

HOW THE CONSTITUTION MAKES SUBTRACTION EASY

Saikrishna Prakash

REMOVAL and *Tenure in Office* argued that each branch may remove officers.¹ Courts may remove their inferior judicial officers; the Chief Executive may remove all his executive officers; and Congress may remove, via statute, all officers of the United States, save for federal judges with good behavior tenure. The resulting scheme is a system of overlapping and shared powers over removal.

While we agree on many points, Professor John Harrison's trenchant response raises doubts about some of the arguments made in *Removal and Tenure in Office*.² A brief discussion of these disagreements is in order, starting first with the judicial power to remove inferior officers.

We disagree about the merits of the disempowerment theory as applied to the judiciary.³ Professor Harrison disputes the claim that Article III courts may disempower, and thereby remove, their inferior judicial officers.⁴ The disempowerment theory is premised on the notion that inferior judicial officers must receive an implicit delegation of judicial power from federal courts if they are to assist the courts. Professor Harrison contests this premise. He argues that Article III directly vests juries and inferior judicial officers with some measure of the judicial power, and hence no implicit delegation is necessary. Professor Harrison notes that Article III grants the judicial power to "Courts." He then makes the textually plausible claim that the "Courts" consist of judges, juries, and inferior judicial officers. Given this broader understanding of "Courts," the Constitution itself empowers juries and inferior judicial officers. Though the Constitution directly empowers judges, juries, and in-

¹ Saikrishna Prakash, *Removal and Tenure in Office*, 92 Va. L. Rev. 1779 (2006).

² See John Harrison, *Addition by Subtraction*, 92 Va. L. Rev. 1853 (2006).

³ See Prakash, *supra* note 1, at 1845–47. It is worth noting that we seem to agree that *Ex parte Hennen* supplies a faulty basis for a judicial removal power. See 38 U.S. (13 Pet.) 230 (1839). While Professor Harrison never specifically discusses *Hennen*, his discussion of the issue is, like mine, inconsistent with the Supreme Court's claim that a removal power arises from the judiciary's ability to appoint its inferior officers.

⁴ Harrison, *supra* note 2, at 1854–58.

ferior judicial officers, Professor Harrison argues that judges have unquestioned “primacy” in the exercise of the judicial power.

I fully agree with Professor Harrison that Article III grants the judicial power to “Courts.” The crucial question, then, is what the Constitution means by “Courts.” While this question surely requires far more careful consideration than I can give here, there are reasons to doubt that the Article III Vesting Clause incorporates a broad reading of “Courts.” In an Article III sense, there is no “Supreme Court” if there are no justices, and there are no inferior courts without judges. On the other hand, courts may exist even if there are no inferior judicial personnel. We would still have a Supreme Court even if all we had were Supreme Court Justices. The personnel who work for these various courts surely assist in the exercise of the judicial power, but they are not constitutive elements of these courts, at least as the Constitution uses the term “Courts.”

Several considerations lead me to this conclusion. First is an important page of history: the Judiciary Act of 1789, which created inferior federal courts and helped establish a Supreme Court. Its language is telling: the “supreme court of the United States shall consist of a chief justice and five associate justices.”⁵ The language creating the District Courts reads the same: “there [shall] be . . . a District Court . . . to consist of one judge” in each of the respective districts.⁶ Finally, each of the circuit courts was to “consist” of two Supreme Court justices and one district judge.⁷ This Act, written shortly after the Constitution’s ratification, makes it clear that in the opinion of Congress, judges comprise the court. Inferior judicial officers merely work for the judges who comprise the court. While the Constitution might have used “Courts” in a broader sense than the Judiciary Act, it seems more likely that the Act incorporates the Constitution’s understanding of “Courts.” After all, many of the same people who helped draft and ratify the Constitution drafted and adopted the Judiciary Act shortly thereafter.

Apart from history, Professor Harrison’s argument seems to yield certain implausible outcomes. If inferior judicial officers are

⁵ Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73.

⁶ Id. § 3, 1 Stat. at 73–74.

⁷ Id. § 4, 1 Stat. at 74–75.

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part of the Article III “Courts,” then these non-judges have a right, granted by the Constitution itself, to exercise the judicial power. Professor Harrison’s primacy principle ensures that when there are judges, inferior judicial officers must labor under the superintendence of these judges. But suppose a district judge dies or resigns. Professor Harrison’s arguments suggest that the district court could continue to function because the inferior judicial officers would have the authority to issue orders, opinions, and judgments. After all, under Professor Harrison’s view, the inferior judicial officers have a constitutional claim to judicial power. Is the Constitution plausibly read as permitting these officers to act as if they were judges?

I think not. There are excellent people laboring for the various courts, but these assistants do not comprise the “Courts” in the Article III sense. Once again, there is no Supreme Court without justices. There are no inferior courts without judges. Conversely, we would have no difficulty saying that a district court composed of a single judge is an “inferior Court” even if that court lacked any inferior judicial officers to assist it. While Article III distributes judicial power—in stark contrast to Article II’s evident concentration of executive power—it does not grant judicial power to every officer or employee of a court.

Professor Harrison’s claim that juries help comprise courts merits special attention. Whatever one might think about court personnel, are not juries constituent elements of courts? They are, in the sense that juries are part of the court system. When we think of the “courts,” broadly speaking, we may regard the judges, jury, the sheriff, constables, attorneys, and the coroner as “constituent elements” of a court.⁸

But if we ask more narrowly what the Constitution means by “Courts,” we are, I believe, led back to a more narrow conception. Writing of the Article III Vesting Clause, The Federal Farmer emphatically denied that juries were part of the courts.⁹ His conclusion

⁸ See 2 *The Works of James Wilson* 500–69 (Robert Green McCloskey ed., 1967) (describing the “constituent parts of the courts”).

⁹ Letters from The Federal Farmer (No. 15), in 2 *The Complete Anti-Federalist* 315, 319 (Herbert J. Storing ed., 1981). The Federal Farmer wrote:

What is meant by court? Is the jury included in the term, or is it not? I conceive it is not included: and so the members of [the Philadelphia] convention, I am

makes sense, for juries are not essential to the business of courts. The parties to the case may waive a jury trial, in which case the judge decides questions of law and fact. Indeed, most criminal cases end via plea agreements with no jury trial at all. On the other hand, the parties cannot waive a judge's participation in the business of the court.

Juries are perhaps best conceived as a popular check on the executive and judicial branches. They check executive branch prosecutions founded on weak facts. They check judges who, notwithstanding their independence, may be inclined to side with the prosecution on questions of disputed fact.

Regarding the President's removal authority, Professor Harrison gives two reasons for doubting the claim that the President has latitude to set the tenure of executive officers.¹⁰ First, he says that Congress has the power to set the tenure of officers, not the President.¹¹ Second, he suggests that even though the Crown had some authority to set the tenure of its officers, this authority was a royal prerogative and not an executive power; therefore, the President cannot set tenure.¹²

I agree that Congress has a power to set the tenure of executive officers. The crucial question is: what are the limits of this power? For the President to have a right to remove at pleasure, Congress may not set minimum tenures for executive officers. If Congress could set minimum tenures, then the President obviously could not remove officers during that period. Congress is therefore best regarded as having the power to set maximum terms of office. The President has the same power, with the shorter of the two chosen terms constituting the maximum term of office. So, even though a statute might provide that an officer may serve for four years, the President may instead grant a two-year term.

very sure, understand it. Court, or curia, was a term well understood long before juries existed In our [courts] in which there are jury trials, we uniformly speak of the court and jury, and consider them as distinct. Were it necessary I might site [sic] a multitude of cases from law books to confirm, beyond controversy, this position, that the jury is not included, or a part of the court.

Id.

¹⁰ See Prakash, *supra* note 1, at 1832.

¹¹ See Harrison, *supra* note 2, at 1860.

¹² See *id.* at 1860–61.

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Importantly, the Constitution arguably empowers the President to grant a term of office during good behavior. If a statute provides that an officer's term of office expires after four years, the President might provide in the officer's commission that she shall serve for three years during good behavior. The President may wish to grant tenure during good behavior to attract qualified and knowledgeable experts who understandably might not wish to serve at the President's pleasure, an uncertain and tenuous term of service. Such a grant is entirely consistent with the tenure set by Congress, because Congress can only provide a maximum length of tenure and not a minimum term.

On Professor Harrison's second point, I agree that the President cannot grant honors.¹³ The Constitution makes it clear that America shall have no lords, no barons, and no nobles.¹⁴ This entirely reasonable point is far removed from the question of whether the President can set terms of tenure that are consistent with Congress's power to set a maximum tenure. The claim that the President may grant traditional tenures such as tenure during pleasure or tenure during good behavior, so long as he does not trench upon a future President's right to remove at pleasure, is an entirely plausible one. This circumscribed and reasonable claim, it seems to me, cannot be defeated by merely invoking the specter of royal prerogative. However difficult it may be to distinguish executive prerogatives from executive powers, I doubt that the power to set tenures truly smacks of the monarchical practice of bestowing honors.

Having said all this, *Removal and Tenure in Office* hardly made a full-throated defense of a limited presidential ability to grant tenures besides tenure during pleasure. My few doubts about this theory turn on a lack of evidence. No evidence suggests that presidents have ever granted, for a set period of years, tenure during pleasure or during good behavior. Nonetheless, failure to exercise power arguably conveyed by the Constitution does not, by itself, mean that the Constitution never granted such power in the first place.

Perhaps one day a President will grant an office for a term of one year during pleasure, thereby saving himself the trouble of

¹³ See Harrison, *supra* note 2, at 1860.

¹⁴ See U.S. Const. art. I, § 9, cl. 8.

having to dismiss someone whose abilities he doubts. Likewise, maybe a future President will grant an office during good behavior so long as the President remains in office. Should a President grant either tenure, we can perhaps have a more thorough debate on this interesting question.

Finally, regarding the question of a congressional removal power, Professor Harrison mounts a spirited defense of the orthodox view. He argues that Congress cannot enact a simple removal statute that dismisses the officer but keeps the office intact.¹⁵ He supplies several reasons for his conclusion: there are formal and functional differences between simple removal statutes and other statutes that remove officers; such a power would inevitably cause executive officers to serve as agents of Congress; and the power of removal is a far more potent form of control than are committee hearings and statutes that grant salaries and alter jurisdiction.¹⁶

Perhaps unsurprisingly, I remain a firm defender of simple removal statutes. First, there are no sound reasons for supposing that form should matter when it comes to removals. Why should it matter, constitutionally speaking, if Congress passes a simple removal statute dismissing Donald Rumsfeld as opposed to doing away with the Office of the Secretary of Defense and transferring all of its current functions to the Office of the Secretary of State? Form should only matter when the Constitution gives us a reason for thinking that form should matter. Because the Constitution says nothing about proper and improper forms of removal, either all methods of congressional removal are constitutional, or all are unconstitutional.¹⁷

I am more sympathetic to Professor Harrison's concern about executive officers becoming agents of Congress.¹⁸ But the real

¹⁵ See Harrison, *supra* note 2, at 1865.

¹⁶ See *id.* at 1865, 1868–69.

¹⁷ On a related note, Professor Harrison says nothing about statutes that create a new term limit for existing officers, as did the 1820 Tenure of Office Act, ch. 102, 3 Stat. 582 (1820); see also Prakash, *supra* note 1, at 1797. If Congress can do this, then it can also enact a one-day tenure limit for an existing officer. Presumably, Professor Harrison would deny that Congress can enact tenure limits for existing officers, but then he would have to regard the 1820 Act as unconstitutional and explain why Congress can enact tenure limits when there is no incumbent, but cannot create them for officers already in office.

¹⁸ See Harrison, *supra* note 2, at 1862.

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world suggests that his fears are overblown. Executive officers will never be agents of Congress simply because Congress can remove them by statute. First, officers will continue to look primarily to the President for direction because he can remove them far more easily than Congress can. One person, capable of acting unilaterally, is far more powerful than a slow, ponderous, legislative assembly. Second, officers will wish to curry the President's favor because he is the one official who can shield them from congressional removal. By exercising a veto, the President can bar the vast majority of statutory dismissals. In contrast, Congress cannot safeguard an officer whom the President wishes to oust. Third, if Congress can remove by many other means—such as terminating the office, stripping it of all meaningful jurisdiction, or enacting term limits for existing officers—then it is hard to see why executive officers would be particularly fearful or wary of simple statutory removals.

This last point makes it clear that the stakes involved in a congressional removal power are rather small. The question is not whether Congress can oust an officer—on this point, Professor Harrison and I agree that it can. The question is whether Congress can enact simple removal statutes in addition to statutes disestablishing offices and statutes creating tenure limits. If the Congress did not have these other powers, the ability to enact simple removal statutes might be a considerable augmentation of congressional power. Given these other removal powers, however, no one ought to lose sleep over Congress's authority to enact simple removal statutes. In arguing for a power to enact simple removal statutes, *Removal and Tenure in Office* does not posit a quantum leap in congressional removal power.

Finally, many (but not all) of Professor Harrison's concerns relate to Congress having a removal power over executive officers. If we consider non-executive officers, such as inferior judicial officers, perhaps Professor Harrison might come to a different conclusion. After all, he thinks Congress might be able to grant the President the power to remove inferior judicial officers.¹⁹ If the President can be granted such authority, perhaps Congress can remove inferior judicial officers itself. Moreover, if one believes that the Constitution permits Congress to create non-executive "admin-

¹⁹ Id. at 1856–57.

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istrative officers,” then Congress’s ability to make them agents of Congress through its authority to remove these officers might actually be a salutary thing, permitted by the Constitution.

Professor Harrison’s insightful comments and criticisms have gone some way to fulfilling the hope expressed in *Removal and Tenure in Office* that more scholarly attention should be paid to the removal question. He is most certainly correct that understanding these important questions begins, but does not end, with this exchange.