

## ADDITION BY SUBTRACTION

*John Harrison\**

SKEPTICS of the forward pass in football point out that on a pass play, three things can happen, and two of them are bad.<sup>1</sup> As the Constitution itself suggests, there are three ways in which an officer can leave office before the term expires—death, removal, and resignation—and two of them are bad.<sup>2</sup> Professor Saikrishna Prakash's valuable article deals systematically and innovatively with the lesser of the two evils, removal.<sup>3</sup> At some points he rejects conventional wisdom, at others, he reinforces conventional wisdom, and at every point he contributes substantially to the scholarly understanding of the subject.

This is a brief comment, so I will deal mainly with Professor Prakash's primary claims, and in particular those with which I disagree. I will thus have to neglect broad areas of agreement, and put aside some comments on matters of detail that I found fascinating. It is worth mentioning that Professor Prakash and I are in broad agreement on methodological issues when it comes to understanding the constitutional structure. We focus closely on the text, we regard that text as in large measure creating a system of rules and not standards, and we think that history is of great importance in understanding any legal document, especially one that is now more than 200 years old. For that reason this exchange may be more fruitful than some, as we are not talking past one another.

Prakash discusses removal with respect to the three powers of government, in the order that the Constitution provides. I will proceed in reverse, because my thoughts about removal and legislative power build on issues that Prakash addresses primarily when he is dealing with executive and judicial power. Befitting an exchange

---

\* D. Lurton Masee, Jr., Professor of Law, University of Virginia.

<sup>1</sup> The possibilities are a completion, which is good; an incomplete pass, which is bad; and an interception, which is very bad. A similar point can be made in baseball about balls put in play, from the standpoint of the pitcher. The possibilities are that the ball will stay in the field of play and the runner will be put out, which is good; that the ball will stay in the field of play but the runner will not be put out, which is bad; and that the ball will leave the field of play, which is very bad.

<sup>2</sup> See U.S. Const. art. II, § 1, cl. 6.

<sup>3</sup> Saikrishna Prakash, *Removal and Tenure in Office*, 92 Va. L. Rev. 1779 (2006).

about the power to terminate an officer's government service, I will begin at the end.

I. COURTS, JUDGES, AND REMOVAL OF SUBORDINATE  
JUDICIAL OFFICERS

Professor Prakash is, as far as I know, the first scholar to develop a systematic account of the federal courts' power to remove inferior judicial officers, such as clerks of court. According to Prakash, Article III courts must have the power to remove subordinate judicial officers.<sup>4</sup> He reasons by analogy to the President's power to remove subordinate executive officials, which he endorses strongly elsewhere in the article. Because the President has the executive power, he must at least be able to rid himself of unwelcome subordinates. The job of an executive subordinate is to assist the President or to act on his behalf; if the President lacks confidence in a particular subordinate officer, that officer should not be allowed to participate in the exercise of a power that the Constitution gives to the President alone. In similar fashion, Prakash argues, courts have the judicial power and must be able to remove all those who participate in its exercise.<sup>5</sup>

Although he refers to the removal power of the courts, if I understand Prakash correctly, he more specifically means a removal power of the life-tenured judges of those courts. A court clerk is in a sense a part of the court, but I do not think that Prakash means that court clerks may participate in the decision to remove marshals, for example, or indeed one another. Prakash's move of identifying the Article III courts with the Article III judges may seem perfectly natural, but I think it is not, and that therefore the parallel he draws between Articles II and III concerning the removal power does not hold.

---

<sup>4</sup> Prakash, *supra* note 3, at 1846. Although Prakash refers to "inferior judicial officers," I will generally use the term "subordinate judicial officers." By that term I mean, and by inferior judicial officers I think Prakash means, everyone who participates in the operation of the federal courts other than life-tenured judges (Article III judges, as they are often called) and jurors. As I understand the category, it includes both non-adjudicatory officials, such as court clerks, and subordinate adjudicators, such as magistrate judges.

<sup>5</sup> Prakash, *supra* note 3, at 1846–47.

2006]

*Addition by Subtraction*

1855

Article II vests the executive power in the President, a single individual. Article III vests the judicial power in the courts, which are institutions. Because courts are not composed solely of judges in the way that the House, for example, is composed solely of Representatives, there is no simple pass-through of the judicial power to the judges.<sup>6</sup> The Constitution itself explicitly anticipates that the heart of the judicial power, the adjudication of cases and controversies, will not be done entirely by judges. Juries, too, participate in the exercise of the judicial power; courts have juries just as they have judges.<sup>7</sup> Courts also often have clerks, marshals, and other non-adjudicatory officers.<sup>8</sup> These days, every United States District Court has adjudicatory officers who are not judges or jurors—bankruptcy judges and magistrate judges.<sup>9</sup> While there are lingering constitutional doubts about some of the powers exercised by the more recently created adjudicatory officers, there is and can be none about juries. A jury is just as much part of a court, and just as much involved in the exercise of the Article III judicial power, as a judge. A straightforward identification of a court with its judges is inaccurate, and the premise that the judicial power is in effect vested in the judges is therefore unsound.

Nevertheless, it seems obvious that judges are more central to courts than are clerks. Article III specifies the tenure of judges and protects their salaries; it says nothing about anyone else who works for a court. So, while it may not be strictly true that a court is made up of judges the way the House is made up of Representatives, it is true that the Constitution contemplates something, which I will refer to as “primacy,” that makes judges central to courts and the judicial power they exercise.

---

<sup>6</sup> U.S. Const. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . .”).

<sup>7</sup> U.S. Const. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .”).

<sup>8</sup> The Supreme Court, for example, is authorized to have a Clerk, a Marshal, a Reporter of Decisions, and a Librarian. 28 U.S.C. §§ 671–74 (2000).

<sup>9</sup> Each judicial district has a bankruptcy court, statutorily designated as “a unit of the district court,” which is made up of the bankruptcy judges for that district. 28 U.S.C. § 151 (2000). Bankruptcy judges are appointed by the courts of appeal, 28 U.S.C.A. § 152(a)(1) (Supp. 2006), pursuant to the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, which authorizes Congress to vest the appointment of inferior officers in the courts of law. Magistrate judges are appointed by the district courts. 28 U.S.C. § 631(a) (2000).

The interesting question, then, is whether primacy, or whatever it should be called, implies removal power. It may, but if so, the argument is not as simple as the argument for presidential removal authority: the President alone has the executive power and whatever removal power comes with it, but the judicial power is not similarly vested just in life-tenured judges.<sup>10</sup> As to non-adjudicatory officials like clerks, the relatively limited scope of their work suggests that at-will removal by judges may not be necessary to ensure judicial primacy. An officer who is exercising little substantive discretion and does not participate directly in deciding cases is not as central to the judicial power as the Secretary of Commerce is to the executive power. For such officers, a power in the judges to remove for cause quite possibly would be enough to make sure that the subordinate did not interfere with the judges' central role in deciding cases.

Adjudicatory officers like magistrate judges present a more difficult question, but there too the Constitution may not dictate service during the pleasure of the life-tenured judges. As long as Congress provides for substantial appellate review by the life-tenured judiciary, it may have given them a powerful enough tool to ensure that they retain the dominant role that Article III contemplates for them (and for juries). Indeed, removal is not well designed as a means to deal with episodic decisional error; I would be very surprised to learn that federal appellate judges would think it appropriate to fire every district judge they reverse, if they could. Chronic decisional error is another matter, but at-will removal power is hardly needed to deal with that problem. Removal for cause probably would do the job of keeping subordinate adjudicators within the limits prescribed by the Article III judges.

These are difficult questions. Understanding them properly begins, but I think does not conclude, with Prakash's analysis.

Professor Prakash also caused me to think about this question: could Congress give the President, or some other executive officer,

---

<sup>10</sup> Again, I am assuming that Prakash means to assert that judges must be able to remove subordinate officers who are not judges. As he correctly speaks of courts and not judges, it could be that he means to recognize the distinction between judges and courts and not necessarily to say that judges must be able to remove others. I doubt that, however, because it could lead to the conclusion that clerks are allowed to participate in the decision about their own removal.

2006]

*Addition by Subtraction*

1857

a role in the removal of judicial officers who serve without life tenure?<sup>11</sup> I think the answer may be yes, and explaining why is worthwhile.

Article III vests the judicial power in courts, specifically in one Supreme Court and such inferior courts as Congress may create. If we assume that the grant is exclusive, its first implication is that no other institution of government may exercise the judicial power. This in turn implies that no government functionary who is not adequately attached to the courts as an institution may do so. The Administrator of the Environmental Protection Agency, for example, may not exercise the judicial power because the Administrator has nothing to do with the courts.

If the drafters of the Constitution believed anything, they believed that the tenure of officers was overwhelmingly important because, in large part, the power to remove an officer would give the possessor of that power very strong influence over the officer's decisions.<sup>12</sup> In their terms, removal power makes an officer dependent on the person with that power. In our terms, removal power makes an officer an agent of the person with the removal power. Judicial independence, secured largely by the protected tenure of the judges, means that the judges and the courts on which they sit are not simply the agents of anyone else, in particular Congress and the President. To allow the President to remove judges at will would move toward vesting the judicial power not in the courts, but in the chief executive.

---

<sup>11</sup> Prakash considers and rejects the possibility that the Constitution itself gives the President such a power. He says that presidential removal authority of this kind must come from statutes, but does not discuss the constitutionality of statutes granting that authority. Prakash, *supra* note 3, at 1832–33.

<sup>12</sup> As Professor Jack Rakove explains, executive independence from Congress was the starting point in designing the system of selection and tenure for the President. “Within this matrix [of design questions], the nearest thing to a first principle or independent variable was the desire to enable the executive to resist legislative ‘encroachments.’” Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 259 (1996). The Constitution’s drafters regarded a congressional power to remove the President to be a major threat to executive independence, and this concern created a dilemma for the Federal Convention when it designed the impeachment mechanism: “What independence could the executive retain if this power [of impeachment] was given to the legislature? But what body other than the legislature could exercise this formidable power?” *Id.* at 261.

Because the Constitution vests the judicial power in the courts alone, the premise that discretionary control over tenure creates an agency relationship implies that no one outside those courts may have discretionary control over the tenure of judicial officers, including judicial officers who are not judges. That in turn implies that Congress may have no control at all, because everything Congress does is discretionary.<sup>13</sup>

Executive power, by contrast, is routinely used to apply the law. An executive officer's discretion, including the discretion of the President, therefore may be circumscribed by law. Congress could provide that clerks of court may be removed by the President for neglect of duty, for example. That standard would significantly limit the President's range of decision, and would be very far from providing that the clerks were to serve at the President's pleasure. On the contrary, clerks of court under those circumstances might well be described as independent of the President, just as are those executive officers who may be removed only for neglect of duty, inefficiency, and malfeasance in office.<sup>14</sup> A suitably limited power in the President to remove some judicial officers thus might well be constitutional.

## II. PRESIDENTIAL REMOVAL, THE PRESIDENT'S EXECUTIVE POWER, AND THE PRESIDENT'S AGENTS

Professor Prakash develops a theory of constitutionally based presidential removal power with respect to executive officers (and only executive officers) that derives from the Article II Vesting Clause, and he tentatively endorses another theory derived from the royal practice of specifying tenure when making appointments. Just as important, and consistent with his views about congressional removal, is that he does not endorse a standard justification for presidential removal power based on the usefulness of the threat of removal in controlling subordinates. I agree on the import

---

<sup>13</sup> Congress as such always exercises discretion because it has legislative power and nothing else. The House has the impeachment power, which combines elements of choice with the requirement to apply legal norms. The Senate's power to try impeachments is similarly non-legislative and is probably even more constrained than the House's power to impeach.

<sup>14</sup> See, e.g., *Morrison v. Olson*, 487 U.S. 654, 692–93, 696 (1988); *Humphrey's Executor v. United States*, 295 U.S. 602, 620, 625–26 (1935).

2006]

*Addition by Subtraction*

1859

of the Vesting Clause, but am not so sure that royal control over tenure has implications for presidential authority, nor do I think the role of removal authority as a means of presidential control over the executive branch can be so easily discounted.

One of the many insights of Prakash's analysis is his isolation of what he calls the disempowerment justification for presidential removal of executive officers.<sup>15</sup> Once again, key facts about Article II are that the executive power is vested in the President and no one else, and that the President is an individual, not an institution. For those who believe that the Vesting Clause really conveys power, it is no mere verbal matter that it conveys that power—and conveys it exclusively to a single person. For Prakash and for me, the text reads in this way in order to establish an executive that is doubly unitary. It is unitary first in that the Chief Executive is one person and not a collegium, and second in that the Chief Executive is to be very much in control of all that is done with the executive power, which means all that is done by subordinate officers.

The latter feature of the Constitution, Prakash argues, means that even if Congress may require that the President act through subordinates, by granting statutory authority to the subordinate and not the President directly, it may not force him to act through a subordinate in whom he has no confidence. As Prakash explains, the fundamental principle here is presidential control over exercises of the executive power. While it is conceivable that such control might be adequately vindicated by an obligation of subordinates to comply with presidential orders, Prakash argues, and I agree, that both common sense and history support the claim that the linkage between control and removal is very close, although not quite definitional.<sup>16</sup> Agency requires some degree of trust, and if executive subordinates are to be the President's agents, he must have some trust in them. An ability to remove those who have forfeited that trust, or perhaps never had it because they were appointed by a previous President, is needed to establish a relationship of agency, and thus to ensure that the executive power,

---

<sup>15</sup> Prakash, *supra* note 3, at 1816–20.

<sup>16</sup> *Id.* at 1825.

although in one sense dispersed, will in a more basic sense remain the President's alone.<sup>17</sup>

Prakash, with some hesitation, endorses the view that the President, like the British monarchs, may set the tenure of officers when commissioning them.<sup>18</sup> He may give tenure during pleasure, during good behavior, for life, or to the officer and his heirs. I have even more doubts about this than Prakash—doubts enough to cause me to disagree.

According to long-standing practice, by contrast with Prakash's suggestion, Congress determines the tenure of an office when it creates that office, and the President appoints to the office with that tenure, no more and no less. Standard practice thus allocates the authority to set tenure to the legislative, not the executive power. In this respect, I think conventional wisdom is correct. It is in general the function of the legislative and not the executive power to establish legal norms that govern public and private rights. Underlying that arrangement is the conceptual understanding that legislation creates and changes legal norms, while execution carries them out.<sup>19</sup> For that reason, issues concerning the powers and salary of an office are for Congress to resolve. In similar fashion, issues concerning the term for which office is held are matters of legal right to be decided by the lawmaker.

Prakash is correct that, as an historical matter, the British monarchs, and possibly American colonial and immediately post-colonial governors, enjoyed this power. That is important, but, as he understands, it is far from dispositive because the British constitution had a monarch long before it had conceptually based separation of legislative and executive power. For that reason, historical British practice concerning the *royal* power, especially the royal prerogative, is a notoriously hazardous guide to understanding the American *executive* power. And here we have a royal power with deep historical roots in the feudal principle that the King is the font

---

<sup>17</sup> Because the presidency is personal and not institutional, the shift from one President to another will often be sharper than the shift that takes place in Congress or the courts every time there is a change of personnel. Hence the possibility that one President's trusted aide will be the next President's viper in the nest is very real.

<sup>18</sup> *Id.* at 1831 (“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.”).

<sup>19</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–89 (1952).

2006]

*Addition by Subtraction*

1861

of honor, able to create Dukes and Earls and so forth. William the Conqueror was free to vest families with fiefs, parceling out land and offices to his retainers, but George Washington did not invade and conquer America and then hand out honors to his men. That bit of the royal power is not executive, not American, and not presidential.

### III. CONGRESSIONAL POWER TO REMOVE EXECUTIVE OFFICERS

May Congress remove non-legislative officers, such as the Secretary of Commerce, through legislation providing simply that the incumbent shall be removed? Professor Prakash, in his most innovative and provocative claim, believes that it can. First, Congress has a grant of power in the Necessary and Proper Clause. Second, no other provision of the Constitution, including the grant of the executive power to the President, stands in the way.<sup>20</sup> On both points, Prakash relies on the argument that many forms of congressional removal are well accepted and that there is nothing special about the sub-category of legislation that does nothing but remove an officer, which I will call “pure removals.”

On the point about *prima facie* congressional power under the Necessary and Proper Clause, I can agree with Prakash, despite some nagging doubts.<sup>21</sup> But I must part company on the question

---

<sup>20</sup> Prakash, *supra* note 3, at 1799–1800. In discussing whether congressional removal power is consistent with the President’s executive power, Prakash asks separately whether the President’s removal power is exclusive and whether a congressional removal power would undermine the President’s executive power. *Id.* at 1806–11. Although the two questions are distinct, they are also closely connected because the presidential removal power over executive officers rests on the need for presidential control thereof, and that control could be undermined by a congressional removal power. Presidential removal power might be exclusive only because removal power in anyone else would sap presidential control. That is indeed the conclusion I will urge.

<sup>21</sup> The nagging doubts come from the fact that a statute removing a particular individual from office is so specific, and so concerned with the operational details of government, as to approach the conceptual boundary between legislative and executive power. The more general a decision, the more clearly it is legislative. The more specific, the less clearly so. The Bill of Attainder Clause, although sometimes understood in terms of specificity, is more accurately understood as forbidding legislative punishments. See *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 472–73 (1977) (citing *United States v. Lovett*, 328 U.S. 303, 315 (1946)); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1866). Moreover, there is some appeal to the idea that the executive power is the power to manage the day-to-day operations of the government. Conversely, it is also true that legislative power controls legal rights and obligations, be they specific or

whether a congressional removal power is consistent with the degree of control over executive officers that follows from the President's possession of the executive power. The President, and the President alone, is vested with the executive power. That means that subordinate officers who exercise that power must be his agents and agents of no one else. The latter is true because if they were agents of someone else, that someone else would have the executive power, or some share of it. The problem with a congressional removal power over executive officers is that it would create an agency relationship between those officers, and the executive power they exercise, and the legislature. That would defeat separation of powers.

The argument that removal power creates an agency relationship between the removable officer and the possessor of the power to remove was thoroughly familiar to the framers and has been central to separation of powers doctrine ever since. Defending the Electoral College, that wholly impermanent body that never even meets all together, Hamilton as Publius explained that the electors' evanescence would help ensure presidential independence: "Another and no less important desideratum was that the executive should be independent for his continuance in office on all but the people themselves. He might otherwise be tempted to sacrifice his duty to his complaisance for those whose favor was necessary to the duration of his official consequence."<sup>22</sup> Even the limited removal power that derives from the ability not to re-elect the President was enough, Hamilton feared, to create dependence on those who possessed that power.

That judicial life tenure secures independence also seemed plain to Hamilton. "In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to

---

general and strategic or tactical, as it were. In that sense, a removal statute would be legislative. Despite the doubts, I am currently prepared to accept that understanding.

<sup>22</sup> The Federalist No. 68, at 381 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Similar reasoning appears in Federalist 71, in which Hamilton defended a relatively long (by then-current standards) term of four years for the President: "It may perhaps be asked how the shortness of the duration in office can affect the independence of the executive on the legislature, unless the one were possessed of the power of appointing or displacing the other." The Federalist No. 71, at 401 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Underlying that question is the assumption that a power to displace would create dependence.

2006]

*Addition by Subtraction*

1863

the encroachments and oppressions of the representative body.”<sup>23</sup> Judicial independence is crucial to the liberty of the people, he argued, and “nothing can contribute so much to its firmness and independence as permanency in office.”<sup>24</sup> A power in Congress or the President to remove the judges would make the latter agents of the former and practically undo the nominal separation of judicial power from the other powers.

As I noted above, Prakash defends presidential removal power over executive officers without himself endorsing Hamilton’s reasoning. His position is that removal power is necessary to create a relationship of agency, not that it is sufficient to do so. If removal power is necessary but not sufficient, then if both the President and Congress can remove executive officers, those officers might be agents of the former but not the latter. Hamilton’s reasoning, however, is quite powerful, even though it rests on a generalization about human nature. The question is whether the threat of removal will be enough to cause the removable officer to want to retain the confidence of the possessor of the removal power. It may not always do so. Certainly, some people of limited ambition are unaffected by the threat of removal. But a basic principle of the framers’ design is that virtue, and indeed just indifference to power, are in short supply. To say that if *A* can remove *B*, *B* is very likely to care very much about what *A* thinks, is almost certainly a generalization close enough for government work.

If that relationship of removal and agency obtains between Congress and, for example, the Secretary of Commerce, then the separation of legislative and executive power will be threatened doubly. First, making subordinate executive officials agents of the legislature undermines the independence of the executive. If the independent President is surrounded by and must act through congressional lackeys, his independence is a sham.<sup>25</sup> Second, it undermines the authority of the President over other executive functionaries, just as does limiting the President’s power to remove those functionaries. Someone who can be fired by either of two political

---

<sup>23</sup> The Federalist No. 78, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>24</sup> *Id.* at 434.

<sup>25</sup> Confirmation of this point can be found in the Incompatibility Clause, which bars Senators and Representatives from holding any other office in the government, not just the presidency. U.S. Const. art. I, § 6, cl. 2.

branches that compete for influence, and does not want to be fired, will seek to tread a middle course, offending neither rather than being wholly loyal to one or the other. A congressional power to remove executive subordinates would interfere with presidential control, much as would a power in a state's governor to remove federal officials in that state.<sup>26</sup> For executive subordinates to be loyal to anyone other than the President is bad; for them to be loyal to Congress in particular is doubly so.<sup>27</sup>

Prakash's response is that subordinate executive officials already have reasons to please Congress and its individual members, so such incentives do not make congressional removal impermissible.<sup>28</sup> He is right; not everything is unconstitutional that creates some dependence of executive subordinates, or the President, on Congress. I disagree, however, with the conclusion that for these purposes there is no difference between a pure congressional removal power and the various other tools that Congress has with which to influence executive officers, and indeed the President himself. Some of those tools come within Prakash's category of removals broadly defined, others take another form.

---

<sup>26</sup> As the example of a removal power given to a governor shows, the two problems of congressional interference and undercutting the President are in principle distinct. Although critics of independent agencies often argue that they will in fact be dependent on Congress, that is not necessarily the case. A life-tenured Secretary of Agriculture would be independent of both Congress and the President, undermining the unitary nature of the executive without increasing congressional power. States that have elected Attorneys General have non-unitary executives but not parliamentary government.

<sup>27</sup> Prakash maintains that Congress may exercise its removal power the way it exercises its other legislative powers: by passing a statute. Statutes must be presented to the President for approval, and if he rejects them, they become law only if two-thirds of both houses re-pass them. It is therefore natural to ask whether the presidential veto provides enough protection to the President's control of the executive branch. A sufficient answer, I think, is that the veto is but one of the Constitution's protections for presidential power, and indeed it is weaker than those that take the form of absolute restrictions on Congress that the President may not waive by signing a bill. Congress may not reduce the President's salary during his term, even with his signature on the legislation doing so. Perhaps the framers wanted to take away from the President the temptation to accept a reduced salary in return for something he wanted from Congress. If the grant of the executive power to the President does indeed imply that Congress has no removal power, then that implication too is a constitutional rule that the President may not waive.

<sup>28</sup> Prakash, *supra* note 3, at 1810–11.

2006]

*Addition by Subtraction*

1865

As Prakash points out, Congress can eliminate offices altogether, it can provide that officers are to be appointed for a limited term, and it can provide for loss of office as punishment for crime or in response to official misconduct. The use of these powers can have the effect of “removing” an individual from office. Because they are all forms of removal, says Prakash, it is no big deal to have one more form. Moreover, Congress can withdraw funding for officers, thereby making it impossible for them to perform their functions and de facto removing them.<sup>29</sup> All these permissible congressional actions closely resemble pure removal statutes, which remove officers and do nothing else. If they are within Congress’s constitutional power, why is not pure removal?

All the non-pure forms of removal, however, differ significantly from pure removal. Closest to pure removal is elimination of the office. With respect to Article III judges, there is a long-standing argument that elimination amounts to removal and is therefore unconstitutional. That was a leading objection to the 1802 statute that repealed provisions of the Judiciary Act of 1801 that had created a number of new Article III judgeships.<sup>30</sup> Opponents hooted at the Jeffersonians’ attempt to distinguish between getting rid of the office and getting rid of the incumbent.<sup>31</sup>

Yet Congress went ahead and eliminated the offices, and like many at the time and since, I believe that what it did was constitutional. There really is a difference between abolishing an office and removing the current incumbent, at least as long as Congress may not immediately create a virtually identical replacement office.<sup>32</sup> First, elimination is not a perfect substitute for removal, and hence is not as likely as removal to be used when people in Congress are dissatisfied with the incumbent, because elimination has a cost that removal does not: elimination of the office. Influential people in Congress might be quite dissatisfied with the decisions of the United States District Judge for the District of Wyoming, but many

---

<sup>29</sup> Id. at 1787–93.

<sup>30</sup> The Repeal Act, ch. 8, 2 Stat. 132 (1802) (eliminating the judgeships created by the Judiciary Act of 1801, ch. 4, § 21, 2 Stat. 89, 96).

<sup>31</sup> For a penetrating account and analysis of the debate, see David P. Currie, *The Constitution in Congress: The Jeffersonians 1801–1829*, at 11–22 (2001).

<sup>32</sup> As Professor Prakash notes, executive branch attorneys have argued that such “ripper legislation” would be unconstitutional. Prakash, *supra* note 3, at n.43 (citing 11 Op. Off. Legal Counsel 25, 26 (1987)).

people in Wyoming would likely be very unhappy with no federal trial court. Congress creates offices to accomplish its goals, and eliminating an office means accomplishing those goals less well. If the legislature still cares about a goal, the loss of the office serving that goal will hurt someone who matters politically. Often, the collateral damage that would be inflicted by elimination will protect even an unpopular incumbent.<sup>33</sup>

Second, just as elimination has a cost that removal does not, so it sometimes has a benefit: eliminating an office that is no longer needed. If there are two judges in a district and both of them spend the afternoons sitting at the office reading Gibbon, or playing golf, then quite possibly the country would be better off with only one judge in that district, even if both are performing admirably. The Judiciary Act of 1801 may indeed have needlessly multiplied the number of highly paid federal functionaries. There often will be a purpose for abolishing an office that is unobjectionable for those who believe that Congress has no business seeking to influence officers with threats of removal. This difference justifies the Constitution in treating the two powers differently, as one is more likely to be used innocently than the other.

Term limits for executive officers are even farther from a congressional removal power and thus easier to distinguish for constitutional purposes. The central objection to congressional removal is that it gives Congress too much influence over the officer. A term limit gives none, or hardly any. To Congress as such it gives none, because the Senate, but not the House, will be needed for a reappointment if one is sought. A slightly more subtle effect, moreover, will mute even the influence of the Senate. Someone who takes an office with a term rather than an indefinite appointment can plan for the possibility that the term will not be renewed with respect to both personal and official considerations. Personal disruption and possible loss of income resulting from removal will thus be less of a threat. Someone with an agenda for the office can undertake to implement that agenda within the fixed time limit,

---

<sup>33</sup> Strategic theorists refer to a related phenomenon known as self-deterrence, which arises when the collateral consequences of a military action keep it from being taken, even though it would accomplish an important goal. The classic example is nuclear weapons, which are often far too powerful to be used.

2006]

*Addition by Subtraction*

1867

and so be much less worried about being taken from power before the job is done.

Contingent removals, as for conviction of a felony, are thoroughly unlike congressional removals in their effect on the incumbent's incentives. As Congress has no hand in such removals, it cannot threaten them. And the incentive not to commit crimes is desirable.

Congress's control over appropriations does give it a tool with which to threaten executive officers, including the President himself, but I think that Prakash exaggerates its power. First, it is not strictly true that "unfunded officers cannot perform their statutory functions,"<sup>34</sup> or that "when Congress does not appropriate funds for officers, the officers cannot function."<sup>35</sup> Official power is conceptually, and often practically, distinct from expenditure of public funds. While the Constitution says that Representatives, Senators, the President, and judges all are to be compensated for their service, it makes no such provision for the Vice President of the United States, who, as far as the Constitution is concerned, can work for free. In practice, he could do so, performing his constitutional functions of presiding over the Senate and of, well, being there, without spending a dime of the taxpayers' money. Money is indeed the sinew of war, so armies are not much good without funding, but many other officers could, for example, adopt regulations from home.

Second, to the extent that refusals to fund, combined with a ban on the use of non-government resources, make it impossible to perform some official functions, by refusing funds, Congress would be eliminating those functions rather than removing the functionary. As noted above, the former is not identical to the latter because of its cost to the constituency that wants the function performed.

In addition to embedding pure removals in a broader category of removals, Prakash also embeds removals broadly considered within the even larger category of means by which Congress may influence executive officers. If such tools of pressure do not so interfere with presidential power as to be unconstitutional, he asks, why should removal? Congress can do, and therefore can threaten

---

<sup>34</sup>Prakash, *supra* note 3, at 1792.

<sup>35</sup>*Id.* at n.46.

to do, many things to make the lives of executive officers difficult. One more form of humiliation should not matter.<sup>36</sup>

To see why Prakash's argument is not as strong as it may seem, put aside subordinate officers for the moment and think about the President alone. Congress has many means of influencing his decisions. Indeed, it has the same means of influencing his decisions that, as Prakash points out, it uses regularly to influence the decisions of his subordinates. Influential members of Congress can threaten to reduce funding for programs the President cares about, or can offer to support legislation that he very much would like to see adopted. But Congress cannot fire the President, and so cannot threaten him with removal. The Constitution's drafters knew well that they had given Congress means to affect presidential action, yet they also believed that they had devised a presidency that would be substantially independent of Congress and that protected tenure was crucial to that independence.

A power to remove, they seem to have thought, would be much more influential than any other bargaining chip. On that score, they were almost certainly correct. For a politician, office is the sine qua non of political effectiveness. Except in rare circumstances, the threat of removal will be more effective than any other threat because it goes to all of the incumbent's power and, hence, all of his ability to accomplish anything. If a favorite project loses funding, the President loses that project. If the President is removed, he loses all his projects. Considered not as a threat but as a more direct means of affecting decisions, removal is also especially important because of its global implications. Every four years, the American voters exercise their ability to fill the most powerful office in the world, often deciding whether to fire the holder of that most powerful office. That ability, cutting across all policy issues, is much greater in its practical effect than any other political tool.

None of this is to say that the power to remove an officer is similar in the magnitude of its effect, even with respect to the decisions the officer makes, to the power to remove the President. It does mean that the removal power is likely to be more meaningful than any other tool of congressional influence over the executive branch. The Constitution's drafters thought very carefully about

---

<sup>36</sup> *Id.* at Part I.C.2.c, at 1810–12.

2006]

*Addition by Subtraction*

1869

the ways in which the offices they created would be filled and the ways in which they would be made vacant. Removal is a big deal. That is one of Prakash's themes, but it cuts against him on this point.

In a comment on a piece about the constitutional structure, it is appropriate to conclude with an observation about the larger picture. It is possible to read Prakash as a believer in broad removal power generally, as he argues that Congress, the President, and the courts have even more constitutionally based removal authority than orthodoxy accepts. But that is right only if each branch is viewed in isolation. When they are looked at together, the removal power looks more like a zero-sum game in which one branch's gain is another's loss. Although congressional removal power does not, formally speaking, interfere with presidential removal power, I have argued that it does make the latter less practically effective, as threats of removal can counteract one another. Indeed, my argument against a congressional removal power is precisely that it interferes with the principle of presidential control, which in turn generates presidential removal power. Addition to congressional power is subtraction from presidential power. The whole of the Constitution may not be greater than the sum of its parts, but it is at least as great.