precise question of whether Congress has a power to remove was not litigated before the Supreme Court.

Third, a Supreme Court case, *Crenshaw v. United States*, runs somewhat counter to the claims in *Myers* and *Bowsher* that Congress cannot remove officers. 134 U.S. 99 (1890). *Crenshaw* sought back pay after he was discharged from the naval service under a statute passed by Congress to reduce the number of naval appointments. *Id.* at 101–02. Congress did this not by eliminating existing offices but by precluding the

II. A PRESIDENTIAL REMOVAL POWER

Ever since 1789, statesmen and scholars have maintained that the Constitution grants the President a power to remove officers.¹¹⁶ The principal foundation for this conclusion was that the Constitution's grant of executive power encompasses a removal power. As James Madison put it, "I conceive that if any power whatsoever is in its nature executive it is the power of appointing, overseeing, and controlling [sic] those who execute the laws."¹¹⁷ The precise contours of this removal authority were never made clear. Some thought that the President had a power to remove all officers, save for federal judges.¹¹⁸ Others made comments that suggested that the President's removal power extended to executive officers only.¹¹⁹

Arguing in the alternative, some early advocates of a presidential removal power also maintained that because the President appointed, he could remove.¹²⁰ The theory was that a removal power inherently accompanied the appointment power. Other proponents inferred a removal power from the President's "faithful execution"

Navy from creating new midshipmen positions for recent graduates of the Naval Academy. Citing precedents about the power of state legislatures to change the terms and conditions of incumbent officers, the Court concluded that Congress also had the power to alter the terms of incumbent federal officers, including military officers who had been appointed under a statute that provided that they would not be removed except via court martial. *Id.* at 108.

Neither *Myers* nor *Bowsher* considered *Crenshaw*, the cases it relied upon, or the claim that the legislature, as the creator, funder, and terminator of offices, also enjoys authority to remove incumbents from office. Should the Court ever confront the tension between *Crenshaw*, *Bowsher*, and *Myers*, it should more fully explore the complicated question of a congressional removal power.

¹¹⁶ See Prakash, Decision of 1789, *supra* note 5, at 1023–24.

¹¹⁷ 11 Documentary History of the First Federal Congress 868 (Charlene Bangs Bickford et al. eds., 1992).

¹¹⁸ *Id.* at 1082 (comments of Mr. Benson).

¹¹⁹ *Id.* at 1079–80 (comments of Madison).

¹²⁰ See, e.g., *id.* at 872 (statement of Mr. Vining); *id.* at 903 (comments of Mr. Benson). In more recent times, executive branch lawyers have tended to latch on to the appointment argument as a means of justifying a removal power. See, e.g., 7 Op. Off. Legal Counsel 95, 97 (1983). These lawyers might have regarded this argument as the best means of validating a presidential removal power. Alternatively, it is possible that these lawyers concluded that the President would have a broader power to remove if his removal power was tied to those who were presidential appointees. In practice, this enables the President to remove the so-called quasi-judicial and quasi-legislative officers that populate the independent agencies.

duty. The claim was that, without a removal power, the President could not ensure faithful law execution.¹²¹

The idea of a unilateral presidential removal power has not gone unchallenged. Even before 1789, Publius claimed that because the Senate's consent was necessary to appoint, its consent was necessary to remove.¹²² During the famous Decision of 1789, some members of the House denied that the President had a unilateral removal power. Some echoed Publius, some insisted that impeachment was the exclusive means of removing officers, and some maintained that the Constitution was silent, leaving it to Congress to grant the President a removal power.¹²³

For many reasons, textual, structural, and historical, Madison and his allies had the better case. Though a previous subpart merely assumed that the President had some ability to remove officers,¹²⁴ this Part actually makes a sustained case for a presidential power to remove. It then addresses arguments against recognizing such power. It concludes by discussing whether and how Congress might constrain the President's ability to remove.

A. The Executive Power of Removal

The idea that the President may remove officers has a long pedigree and much to commend it. Yet, to date, there has not been a thorough analysis of exactly why and how the President may remove officers. This Part advances textual, structural, and historical arguments in favor of a few removal theories.

1. Text and Structure

Three overlapping theories might justify an executive power of removal. First, just as the Article II grant of executive power encompasses law execution authority and a residual foreign affairs authority, so too may it incorporate a power to remove executive officers. The underlying claim is that the grant of executive power conveys all those authorities commonly regarded as executive in late eighteenth century America and that removal was such an au-

¹²¹ 1 Annals of Cong., supra note 73, at 496–97 (statement of Mr. Madison).

¹²² The Federalist No. 77, at 427 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹²³ See Prakash, Decision of 1789, supra note 5, at 1034–42.

¹²⁴ See supra Part I.C.2.b.

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thority. This “distinct power” theory is a plausible and simple explanation for why the Constitution might grant the President a removal power.

Alternatively, removal authority might arise from the President’s ability to control the exercise of his constitutional powers. When the President appoints and commissions an executive officer, he arguably authorizes the officer to help implement his executive powers. Because the powers the executive officers help exercise are ultimately the President’s, he may withdraw his authorization. When the President rescinds his authorization, he disempowers the executive officer and thereby removes her.¹²⁵ We can call this the “disempowerment” theory of removal.

These two theories possibly shortchange the President, at least if we use the English Crown’s authority over offices as a guide. When the Crown appointed someone, it had some discretion as to which tenure to grant: during pleasure, during good behavior, or during other recognized terms.¹²⁶ Each tenure grant thus stated whether and how the Crown might remove. In this way, the Crown’s ability to remove turned upon its own grants of tenure.

If the President has a similar tenure-setting power, he may reserve the right to remove executive officers. Consistent with this claim, it has long been understood that the President may appoint officers during pleasure. When the President makes such an appointment, the President reserves the right to remove for any reason. Yet, if a President granted an officer tenure for four years, terminable earlier upon her misbehavior, then the President could remove the officer only for misbehavior.¹²⁷ That is, the President would need a judicial decision that the officer had misbehaved in order to oust her from office.¹²⁸ This “tenure” theory suggests that

¹²⁵ This argument somewhat parallels the claims made in the context of jurisdiction stripping removal statutes.

¹²⁶ See G.E. Aylmer, *The King’s Servants* 69, 106–10 (rev. ed. 1974) (describing offices as “gift” of the King, outlining different tenures, and relating the Crown’s overgenerosity and how some of his assistants tried to check it).

¹²⁷ Of course, other tenures are possible. The President might grant a four-year term, terminable at his pleasure. The officer’s tenure would end whenever the President sought removal, but in no event would tenure extend beyond four years. Reappointment would be necessary to serve beyond four years.

¹²⁸ See Prakash & Smith, *supra* note 13, at 33–37 (discussing means for adjudicating claims of misbehavior).

the President determines the extent of his authority to remove officers when he grants commissions to executive officers.

Could the President grant executive officers tenure that outlasts the President's time in office, such as tenure for life during good behavior? There are compelling reasons to doubt that the President can grant such tenure, or any other tenure, that constrains a future President's ability to control who helps exercise his executive powers. Subject to certain constraints, such as the Faithful Execution Clause,¹²⁹ one might conclude that the President may delegate his executive power for as long as he is President. To entrench a delegation beyond the President's tenure and thereby limit a successor's ability to remove, however, would trespass upon the successor's power. The Constitution grants each new President all of the Article II powers. It never empowers any President to delegate or alienate these powers in a manner that precludes a future President's complete control over them.¹³⁰ Whatever tenure-setting power presidents enjoy, subsequent presidents must have a free hand in removing holdover executive officers.

The President's power to issue commissions supports the notion that the Constitution permits the President to set the tenure of his executive officers. The Constitution hints at this in two places. It dictates that officers who receive recess appointments must have their "Commissions . . . expire at the End of [the Senate's] next Session."¹³¹ This arguably is necessary to ensure that the President could not grant a recess appointee a commission with an indefinite term. This language arguably presupposes that the President ordi-

¹²⁹ The Faithful Execution Clause arguably bars the grant of certain tenures. The President likely cannot take steps that make it impossible for him to "take Care that the Laws be faithfully executed." U.S. Const. art II, § 3. For instance, he must retain the ability to remove unfaithful law executors. If he could grant law executors tenure without possibility for removal, the President would have ensured that he could *not* see such laws faithfully executed. Conversely, tenure during good behavior for a period of four years might preserve the President's ability to remove for unfaithful execution. Unfaithful execution of the laws prior to the end of four years could lead to the premature ouster of the officer on the grounds that she had misbehaved.

¹³⁰ This is not to deny that presidents may exercise powers in ways that affect the exercise of powers by future presidents. For instance, when a president pardons an unconvicted person, he precludes future prosecution of that person, at least for the pardoned offense. But that is far different from delegations of authority that strip future presidents of a portion of their power indefinitely.

¹³¹ U.S. Const. art. II, § 2, cl. 3.

narily has the ability to set when a commission expires. Likewise, the Constitution refutes any pretensions the President might have about setting the tenure of judges when it provides that they “shall hold their Offices during good Behaviour.”¹³² The constitutionally mandated tenure perhaps suggests that the President may set the tenures of executive officers in the commissions he issues them.

Under each of these theories, any removal power likely extends to executive officers only. It makes sense to suppose that any distinct removal power wielded by the Executive would extend only to executive officers. Given our system of separated powers, it seems unlikely that the Constitution grants the Chief Executive the authority to remove officers of Congress or inferior judicial officers. Moreover, not having delegated any of the non-executive powers exercised by quasi-judicial and quasi-legislative officers, the President cannot remove such officers by merely retracting any executive power these officers might exercise. In other words, the disempowerment theory likely does not permit the President to oust non-executive officers from their offices. Finally, the President’s tenure-setting authority arises, if at all, from his ability to attach conditions to the commissions of those who help exercise executive authority. Where non-executive officers are concerned, the President would seem to have no right to control their exercise of non-executive authority. Hence, the President has no right to set the tenure of non-executive officers and therefore no ability to set tenure during pleasure. Whatever tenure Congress sets for non-executive officers will prevail, for the President has no constitutional claim over such officers or their powers.

Structurally, regarding the President’s removal power as limited to only executive officers makes good sense. As Fisher Ames argued two centuries ago in the House, executive officers are properly regarded as the executive’s assistants, and it seems fitting that

¹³² U.S. Const. art. III, § 1. Interestingly, the Act of Settlement, the precursor of the Constitution’s good behavior provision, made it clear that the Crown could establish, via commission, the terms of a judicial officer’s tenure. The Act of Settlement specifically stated that “judges commissions be made *quamdiu se bene gesserint*,” Act of Settlement, 12 & 13 Will. 3, c. 2, § III (1701) (Eng.), thereby strongly suggesting that in the absence of this constraint, the Crown could set less secure tenures in judicial commissions. Steve Smith and I argue that the Crown originally did have the authority to set the tenure of all officers, including judges. See Prakash & Smith, *supra* note 13, at 14.

he should be able to remove them.¹³³ On the other hand, non-Article III judicial officers, such as clerks of the court, are not servants of the President in any sense. The same must be said of quasi-legislative and quasi-judicial officers. If Congress can create such “quasi” officers,¹³⁴ the President’s constitutional claim to remove such officers is weak.

2. History

History does not uniformly back any of these presidential removal theories. English and colonial history support the tenure theory of removal, as the Crown and its governors enjoyed the power to set tenure rather than a distinct removal power. Post-ratification events, however, favor the distinct power theory, with many speaking of a separate removal power. Notwithstanding these different rationales, history provides robust support for the generic claim that the President may remove executive officers.

Contrary to what some might suppose, the Crown in the seventeenth and eighteenth centuries lacked a distinct removal power. Instead, as the fountain of all offices,¹³⁵ the Crown could establish the tenure of its officers, judicial and executive.¹³⁶ The Crown could choose which of several tenures to grant an officer: to an individual and his heirs; for the officer’s life; during good behavior—*quamdiu se bene gesserint*; or during the Crown’s pleasure—*durante bene placito*.¹³⁷ Repeated dismissals of judges appointed during pleasure led Parliament to enact the famous Act of Settlement as a means of mandating that certain judicial offices be held during good behavior.¹³⁸ Less famously, Parliament constrained the Crown’s authority to set tenure for certain executive offices.¹³⁹ Each such act con-

¹³³ See, e.g., The Congressional Register (June 16, 1789), *reprinted in* 11 Documentary History of the First Federal Congress, *supra* note 117, at 860, 880.

¹³⁴ Steve Calabresi and I have argued that Congress cannot create such officers. See Calabresi & Prakash, *supra* note 18, at 567–68.

¹³⁵ 1 Blackstone, *supra* note 38, at *271.

¹³⁶ See Prakash & Smith, *supra* note 13, at 14.

¹³⁷ See Aylmer, *supra* note 126, at 106.

¹³⁸ Act of Settlement, 12 & 13 Will. 3, c. 2, § III (1701) (Eng.).

¹³⁹ See 1 Blackstone, *supra* note 38, at *348 (noting that the office of coroner was held for life, but that “extortion, neglect, or misbehavior [were] also made causes of removal” by statute).

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firmed that, in the absence of legislation, the Crown could set official tenure.

The Crown's ability to remove depended wholly on its grants of tenure. When the Crown granted tenures other than during pleasure, the Crown limited its ability to remove. For instance, when the Crown granted an officer tenure during good behavior, the officer could be ousted only upon a judicial finding of misbehavior.¹⁴⁰ In contrast, when the Crown granted an officer tenure during pleasure, the Crown could remove at will because it had reserved the power to do so. Because the ability to remove depended upon the grant of tenure, the Crown lacked a distinct removal power.

Predictably, colonial governors enjoyed the power to set the tenure of officers they appointed. While the gubernatorial commissions that came from the Crown did not mention this authority, it was understood to exist nonetheless.¹⁴¹ Using this authority, governors sometimes granted judges tenure during good behavior.¹⁴² Concerned about such grants, the Crown eventually mandated that colonial judgeships be held during pleasure.¹⁴³ By so constraining gubernatorial power, the Crown confirmed that in the absence of such instructions, the governors could set tenure in office as they saw fit. Indeed, in one case where a colonial governor granted tenure during good behavior, the Crown's lawyers concluded that the governor's commission granted him authority to set tenures, even tenures contrary to later royal instructions.¹⁴⁴

¹⁴⁰ See Prakash & Smith, *supra* note 13, at 14–15.

¹⁴¹ See Evarts Boutell Greene, *The Provincial Governor in the English Colonies of North America 134–35* (New York, Longmans, Green, & Co. 1898) (discussing how governors sometimes granted tenure during good behavior and sometimes granted tenure during pleasure).

¹⁴² See *id.*

¹⁴³ See *id.* at 135.

¹⁴⁴ See Prakash & Smith, *supra* note 13, at 22 (citing D. Ryder & W. Murray, *The opinion of the attorney and solicitor, Ryder and Murray, on the commission granted to De Lancy, the chief justice of New York, in 2 Opinions of Eminent Lawyers 177, 177–78* (photo. reprint 1971) (George Chalmers ed., Burt Franklin 1814)). In another case, a governor's grant of good behavior tenure to three judges was held invalid because even though the governor's commission might have authorized him to grant such tenure, the simultaneously issued instructions denied him that authority. See Greene, *supra* note 141, at 95.

Like the Crown, the colonial governors lacked a distinct removal power.¹⁴⁵ Instead, their power to set tenure in office gave them the ability to reserve the right to remove. Once again, when an officer served at pleasure, the governor had the power to remove him at will. When officers served during good behavior, however, neither the governor nor the Crown could legally remove without a judicial finding of misbehavior.

In the revolutionary state constitutions, removal was clearly associated with the executive. Some constitutions explicitly referenced removal authority. For officers not appointed by the legislature, the South Carolina governor could “appoint [officers] during pleasure.”¹⁴⁶ The Delaware Constitution expressly granted its president a removal power over civil officers.¹⁴⁷ New York’s governor was part of the council of appointment that could remove various officers.¹⁴⁸ In Maryland, the governor could suspend or remove civil officers.¹⁴⁹

Other state constitutions incorporated a removal power through the grant of executive power. Under the Pennsylvania Constitution, the General Assembly might impeach an officer even after he had been removed, implying that state officers generally served at

¹⁴⁵ An interesting 1773 debate between General William Brattle and John Adams suggests that colonial governors lacked a distinct removal power. Massachusetts judges had commissions that failed to set tenure. Brattle asserted that these judges had tenure during good behavior, arguing that all judges had to have such tenure. See Prakash & Smith, *supra* note 13, at 22–23. Adams argued that when no tenure had been granted, the offices were presumed to be granted at pleasure. See John Adams, *The Revolutionary Writings of John Adams* 104 (2000), available at http://olldownload.libertyfund.org/EBooks/Adams_0283.pdf. Neither seemed to think that the governor had a distinct removal power. Adams could have argued as much, but he instead maintained that the judges’ commissions had an implied condition of tenure during pleasure. *Id.* In making this argument, Adams suggested that he did not believe that either the Crown or the governor had a distinct removal power. Instead, their ability to remove stemmed from their grants of tenure.

¹⁴⁶ S.C. Const. of 1778, art. XXXII. The Governor needed the advice and consent of his executive council for such appointments. *Id.*

¹⁴⁷ Del. Const. of 1776, art. 16.

¹⁴⁸ See N.Y. Const. of 1777, art. XXIV (requiring that “all military officers be appointed during pleasure”); *id.* at art. XXIII (creating a council of appointment composed of the Governor and one Senator per great district); *id.* art. XXVIII (providing that offices for which tenure was not set by the constitution were to “be construed to be held during the pleasure of the council of appointment”).

¹⁴⁹ Md. Const. of 1776, art. XLVIII.

the pleasure of the executive council.¹⁵⁰ A committee of the Pennsylvania Council of Censors confirmed this reading. The Committee noted that executive officers hold office “at pleasure” and that removal was an “executive power.”¹⁵¹

Other state constitutions that granted executive power were likely understood the same way. Because the Vermont Constitution was based on its Pennsylvania counterpart,¹⁵² the corresponding provision of the former might have been understood as granting the executive council a removal power.¹⁵³ Likewise, constitutions in Georgia, New Jersey, North Carolina, and Virginia all contained generic grants of executive power.¹⁵⁴ Because these constitutions did not grant anyone a broad removal power, the chief executives presumably had such power as part of the general grant of executive power.¹⁵⁵

Consistent with the claim that state chief executives were generally empowered to superintend and remove officers, the Continental Congress requested that these executives suspend or remove continental officers who neglected their duties.¹⁵⁶ Nothing in the Articles of Confederation required Congress to direct their request to the state chief executives (as opposed to the assemblies). Nonetheless, Congress’s appeal made sense because these executives were already suspending and removing state officials.

¹⁵⁰ See Pa. Const. of 1776, § 22.

¹⁵¹ A Report of the Committee of the [Pennsylvania] Council of Censors 22 (Bailey ed., 1784).

¹⁵² See Paul Gillies, Not Quite a State of Nature: Derivations of Early Vermont Law, 23 Vt. L. Rev. 99, 106–22 (1998) (discussing Vermont’s use of Pennsylvania’s Constitution of 1776 as a model).

¹⁵³ See Vt. Const. of 1777, ch. II, § XX.

¹⁵⁴ See Ga. Const. of 1777, art. XIX; N.C. Const. of 1776, art. XIX; N.J. Const. of 1776, art. VIII; Va. Const. of 1776.

¹⁵⁵ Any narrow grants of removal authority to another institution in these constitutions likely were regarded as exceptions to the governor’s generic removal power. In other words, if the governors had a generic removal power, grants of specific removal authority to other institutions were likely regarded as exceptions to the governor’s removal power.

¹⁵⁶ 10 Journals of the Continental Congress 138, 139–40 (recording the Continental Congress’s recommendation that state “supreme executive powers” suspend officers for “misbehaviour or neglect of duty” and remove “supernumerary” civil officers”).

Did state executives have the power to set tenure, albeit within a more confined scope than the Crown could grant in England?¹⁵⁷ Like the federal Constitution that was to come, the state constitutions never expressly declared that the state executives had any discretion as to the tenure they might grant. Yet there may have been hints that the state executives had such authority. The South Carolina Constitution declared that governors “*may* appoint during pleasure,” language that might have left open the possibility that the governor might grant a more secure tenure.¹⁵⁸ The Delaware Constitution may have raised the same possibility.¹⁵⁹ And the generic grants of executive power often found in state constitutions might have been understood to encompass a power to establish variable tenures.

The creation of the Constitution witnessed few specific discussions of whether the executive could remove officers or set tenure. A few Philadelphia delegates proposed an executive council composed of six secretaries that would serve during the President’s pleasure.¹⁶⁰ Additionally, Publius claimed that the Executive could remove only with the Senate’s concurrence.¹⁶¹ Publius’s claim

¹⁵⁷ By the time the colonial period came to a close, Americans likely conceived of possible tenures in office more narrowly than did their English counterparts. In the many controversies about the tenure of colonial judges, tenure during good behavior was consistently contrasted with tenure during pleasure. Perhaps longer tenures (such as tenure to a person and his heirs) were regarded as improper because they treated offices as property. A more republican conception of government meant a more republican conception of offices. Consistent with this claim, the New York Constitution mandated that all tenures would be in a narrow range. Some officers served at pleasure, others served a set number of years, and still others served during good behavior. See N.Y. Const. of 1777, art. XXIV (providing that “all military officers be appointed during pleasure” and that the chancellor, judges of the supreme court, and first judges of the county courts hold their offices during good behavior or until the age of sixty); id. art. XXVI (providing that “sheriffs and coroners be annually appointed”); id. art. XXVII (providing that various court personnel hold offices at the pleasure of the judges who appointed them).

¹⁵⁸ S.C. Const. of 1778, art. XXXII (emphasis added).

¹⁵⁹ Del. Const. of 1776, art. 16 (providing that the governor “may appoint, during pleasure”). More so than the South Carolina Constitution of 1778, the Delaware Constitution suggests that the discretion may have solely related to the decision of whom to appoint and may not have extended to the tenure grantable.

¹⁶⁰ This proposal was eventually pared back, leading to the Opinions Clause. U.S. Const. art. II, § 2, cl. 1 (“The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . .”).

¹⁶¹ See The Federalist No. 77 (Alexander Hamilton).

probably was based on the idea that removal authority followed the appointing power, save for judges who would have tenure during good behavior.¹⁶²

There were, however, numerous suggestions that the President could superintend executive officers. Hamilton's comments, also in *The Federalist Papers*, that executive officers ought to be subject to the President's "superintendence," are in tension with his claim about removal.¹⁶³ William Maclaine of North Carolina spoke of the Chief Executive giving instructions to his revenue officer "deputies" and being responsible for such instructions.¹⁶⁴ Even anti-federalists understood that one man was best situated "to superintend the execution of laws with discernment and decision, with promptitude and uniformity."¹⁶⁵ Evidently, this claim was premised on the assumption that the President would be able to direct the law execution of subordinate executives. Although it is possible to believe that the Constitution requires executive officers to follow presidential instructions without also supposing that the Constitution grants the President a removal power,¹⁶⁶ it surely is more plausible to regard removal as the powerful tool by which the Chief Executive would exert control over his executive branch.

After ratification, the question of removal came to the fore in the early summer of 1789. In acts creating the Departments of Foreign Affairs, War, and Treasury, Congress famously concluded that the President had a constitutional right to remove executive officers. Each of these acts assumed that the President had a preexisting, constitutional power to remove the relevant secretary. In the House, Representatives contested the question over days of debate, with a significant majority (29-22) voting to approve language implying a constitutional removal power in the hands of the Presi-

¹⁶² Publius's earlier claim in *The Federalist* No. 39 that Congress would help set the tenure of offices, *supra* note 53, does not foreclose the possibility that the President might set tenure as well. For a discussion of the interaction between the two powers to set tenure, see *infra* Part II.E.

¹⁶³ See *The Federalist* No. 72 (Alexander Hamilton).

¹⁶⁴ See 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 47 (photo. reprint 1987) (1888).

¹⁶⁵ Letters from *The Federal Farmer* (No. 14), in 2 *The Complete Anti-Federalist* 307, 310 (Herbert J. Storing ed., 1981).

¹⁶⁶ See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *Harv. L. Rev.* 1231, 1244 (1994) (suggesting the alternative that the President could have the power to nullify the acts of insubordinate officials).

dent. In the Senate, the Vice President cast tie-breaking votes in favor of retaining this language.¹⁶⁷

On the one occasion when the Senate challenged the House majority and eliminated any reference to presidential removal, members of the House issued an ultimatum.¹⁶⁸ These members demanded that the Senate either accept the language implying that the President had constitutional power to remove the Treasury Secretary or adopt a separate resolution affirming the same.¹⁶⁹ The Senate chose the former, thus agreeing to adopt a provision which implied that the President had a constitutional right to remove the Treasury Secretary.¹⁷⁰

Although various arguments were made in favor of a presidential removal power, the one made most often rested on the claim that the executive power included a power to remove executive officers. Indeed, the vote on the act establishing a Department of Foreign Affairs was immediately and thereafter regarded by all as vindicating that view.¹⁷¹ Apparently absent was any discussion that the ability to remove arose specifically from the President's grants of tenure.

¹⁶⁷ 4 Documentary History of the First Federal Congress of the United States of America 697 n.4 (Charlene Bangs Bickford & Helen E. Veit eds., 1986).

¹⁶⁸ See Letter from Thomas Hartley to William Irvine (Aug. 17, 1789), in 16 Documentary History of the First Federal Congress of the United States of America 1337 (Charlene Bangs Bickford et al. eds., 2004).

¹⁶⁹ See *id.*

¹⁷⁰ See Treasury Act, H.R. 9, 1st Cong. (1789), reprinted in 6 Documentary History of the First Federal Congress of the United States of America 1975, 1985 & n.5 (Charlene Bangs Bickford & Helen E. Veit eds., 1986).

¹⁷¹ See Letter from James Madison to Thomas Jefferson (June 30, 1789), in 16 Documentary History of the First Federal Congress of the United States of America, supra note 168, at 890, 893; Letter from James Madison to Tench Coxe (June 24, 1789), in 16 Documentary History of the First Federal Congress of the United States of America, supra note 168, at 852, 853; Letter from James Madison to George Nicholas (July 5, 1789), in 16 Documentary History of the First Federal Congress of the United States of America, supra note 168, at 954, 957. Some might suppose that we should downplay the Decision of 1789 because some votes were close and because a presidential removal power was fiercely and ably contested. This wrongly minimizes the significance of the Decision. Majorities in both chambers resisted the obvious and understandable temptation to narrowly construe the power of an institutional rival. Instead, they enacted statutes that reflected a generous (and proper) understanding of executive power. Given that self-abnegation on a contestable question is rare, it is hard to exaggerate the significance of the Decision of 1789.

With less notoriety, Congress reaffirmed the lesson of the Decision of 1789 in other statutes. Congress “declared” that the President had the same powers to revoke commissions and remove officers that the Continental Congress had over the Northwest Territory.¹⁷² Like the departmental acts, this statute was an affirmation of constitutional principle. In the subsequently enacted Judiciary Act of 1789, Congress provided that the marshals served at pleasure, presumably at the President’s pleasure.¹⁷³ Most often, Congress created offices and said nothing about removal. Given the celebrated Decision of 1789, statutes that said nothing about removal were undoubtedly understood as leaving intact the settled congressional conclusion that the President had a constitutional removal power.

President Washington regarded himself as having the ability to remove. The best evidence comes from Washington’s removal of almost two dozen officers, including ministers, consul, tax collectors, surveyors, and various military officers.¹⁷⁴ Because no federal statute granted him authority to remove these officers, Washington must have believed that the Constitution enabled him to remove.

More comprehensive confirmation of Washington’s belief that executive officers served at the President’s pleasure comes from another source: his commissions granted to executive officers. A

¹⁷² Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (1789). The underlying Act gave the Congress authority to remove the Governor, the Secretary, and members of the legislative council. See *id.* at 51 n. (a). It arguably was necessary to “declare” that the President had removal power because, in the absence of modifying the 1787 Northwest Ordinance, the President might be thought by some to lack removal power over such officers.

¹⁷³ See Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87 (1789). Given that four statutes assumed that the President had a right to remove executive officers, see text accompanying notes 170–72, it seems almost certain that the Judiciary Act contemplated that the marshals would serve at the President’s pleasure.

The Congress presumably affirmed that marshals served during pleasure in the Judiciary Act because the Act also created a term for the marshals. Having established a term, Congress presumably wanted to ensure that the term would not imply that the President somehow lacked removal authority during the term.

¹⁷⁴ Carl Russell Fish, *Removal of Officials by The Presidents of the United States*, in 1 Annual Report of the American Historical Association for the Year 1899, at 67, 69 (1900).

review of available commissions from that era¹⁷⁵ suggests that executive officers served during “the pleasure of the President of the United States for the time being.” Such commissions were issued to the commissioners of the Bank of the United States, to collectors and inspectors of revenue, masters of cutters of the revenue service, and military officers.¹⁷⁶ Presumably, such language found its way into the commissions of all executive officers.¹⁷⁷

Commissions were public documents signifying that the named individual was a federal official. Hence, through his commissions, Washington notified the entire world that the President could remove his executive officers. Anyone reading a commission granting tenure during pleasure would understand that Washington believed that he could remove that officer. This is significant because there were hundreds of documents containing the President’s conclusions about his constitutional powers.

Washington’s letters also adverted to his power to remove officers. In a letter to his Secretaries of Treasury and War, Washington asked for their advice about whether to remove Edmund Randolph, the Secretary of State.¹⁷⁸ Washington sought similar advice regarding the recall of James Monroe from his Paris posting.¹⁷⁹

¹⁷⁵ This search was conducted online and at the National Archives in Washington, D.C., and College Park, Maryland. Copies of the commissions are on file with the author and the Virginia Law Review Association.

¹⁷⁶ Writing in 1818, Attorney General William Wirt claimed that the language relating to pleasure was found in all commissions, save for those commissions relating to offices where Congress “intend[ed] a more permanent tenure, (during good behavior, for example[.]”). 1 Op. Att’y Gen. 212, 213 (1818). Besides confirming the ubiquity of the “pleasure” language, Wirt’s brief opinion raises the issue of whether Congress had actually set a mandatory tenure of office for executive officers. Perhaps Wirt had in mind the justices of the peace created by Congress in the Judiciary Act of 1801.

¹⁷⁷ In contrast, commissions for Article III judges specified that judges served during good behavior. Obviously, someone had concluded that while commissions for executives could provide that such officers served at pleasure, commissions for judges had to be during good behavior tenure.

¹⁷⁸ Letter from George Washington to the Secretaries of the Treasury and War (Aug. 12–18, 1795), in 34 *The Writings of George Washington*, supra note 74, at 275, 275–76. Randolph resigned, making it unnecessary to remove him. See Letter from George Washington to Edmund Randolph (August 20, 1795), in 34 *The Writings of George Washington*, supra note 74, at 276 & n.97.

¹⁷⁹ Letter from George Washington to the Attorney General (July 6, 1796), in 35 *The Writings of George Washington*, supra note 74, at 122, 122–24; Letter from George Washington to the Secretary of State (July 8, 1796), in 35 *The Writings of George Washington*, supra note 74, at 127, 127–28.

In his role as Chief Executive, the President would even rebuke officers, as when he admonished a commissioner that the latter should resign or tend to his statutory duties.¹⁸⁰ Presumably, the commissioner understood that failure to do one or the other would lead to his dismissal.

Perhaps taking a cue from the Decision of 1789, Washington's deputies consistently cited the executive power as granting the President a power to remove. During the House debates on removal that took place prior to the Decision of 1789, Alexander Hamilton apparently told participants that "upon more mature reflection *he had changed his opinion* [and] was now convinced that the [President] alone [should] have the power of removal at pleasure."¹⁸¹ Hamilton's volte-face is noteworthy, especially since he must have known that his mentor would grant him a plum appointment. Hamilton's willingness to repudiate his prior position and to act against self-interest bespeaks a genuine change of heart.

Writing as Pacificus, Hamilton voiced the same conclusion, this time explicitly resting his argument on the executive power clause:

With [certain] exceptions [(the appointment, treaty and war powers)], the *executive power* of the United States is completely lodged in the President. This mode of construing the Constitution has indeed been recognized by Congress in formal acts, upon full consideration and debate; of which the power of removal from office is an important instance.¹⁸²

A joint opinion representing the views of the Secretaries of War, Treasury, and State said much the same. "To appoint to and remove from Office are equally executive powers It is with the President . . . the watchful guardian of the laws, and responsible for their due execution, that the power of removal is chiefly lodged

¹⁸⁰ Letter from Tobias Lear to Woodbury Langdon (July 2, 1792), George Washington Papers at the Library of Congress, 1741–1799: Series 2, Letterbook 23, Image 248, available at <http://memory.loc.gov/cgi-bin/ampage?collId=mgw2&fileName=gwpage023.db&recNum=247>.

¹⁸¹ Letter from William Smith (S.C.) to Edward Rutledge (June 21, 1789), in 16 Documentary History of the First Federal Congress, supra note 168, at 831, 832–33.

¹⁸² Pacificus, no. 1, in 4 The Works of Alexander Hamilton 432, 439 (Henry Cabot Lodge ed., 1904).

... [T]he President may remove without consulting the Senate.”¹⁸³ Where did this removal power come from? “From its being an essential attribute of Executive power...”¹⁸⁴ Attorney General Charles Lee noted his agreement with the above opinion, adding that “the President alone has power to remove from office.”¹⁸⁵

Washington likely also believed that the Vesting Clause bestowed a right to remove officers. Specifically, a revealing letter written in 1789 hints that Washington believed his authority over executive officers arose from the Vesting Clause. “The impossibility that one man should be able to perform all the great business of the State, I take to have been the reason for instituting the great Departments, and appointing officers therein, to assist the supreme Magistrate in discharging the duties of his trust.”¹⁸⁶ The grant of executive power is the only provision that could give the President cross-cutting authority over all the matters committed to the departments. If Washington believed that this clause ceded him authority over the departmental officers, then he likely believed that it also justified a right to remove officers. Significantly, this letter was written months before the Decision of 1789, indicating that Washington reached his conclusion about the subordinate position of executive officers independently of those debates.

Washington’s immediate successors, Adams and Jefferson, both removed officers¹⁸⁷ and issued commissions¹⁸⁸ that made clear that executive officers served during the President’s pleasure. The general sense that the President could remove executive officers was thus confirmed both in word and deed by subsequent presidents.

¹⁸³ Letter from James McHenry to George Washington (July 2, 1796), George Washington Papers at the Library of Congress, 1741–1799: Series 2, Letterbook 37, Image 89, available at http://memory.loc.gov/cgi-bin/ampage?collId=mgw2&fileName=gwpage037.db&recNum=88&tempFile=./temp/~ammem_LRCJ&filecode=mgw&next_filecode=mgw&prev_filecode=mgw&itemnum=47&ndocs=100.

¹⁸⁴ *Id.*

¹⁸⁵ Letter from Charles Lee to George Washington (July 7, 1796), George Washington Papers at the Library of Congress, 1741–1799: Series 4, Image 655, available at http://memory.loc.gov/cgi-bin/ampage?collId=mgw4&fileName=gwpage109.db&recNum=654&tempFile=./temp/~ammem_G6Tc&filecode=mgw&next_filecode=mgw&prev_filecode=mgw&itemnum=14&ndocs=62.

¹⁸⁶ Letter from George Washington to Eléonor François Élie (May 25, 1789), in 30 *The Writings of George Washington* 333, 334 (John C. Fitzpatrick ed., 1939).

¹⁸⁷ See Fish, *supra* note 174, at 70.

¹⁸⁸ See *supra* note 175.

* * *

In England and her colonies, chief executives lacked a distinct removal power. Instead, a chief executive's ability to remove arose from the grants of tenure he made in his commissions. Grants of tenure during pleasure maximized the chief executive's ability to remove. Other grants left a more constrained removal authority.

Whether American chief executives could set tenure poses a difficult question. Some factors favor such authority. First, some state constitutions may have implied a gubernatorial ability to establish a tenure more secure than pleasure. Second, Washington's commissions granted to executive officers specified tenure, something arguably unnecessary had tenure during pleasure been the only possible tenure for such officers. Finally, it seems that no one ever denied that American chief executives might establish tenures other than pleasure for executive officers.¹⁸⁹

At the same time, research has uncovered no evidence that American chief executives actually granted any tenure other than pleasure to executive officers. Likewise, research reveals no discussion in the states, Congress, or the Washington administration, of the possibility that American chief executives could grant variable tenures to executive officers. Nonetheless, given the English practice of setting tenure, perhaps the better view is that the President may grant more secure tenures than tenure during pleasure.

Though there are legitimate questions about the President's ability to set variable tenures, there should be no doubt that the President was widely regarded as enjoying a power to remove executive officers. Many people of the era routinely associated a removal power with the Chief Executive. Hence, early state executives were generally regarded as enjoying some removal authority. Similarly,

¹⁸⁹ The Decision of 1789 and the Washington administration do not detract from the notion that the President, subject to some constraints, may set tenure in office. While the Decision concerned whether officers served at the President's pleasure, no one refuted the idea that the President might grant more secure tenures. Likewise, that Washington apparently never granted any tenure other than tenure during pleasure (except where statutes or the Constitution provided otherwise) does not mean that Washington concluded he lacked that power. Granting tenure during pleasure allowed the President (and his successors) the most flexibility. So assuming that Washington believed that he had tenure choices to make, it would hardly be surprising that he always chose tenure during pleasure.

the 1789 departmental acts (and many other acts that followed) affirmed that the Chief Executive had a constitutional right to remove officers. Subsequently, Washington wrote commissions that granted tenure during pleasure and exercised his right to remove. Finally, his officers and many others regarded his ability to remove as arising from the grant of executive power.¹⁹⁰ Despite some early dissenters, there seems to have been a strong consensus that the Constitution granted the President the ability to remove executive officers.

B. Other Presidential Removal Theories

We have seen that a solid case can be made that the President either has a distinct removal power or a power to set the tenure of executive officers. Of course, alternative conceptions of a presidential removal power are possible. The President's removal power may extend beyond executive offices, encompassing clerks of the court and quasi-legislative officers. Alternatively, the President's removal power may stem from his power to appoint. Finally, the Faithful Execution Clause may grant the President the power to remove those who unfaithfully execute federal laws. Although each theory is intriguing, none offers a sounder basis for removal authority or a better conception of its scope.

1. Executive Power to Remove Non-Executive Officers

As noted earlier, the Crown could set the tenure of all of its officers, executive, judicial, or otherwise. Crown commissions could specify that all officers served during the Crown's pleasure.¹⁹¹ The Act of Settlement—which guaranteed that English judges would serve during good behavior rather than merely during the Crown's pleasure—was necessary precisely because it was understood that the Crown might grant tenure during pleasure to judges.

¹⁹⁰ The “disempowerment theory” of removal, whereby the President may remove officers by stripping away their executive authority, has little historical support. Apparently, no one spoke of a power to retract executive authority. Nonetheless, the disempowerment theory provides structural support for the notion that the Executive likely has the ability to remove executive officers.

¹⁹¹ Commission of Sir Edmund Andros (Apr. 7, 1688), in *3 Documents Relative to the Colonial History of the State of New York* 537, 542 (Albany, Weed, Parsons & Co. 1853).

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If we understand the executive power as including a generic removal power or as encompassing an ability to set the tenure of all officers whose tenures the Constitution does not establish, the President might enjoy the ability to remove all officers other than Article III judges. Not only would the President be able to remove officers like the Secretary of State, he also would be able to remove inferior judicial officers like the clerks of the court. Additionally, he would be able to dismiss all quasi-legislative and quasi-judicial officers, such as administrative law judges and Securities and Exchange Commissioners.

While this broader conception has its merits, it seems ill-suited to our Constitution. Quasi-legislative or quasi-judicial officers clearly do not receive any authority from the Chief Executive because the latter does not have any quasi-legislative or quasi-judicial authority to convey. Presumably, the sources of such authorities are Congress and the judiciary. The President acts solely as a transmitter of power and not as a source. In granting the President the power to appoint and commission non-executive officers, the Constitution authorizes the President to confer authority that is not his own.

Because the President does not cede any of his constitutional authority to judicial, legislative, quasi-legislative, or quasi-judicial officers, and because they do not assist him in the exercise of his presidential powers, he should not be regarded as having any removal authority over such officers. Concretely, this means that if the Constitution grants the President a distinct removal power, it does not encompass authority to remove non-executive officers. Likewise, if the tenure theory of removal is correct, the President cannot specify the tenure of non-executive officers.

This argument suggests that the Article III grant of tenure during good behavior was not strictly necessary as a measure to forestall executive removal of judges.¹⁹² Even absent this guarantee, the President could not remove Article III judges because, under the best reading of our Constitution, judges do not help exercise the executive authority that the Constitution grants the President.

¹⁹² The good behavior tenure provision also constrains Congress, and hence it is not rendered superfluous if we suppose that the President would otherwise lack power to remove federal judges.

Accepting the claim that the President lacks constitutional authority to remove non-executive officers means that Congress does not violate the Constitution when it requires cause for the removal of non-executive officers. In fact, statutes requiring cause for the removal of non-executive officers might be read as granting the President removal authority that he otherwise does not possess. Rather than complaining that such statutes trench upon executive power, Presidents ought to be thankful for what might be an implicit grant of removal authority.

2. Removal as a Concomitant of the Appointing Power

Some have long argued that the power to remove naturally accompanies the power to appoint.¹⁹³ This contention appeals to a sense of symmetry: the appointer who vests authority ought to be able to retract it as well. Moreover, the claim is perhaps based on the intuition that constitution-makers will grant appointment authority only to the entity meant to control those appointed, thus suggesting that the superior appointing authority may also remove.

This intuition does not apply to our Constitution. First, numerous entities select various federal officials, with apparently few supposing that the selectors may remove the selected. The Electoral College has no authority to oust presidents and vice presidents; the people of a congressional district may not recall their Representative; nor did state assemblies have the power to dismiss Senators after having selected them. Furthermore, nothing turns on the word “appoint.” Governors, who could “[a]ppoint[]” replacement Senators (and may continue to do so under certain circumstances), had no authority to remove these Senators merely because they appointed them.¹⁹⁴

¹⁹³ See, e.g., 11 Documentary History of the First Federal Congress of the United States of America, *supra* note 117, at 842, 898–903.

¹⁹⁴ See U.S. Const. art. I, § 3, cl. 2 (“[I]f Vacancies [of Senators] happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.”); U.S. Const. amend. XVII, cl. 2 (“[T]he legislature of any State may empower the executive thereof to make temporary appointments [to the Senate] until the people fill the vacancies by election as the legislature may direct.”).

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Second, even as to the narrower category of “Officers of the United States,”¹⁹⁵ our Constitution does not hew to the logic behind the intuition. As noted, the underlying logic presupposes that constitution-makers will grant an entity the ability to appoint only those officers who will serve the entity and its purposes. For a constitution that always stayed true to this structure, it might make sense to presume that the constitution’s makers implicitly granted the appointing authority a power to remove the officers it appointed.

The federal Constitution plainly lacks this structure. As noted earlier, the President appoints officers who do not assist the President in carrying out any of his functions. Consider federal judges. Unlike the English system, where judges were said to be the Crown’s servants, federal judges have never been thought to be servants, in any sense of the word, of the President. The same must be said of quasi-judicial and quasi-legislative offices. Assuming that our Constitution permits the creation of such offices, the officers do not exist to help implement the President’s powers.

Because the Constitution clearly permits the President to appoint those who do not help execute presidential powers, it makes little sense to suppose that the President has a constitutional right to remove all those whom he appoints. Simply because the Congress might leave the appointment of clerks of the court with the President does not mean that the President may remove these clerks. Likewise, the President does not have the constitutional power to dismiss quasi-legislative or quasi-judicial officers merely because they were presidentially appointed.

In contrast, the President should have the power to remove inferior executive officers, even when they are appointed by the department heads or by the courts. While these inferior executive officers are subordinate in a statutory sense to some department head, they are subordinate in a constitutional sense to the President because they help the department heads implement the President’s powers. Strict adherence to the appointment argument, however, suggests that the President cannot remove executive officers appointed by others. While the President will be able to threaten removal of the department heads who do not remove the

¹⁹⁵ U.S. Const. art. II, § 2, cl. 2 (referencing “Officers of the United States”).

insubordinate inferior executive officers that they appointed, this is a cumbersome and indirect means of exerting pressure. There is no reason to suppose that the Constitution's makers created an unwieldy system in which the President could only indirectly influence the removal of inferior executive officers appointed by the department heads.

Finally, if Congress can authorize the interbranch appointment of inferior officers, it may grant federal courts the ability to appoint inferior executive officers. Obviously, the President cannot threaten removal of federal judges should they not heed presidential commands to discharge inferior executive officers that they had appointed.¹⁹⁶ Hence, if cross-branch appointments of executive officers are permissible, Congress effectively can insulate all inferior executive officers from effective presidential control. Once again, it seems unlikely that the Constitution would grant Congress this indirect means of barring the President from removing inferior executive officers.

3. Removals Authorized by the Faithful Execution Clause

During the Decision of 1789, some lawmakers cited the Faithful Execution Clause as an additional reason to suppose that the President had a removal power.¹⁹⁷ Indeed, one might imagine that the President's duty to faithfully execute the laws grants him all powers necessary to fulfill that duty—a sort of narrow and implied presidential “necessary and proper” authority. Removal authority might be one such power, for a duty of faithful execution might oblige the President to oust officers who *unfaithfully* executed the law.

This argument misreads a duty-imposing provision as if it also granted a power. While it is sensible to suppose that duties are

¹⁹⁶ Despite the difficulties with this theory, the executive branch in modern times has repeatedly emphasized it as the reason for the President's removal authority. One suspects that a strong reason to favor this theory (perhaps the main reason) is that the President appoints all the commissioners who serve on quasi-judicial, quasi-legislative commissions. This theory means that the President may remove all these non-executive commissioners. A theory based on the grant of executive power might not lead to the same conclusion.

¹⁹⁷ See, e.g., 11 Documentaries History of the First Federal Congress of the United States of America, *supra* note 117, at 896 (comments of Madison).

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typically imposed upon those with some means of meeting those duties, the duties themselves ordinarily should not be regarded as granting power. The Faithful Execution Clause is best read as imposing the duty to ensure faithful law execution using whatever constitutional powers and statutory means are at the President's disposal. Interpreting the Clause as if it also granted power goes against its most natural reading.

The Faithful Execution theory also suffers because it cannot explain why the President has long been regarded as enjoying the ability to remove executive officers who do not execute the law. Since the beginning of the Republic, the President has enjoyed a power to remove diplomats and the Secretary of State. Indeed, the Decision of 1789 was a decision about the Secretary of Foreign Affairs. Notwithstanding the Secretary's lack of law execution duties,¹⁹⁸ Congress concluded that the President had the constitutional power to remove the Secretary. Similarly, President Washington removed diplomats like James Monroe when they poorly represented the United States in foreign courts.¹⁹⁹

The President's ability to remove does not turn on the presence of law execution duties. Rather, the President has the ability to remove all executive officers, whether or not they execute the laws. Officers who help carry into execution the President's appointment, pardon, and foreign affairs powers are executive officers, and the President may remove them. Likewise, the President may remove military officers who help him exercise his Commander-in-Chief authority, even though they have little or no law enforcement role.

C. Arguments Against an Executive Power of Removal

The arguments against recognizing an executive power of removal are almost as old as the Constitution itself. In 1789, some Representatives argued that impeachment was the only means of

¹⁹⁸ See Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 29 (1789) (stating the "duties" of the Secretary of Foreign Affairs should execute those "intrusted [sic] to him by the President of the United States").

¹⁹⁹ See Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power* 65 n.* (1976).

removing officers.²⁰⁰ Others argued that the Senate must consent to removals just as it must consent prior to appointments.²⁰¹ And still others claimed that the Article II Vesting Clause vested nothing, and hence could not vest a removal power.²⁰²

To echo earlier themes, impeachment is not the sole means of removing officers. The Constitution neither says nor implies as much. Despite the impeachment provisions, Congress may remove its own legislative officers. Moreover, the previous Part made a strong case that Congress can remove other officers by statute. Finally, as the next Part argues (and as the Supreme Court agrees), the judiciary may remove inferior judicial officers. Thus, the Senate's ability to remove officers under narrow conditions does not preclude others, including the President, from also removing officers under different circumstances.

The claim that the Senate must consent to removals is mistaken as well. Earlier discussions highlighted the difficulties with the claim that a power to remove arises from a power to appoint. If no removal power arises from the power to appoint, the Senate obviously has no share of the removal power by virtue of its alleged appointment role. The argument that the Senate has a share in the removal power because of its appointment role suffers from an additional fatal flaw. The Constitution never grants the Senate a share in the power to appoint. It provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" officers.²⁰³ Under this provision, the President actually appoints all non-inferior officers. The Senate merely has a check on whom the President may appoint, in that the President

²⁰⁰ See, e.g., *Daily Advertiser* (June 17, 1789), *reprinted in* 11 *Documentary History of the First Federal Congress*, *supra* note 117, at 842, 843 (quoting Representative Smith as stating that "if the constitution had provided a particular mode of removing from office, it was a reason from which to conclude that it was improper to adopt any other").

²⁰¹ See *id.* (noting the comments of Representative White advocating an advice-and-consent role for Congress in the removal of such officials); *Daily Advertiser* (June 22, 1789), *reprinted in* 11 *Documentary History of the First Federal Congress*, *supra* note 117, at 895, 901–02 (noting the comments of Representative Gerry advocating a similar role for Congress).

²⁰² See, e.g., *The Congressional Register* (June 17, 1789), *reprinted in* 11 *Documentary History of the First Federal Congress*, *supra* note 117, at 904, 937 (comments of Representative Smith).

²⁰³ U.S. Const. art. II, § 2, cl. 2.

must secure the Senate's consent to the appointment. Consistent with this argument, an appointment is not complete once the Senate consents. The President must still make the formal appointment. *Marbury v. Madison* made this clear when it held that the President's signature on the commission completed the appointment.²⁰⁴ If the Senate had a role in appointment itself, William Marbury's appointment presumably would have been complete upon the Senate's consent; President John Adams's signature of the commission would have been immaterial.

Although oft-heard, the final argument against recognizing a presidential removal power—that the Article II Vesting Clause vests no power and hence cannot vest any distinct removal power—fares no better. Primarily, this is so because the Vesting Clause reads as if it actually vests powers. Contrary to what many suppose, the Article II Vesting Clause does not merely vest the powers “herein granted” by the rest of Article II.²⁰⁵ The Article II Vesting Clause thus stands in stark contrast to the Article I Vesting Clause and reads—like its Article III counterpart—as a grant of actual power.²⁰⁶

The contrary view—one that supposes that the Vesting Clause merely announces the title and number of chief executives—treats the clause as if it were wholly ornamental. The Vesting Clause was unnecessary as a means of declaring that there would be one Chief Executive because other provisions use the singular pronoun “he.” Nor was the Article II Vesting Clause required to establish a title; the Constitution mentions the Executive's title elsewhere several times. Finally, one does not need to “vest[]” “executive power” if all one required was a title and number provision. Had that been the goal, the clause would have succinctly provided that “there shall be a President of the United States.”²⁰⁷

²⁰⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 157 (1803). The same sort of process exists for proposed treaties. The Senate does not make treaties. Instead it consents to a proposed treaty. Thereafter, the President formally ratifies the treaty, giving it legal effect. See Robert B. Dove, Enactment of a Law, <http://thomas.loc.gov/home/enactment/enactlaw.pdf> (last visited Oct. 9, 2006).

²⁰⁵ See Calabresi & Prakash, *supra* note 18, at 574–76.

²⁰⁶ See Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1155, 1175–79 (1992).

²⁰⁷ See Saikrishna Prakash, The Essential Meaning of Executive Power, 2003 U. Ill. L. Rev. 701, 714–16 [hereinafter Prakash, Essential Meaning of Executive Power].

Indeed, it seems clear that the Vesting Clause actually vests other powers, like the power to execute the laws and the power to exercise a residual foreign affairs authority.²⁰⁸ Prior to the Constitution's creation, these powers were long regarded as part of the "executive power."²⁰⁹ After the Constitution's composition but before its ratification, these powers were associated with the proposed President, despite the lack of any other sound textual basis for such powers.²¹⁰ And after ratification, these presidential powers were widely regarded as stemming from the executive power.²¹¹

It may well be that the President lacks removal authority arising from the grant of executive power. But one cannot reach that conclusion relying upon a sweeping and implausible denial that the Vesting Clause actually vests powers. Instead, one must fight on more narrow turf and demonstrate that removal was not regarded as an executive power in the late eighteenth century, something no one has seriously attempted.

D. Regulating Removal

Can Congress tame the Executive's ability to remove? Congress might try to require cause for removals (like incompetence or disability). Alternatively, Congress might impose an external check on removals, such as requiring senatorial consent. Finally, Congress might try to insulate executive officers by hybridizing them; that is, giving them some quasi-judicial or quasi-legislative tasks and thereby denying the President the ability to remove such officers.

1. Restraining Removal Authority

Since 1789 (and certainly since *Myers*), the argument has shifted to whether Congress can restrain the President's ability to remove, either by limiting its exercise to situations where certain circum-

²⁰⁸ See *id.* at 714; Prakash, *Executive Power over Foreign Affairs*, *supra* note 31, at 252–53.

²⁰⁹ See Prakash, *Essential Meaning of Executive Power*, *supra* note 207, at 753–69; Prakash, *Executive Power over Foreign Affairs*, *supra* note 31, at 265–78.

²¹⁰ See Prakash, *Essential Meaning of Executive Power*, *supra* note 207, at 779–89; Prakash, *Executive Power over Foreign Affairs*, *supra* note 31, at 287–95.

²¹¹ See Prakash, *Essential Meaning of Executive Power*, *supra* note 207, at 789–92; Prakash *Executive Power over Foreign Affairs*, *supra* note 31, at 295–346.

stances are present (requiring “cause” for removals, for example), or by mandating the concurrence of some other entity (the Senate). Both types of provisions have antecedents; some colonial governors could only remove for cause,²¹² and one state constitution vested some removal power in a council with the governor merely presiding and having one vote.²¹³

The constitutionality of such constraints turns on the general question of whether the Constitution authorizes Congress to regulate powers granted to other entities. May Congress, in the guise of carrying into execution its powers over commerce and taxes, abridge, modify, or check the judicial power, the veto, or the President’s removal authority?

As I recently argued elsewhere, Congress lacks a generic power to regulate other government entities.²¹⁴ There is little textual support for the idea that Congress can regulate powers granted to the President (or, for that matter, other entities). None of the substantive powers, like the power over commerce, permit Congress to regulate constitutional powers of others. The Necessary and Proper Clause, a power to enact laws to help carry federal powers into execution, cannot be used to enact laws that regulate or modify constitutionally granted powers. Laws that erect barriers to the exercise of presidential or judicial power, however well intentioned, are not laws that help implement federal powers.

To be sure, a few constitutional provisions expressly authorize Congress to regulate powers that the Constitution grants to other entities.²¹⁵ The President is not wholly immune from regulation because Congress can divest the President of his power to appoint in-

²¹² See 1 Royal Instructions to British Governors 1670–1776, at 59–60 (Leonard Woods Labaree ed., Octagon Books 1967) (1935).

²¹³ N.Y. Const. of 1777, art. XXVIII (noting that certain officers serve at pleasure of council); id. art. XXIII (noting that governor would serve and vote on council).

²¹⁴ See Saikrishna Prakash, *Regulating Presidential Powers*, 91 Cornell L. Rev. 215, 256 (2005) (book review) [hereinafter Prakash, *Regulating Presidential Power*].

²¹⁵ See U.S. Const. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”); id. art. III, § 2, cl. 2 (“[T]he supreme Court shall have appellate Jurisdiction, [over certain classes of cases] with such Exceptions, and under such Regulations as the Congress shall make.”).

ferior officers.²¹⁶ Such specific provisions help prove the opposite rule: Congress has no generic power to regulate powers granted to others. Indeed, if Congress did have generic regulatory authority, it would make the express regulatory authority redundant. Even worse, a generic regulatory power would make the limits in these provisions wholly superfluous because Congress could use its generic power to evade these constraints.²¹⁷

Little that preceded the Constitution's creation furthers the claim that Congress can regulate the power of removal, primarily because the English and state experiences are inapposite. In England, the Parliament was sovereign and could pass whatever legislation it wished. Hence, the Parliament could, with the Crown's acquiescence, alter the Crown's ancient powers at will, including its ability to set tenure. The states' experiences with erecting checks on the exercise of executive power are also beside the point. Unlike the federal Constitution, several revolutionary state constitutions expressly made the executive's powers subject to legislative regulation.²¹⁸ The natural inference is that because the Constitution lacks text authorizing generic regulation of the Executive, the Constitution was not meant to replicate the state pattern of dominant legislature and submissive executive.²¹⁹ Consistent with this inference, it appears that during the drafting and ratification of the Constitution no one ever claimed that Congress could tame the Executive by resorting to regulatory legislation.

Under our Constitution, Congress is not an omnipotent and sovereign assembly. Moreover, Congress lacks generic authority allowing it to regulate presidential and judicial powers. Hence, if the Constitution grants the President a distinct removal power, an authority to retract delegations and disempower officers, or a power to set the tenure of executive officers, Congress cannot regulate such authority.

²¹⁶ U.S. Const. art. II, § 2, cl. 2 ("Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

²¹⁷ For a more extended discussion of this point, see Prakash, *Regulating Presidential Power*, *supra* note 214, at 231–40.

²¹⁸ *Id.* at 241–42.

²¹⁹ See *id.* at 242.

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2. Creating Hybrid Officers as a Means of Limiting Removals

As argued earlier, the Constitution probably does not grant the President the ability to remove non-executive officers. If the President has a distinct removal power, then the source of that power—the grant of executive power—likely does not encompass a removal power that extends to non-executive officers. Similarly, the ability to set tenure during pleasure likely does not extend to non-executive offices.

But what of hybrid officers, for example, those who not only wield quasi-legislative or quasi-judicial powers, but also help exercise executive power? Even though these officers help implement the executive power, the Constitution probably does not authorize the President to entirely oust them from office. These hybrid officers also exercise powers over which the President has no legitimate claim of control. Lacking any constitutional claim to control the exercise of non-executive powers, he likely cannot remove them from office.

Nevertheless, the disempowerment theory of removal suggests that the President may retract the executive authority of such hybrid officers. The Constitution commits the executive power to the President. Hybrid officers who help implement the executive power must receive a delegation of executive authority from the President. Because the Constitution commits various executive powers to the President, he may bar others from exercising his executive powers. Hence, whatever other powers a hybrid officer might continue to exercise, the President may withdraw any executive power that the hybrid officer wields. To memorialize their belief that they could strip executive power away from hybrid officers, Presidents could perhaps issue commissions that indicate that their exercise of executive power continues only during presidential pleasure.

Any other answer would permit Congress to insulate all executive officers by appending a sliver of non-executive powers to each executive office. Even if the Constitution permits Congress to establish quasi-legislative or quasi-judicial officers, and even if it also permits the creation of hybrid officers who exercise more than one power of government, it certainly does not authorize Congress to fracture the President's executive power and splinter it amongst hybrid, insulated officers throughout the government.

E. The Interaction of Congressional and Presidential Removal Powers

Given Part I's assertion that Congress can statutorily set the tenure of an office, some thoughts about the interaction of congressional and presidential tenure powers seems necessary. Both Congress and the President can establish maximum tenures for executive officers—Congress by statute and the President by the commission he issues to the executive officer. The lower of the two tenures would actually set the outer limit of an officer's tenure. Moreover, neither Congress nor the President could establish the minimum term for an officer. Hence, if Congress passes a simple removal statute, the President can do nothing to retain the officer. Similarly, no officer may stay in office longer than the maximum tenure established by Congress, even if the President wanted the officer to remain. Finally, no executive officer may remain in office after the President removes her, even if Congress established a longer term of office for that officer.²²⁰ In other words, even if the Congress establishes a five year term for some executive officer, the President may remove that officer sooner. Each of these conclusions follows from the principle that, although Congress and the President may set a maximum tenure in office, neither may set a minimum tenure that impedes on the other's ability to remove.

One finds a parallel in the preemption area. For instance, suppose both the federal and state governments have established an emission standard for a particular pollutant. If we assume that the federal rule merely imposes a maximum level of emissions, then a more restrictive state rule is not necessarily preempted. Satisfying the state rule does not run afoul of the federal rule. In the same way, if the President and Congress can only establish maximum tenures in office, applying whichever tenure limit is more restrictive allows both tenure standards to coexist. So when Congress creates an office with a term of three years, and the President issues a commission to an officer with a two-year term, the President has done nothing wrong because Congress does not have the power to set a minimum tenure for executive offices. Likewise,

²²⁰ As noted earlier, Congress cannot strip away the President's right to remove officers. In this way, the resulting officer's tenure would be consistent with the maximum tenures granted by both the President and Congress.

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whatever a commission might provide, Congress may always shorten an officer's tenure and remove the officer sooner. If the President could set a minimum tenure in his commissions, the Congress would lack the ability to remove officers.

Of course, these claims are premised both on the notion that the President cannot ignore a congressional statute setting a maximum tenure and on the related idea that the Congress cannot regulate the President's power to set tenure. The former conclusion should hardly be controversial. The President has no generic power to ignore constitutional federal statutes. The latter conclusion perhaps follows from the claim that Congress generally cannot regulate presidential powers.²²¹ If the President has removal authority, then Congress cannot preclude early removals by the President. Hence the President must be able to establish a shorter tenure than the maximum tenure established by law. In this way, both Congress and the President could regulate tenure in office.

* * *

Almost everyone accepts that the President may remove officers. Yet this seemingly robust consensus is rather weak. Scholars agree on a superficial level, while disagreeing on a series of fundamental questions: what types of officers may the President remove? What is the source of the President's power to remove? May Congress regulate the President's power to remove?

This Part has suggested answers to each of these questions. The President's ability to remove encompasses executive officers only, and it most likely arises from a distinct removal power that is part of the executive power grant, from the power to withdraw authority previously granted an executive officer, or from a power to set the tenure of executive officers. Congress cannot regulate the President's ability to remove executive officers any more than it can regulate the President's ability to veto legislation.

III. A JUDICIAL REMOVAL POWER

Of the three branches, the Judiciary seems the one least likely to have removal authority. Judges decide cases, and that authority

²²¹ See Prakash, *Regulating Presidential Powers*, supra note 214, at 231–51; see also supra Part II.D.

seems far removed from any decision to remove. Nonetheless, a credible case can be made that the Constitution grants the federal courts the ability to remove their inferior judicial officers, such as clerks of the court.

The disempowerment theory, outlined in Part II, provides the best reason for supposing that courts enjoy a removal authority. Recall that this theory maintained that the President would be able to remove executive officers by retracting the executive authority they help exercise. A parallel disempowerment theory would suggest that the courts must be able to remove their inferior officers (such as clerks of the courts) by retracting the judicial power that these inferior judicial officers help exercise. The argument is simple. Inferior judicial officers help judges exercise the judicial power. In order to carry out this function, inferior judicial officers must receive a delegation of judicial authority. Congress cannot delegate the judicial power because Congress does not have the generic power to delegate the powers of others. The President must commission inferior judicial officers and thereby convey a portion of the judicial power, but the President is not the source of the judicial power. If neither Congress nor the President can delegate a court's judicial powers, the courts must be the source of the authority granted to inferior judicial officers.²²² This conclusion makes good sense because the Constitution grants the judicial power to the courts alone. If inferior judicial officers are to help the courts exercise their judicial power, the courts must delegate authority (either explicitly or implicitly) to these inferior officers.

The disempowerment theory suggests that courts likely have implicit constitutional authority to retract their delegations from inferior judicial officers and thereby remove these officers. Just as the President may control the implementation of his executive authority, courts may control how their judicial power is carried into execution. Where a court disagrees with its inferior judicial officer's

²²² At first blush, it might seem odd that the President would convey the power of the courts to the clerks, thereby empowering and authorizing the clerks. But there is nothing odd about this arrangement. By granting the President the power to commission all officers, the Constitution granted him the authority to convey both the executive and the judicial powers. When the President appoints and commissions federal judges, he is conveying the judicial power of the United States to federal judges. Similarly, when the President commissions a clerk of the court, he conveys a court's judicial power to its clerk.

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implementation of the court's judicial power, that court (and no other) should be able to retract its judicial authority. Courts would have this removal power even when Congress chose to leave the power of appointing inferior judicial officers with the President. Whoever might appoint an inferior judicial officer, the officer serves a particular court and helps implement that court's share of the judicial power. Accordingly, the court served by an inferior judicial officer may remove that officer.

The principal difficulty with the judicial disempowerment theory is that there seems to be little historical support for it. In England, the courts apparently lacked an implied power to withdraw authority from inferior judicial officers. Instead, Parliament expressly granted courts the authority to remove their clerks.²²³ Some of the state constitutions had similar provisions that expressly granted courts the power to remove their clerks.²²⁴ Given these precedents, one might suppose that courts would only have the power to remove if a constitution or statute expressly granted them as much.

Nonetheless, it seems fair to say that, by the time of the federal Constitution, the judiciary was understood as a branch wholly distinct from the executive branch; and as such, its members had an independent right to fully control the exercise of their portion of the judicial power. A court's right to the judicial power comes from the Constitution and not from any statute. Given this right, it seems to follow that courts would have the subsidiary ability to bar anyone from assisting in the exercise of their judicial power. In other words, a more robust conception of the judiciary's role and power might have laid the groundwork for a more robust idea of the judiciary's ability to supervise and dismiss their inferior judicial officers.

Of course, the judicial disempowerment theory is not the only possible means of sustaining a judicial removal power. Judicial removal authority might rest on the appointment theory discussed

²²³ Such statutes were necessary because courts had no independent claim to the judicial power. Instead, officers in the English courts were the servants of the Crown. If the judges of these courts were to remove their clerks, an express grant of authority would perhaps be necessary because one set of servants ordinarily would not have the authority to remove another set of servants.

²²⁴ See, e.g., N.Y. Const. of 1777, art. XXVII (noting that judges could appoint their clerks and that clerks would serve at the pleasure of those who appointed them).

(and rejected) in Part II.B. The Supreme Court made such a case in *Ex parte Hennen*.²²⁵ The department heads, the Court said, could surely remove whomever they had appointed in their respective departments.²²⁶ Similarly, the President had a removal power over all he appointed. The Court proceeded to argue that what was true of the President and the department heads had to be true of the courts: they also must have the power to remove their appointees. The Court's argument concluded that by permitting courts to appoint their clerks, Congress necessarily established that courts could discharge their clerks.²²⁷

Hennen has always rested on dubious foundations. As argued earlier, our Constitution does not embrace a symmetry whereby whoever appoints may also remove.²²⁸ By treating these powers as conjoined, *Hennen* made a serious mistake. Additionally, *Hennen* rested on an unfounded reading of the Appointments Clause. The Court assumed that only judges could appoint court clerks. Yet the Constitution does not require Congress to vest the courts with appointment authority over inferior judicial officers. Had Congress not permitted the courts to appoint their clerks, the President would have had the right to appoint them.²²⁹

Finally, the *Hennen* appointment argument permits all sorts of legislative mischief. If the power to remove necessarily accompanies the power to appoint, the President could remove any presidentially appointed clerks of the court. A Congress and President determined to rein in the federal courts could do so by leaving the appointment of clerks to the President. Armed with the removal power, the President could perhaps browbeat clerks into entering judgments that reflected the President's wishes rather than the actual determinations of the court. In the face of such shenanigans,

²²⁵ *Ex parte Hennen*, 38 U.S. 230, 259–60 (1839).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ See *supra* Part II.B.2.

²²⁹ See U.S. Const. art. II, § 2, cl. 2 (providing that the President has the right to nominate and, with the Senate's advice and consent, to appoint all officers, save for those inferior officers that Congress permits the department heads or the courts to appoint).

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judges might be helpless because, lacking the power to appoint, they would likewise lack the power to remove.²³⁰

In authorizing clerks to carry out functions that are crucial to the judicial power of deciding cases and controversies, Congress created offices that must be subordinate to federal judges, whoever might appoint them. The courts must be able to direct and, if need be, remove clerks who help implement their judicial power. The same is true regarding any other inferior judicial officer who helps execute the judicial power of the United States. Grasping for some reason why courts should be able to remove their clerks, the *Hennen* Court seized upon a mistaken rationale. The disempowerment theory is a far better foundation because it ensures that the courts may remove those who help carry into execution their judicial power, regardless of how these assistants are appointed.

CONCLUSION

Removal has been at the epicenter of many well-known constitutional crises and cases. Despite its historical prominence and its undoubted significance for the exercise of governmental power, there are relatively few scholarly treatments of the subject. The few that exist focus solely on the President's power to remove, saying little or nothing about whether the Congress and the federal judiciary may remove officers.

The lack of scholarship exploring whether Congress can remove officers by statute perhaps explains why there are clashing claims in this area. Courts and executive branch officials usually insist that Congress cannot remove officers at all. Other times, however, they admit that Congress can enact statutes that remove officers, such as statutes that disestablish an office and thereby oust the incumbent officer.

The sounder view is that Congress can enact removal statutes, including simple removal statutes. As a matter of text, Congress has extensive powers over offices. It creates offices, sets their powers and duties, and fixes their salaries. Using its broad powers over offices, Congress may remove officers in many ways. It can termi-

²³⁰ Perhaps the court could assume all the functions of the inferior judicial officer, thereby bypassing any hostile clerk. But the insubordinate inferior officer would remain in office, a thorn in the court's side.

nate offices and thus oust the incumbents; it can establish tenure limits for officers; and it can make removal a consequence of conviction for some offense. As a matter of history, early congresses enacted many such statutes, revealing a consensus view that Congress could decree the removal of officers.

Most everyone admits that the President has some removal authority. Yet there is no consensus on rather basic questions. Does the Constitution's text actually authorize presidential removal? What are the limits of any presidential removal power, and when, if ever, may Congress regulate this power? This Article has made three different arguments as to why the President may remove officers: the President has a distinct removal power arising out of the executive power; the President may disempower (and thereby remove) executive officers; and the President may set the tenure of officers, including the ability to grant offices during his pleasure. Contrary to current practice, the President's ability to remove is best regarded as extending only to executive officers. The Constitution does not authorize him to remove legislative, judicial, quasi-legislative, or quasi-judicial officers. If he is to exercise such authority, Congress must grant it by statute. Finally, Congress lacks the power to constrain the President's ability to remove executive officers because the Constitution never authorizes Congress to regulate the President's removal power, whatever the basis of that power.

A court's power to remove arises not from its appointment of inferior judicial officers but from the fact that, whoever appoints such officers, the court must explicitly or implicitly delegate a portion of its judicial power to those officers in order for them to help carry the court's power into execution. More precisely, a court's power to remove arises from its ability to retract its delegation of judicial power and thereby render the inferior judicial officer powerless. An officer bereft of power is no officer at all, and hence, when a court withdraws all of its authority from an inferior judicial officer, the court has ousted that officer.

The result of these arguments is a shared conception of the removal power. Rather than being something solely within the Executive's province, each branch has the ability to remove officers in its own way, subject to its own constraints. The Appendix illustrates this shared conception of removal authority.

2006]

Removal and Tenure in Office

1851

These claims about removal and tenure in office are controversial enough that one cannot realistically suppose that they will quickly become conventional wisdom. If this Article triggers a long overdue scholarly debate into the scope and distribution of the vital power to remove officers, that will be gratifying enough.

APPENDIX: A SHARED REMOVAL POWER

