

No. 25-332

In the Supreme Court of the United States

DONALD J. TRUMP, ET AL.,
PETITIONERS

v.

REBECCA KELLY SLAUGHTER, ET AL.,
RESPONDENTS

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF OF AMICUS CURIAE PROFESSOR
ILAN WURMAN IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

1. Whether the statutory removal protections for members of the Federal Trade Commission violate the separation of powers and, if so, whether *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), should be overruled.

2. Whether a federal court may prevent a person's removal from public office, either through relief at equity or at law.

This brief addresses the first question only.

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INTEREST OF *AMICUS CURIAE**

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SUMMARY OF THE ARGUMENT

Originalist and formalist scholars disagree among themselves regarding the scope of executive power. Some have argued that Article II's Vesting Clause is a residual grant of all power executive in nature. *See, e.g.,* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001); MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION (2020). Others have

* In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution intended to fund the brief's preparation or submission.

argued that the clause is a grant of law-execution power only. See, e.g., Ilan Wurman, *The Original Presidency: A Conception of Administrative Control*, 16 J. LEGAL ANALYSIS 26 (2024); Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93 (2020). Still a third possibility is that the Vesting Clause is not a grant of power at all, and that the President's only law-execution authority is what can be derived from the duty to take care that the laws be faithfully executed. Despite these disagreements, most originalist scholars agree that under any account of the original meaning of executive power, the President may remove principal officers as a matter of constitutional right. This brief makes several arguments to establish this constitutional principle.

First, the grant of executive power includes at a minimum the power to oversee the execution of the laws. Because one person cannot alone execute the laws, the executive power was understood to include the power to appoint officers to assist in that function. And, at common law, the power to remove was incident to the power to appoint. That explains why the Constitutional Convention did not discuss the removal power: because until a last-minute change by the Committee on Postponed Matters, the Senate and the President had appointment authority over different officers. The power to remove was therefore incident to their powers of appointment.

It was not until the appointment power was assigned to the President by and with advice and consent of the Senate that a question arose as to the implication for the power to remove. Congress therefore debated the question in 1789 when it established the first executive departments, and many representa-

tives concluded that the power to oversee the execution of the laws and the take-care duty required the President to have the ability to remove principal officers in whom the President no longer had confidence.

Second, the Necessary and Proper Clause does not change the analysis. Four reasons suggest why for-cause removal restrictions on principal executive officers are constitutionally problematic. First, once it is recognized that the removal power is part of the executive power, Congress cannot restrict the President's exercise of that power any more than it can restrict the President's exercise of the pardon power. Second, at least if such restrictions are judicially enforceable, they would transfer the take-care duty to the judiciary. Third, to some degree such restrictions create property rights in federal officeholding, which are generally incompatible with republican government. Fourth, if the President's executive power does include the right to control and direct subordinate officers in the exercise of their discretion, that would supply an additional reason why for-cause restrictions are unconstitutional.

Third and finally, concluding that the President has the constitutional right to remove principal officers does not render the Opinions Clause superfluous. For example, if the President has a power to remove, it does not follow that there is a constitutional right to direct them in the exercise of their duties. *See Wurman, Original Presidency, supra*, at 39-48. And even if the President does have a constitutional right to control and direct the principal officers, the Opinions Clause would still create a constitutional obligation on the part of the officers to provide information

to the President so that he can intelligently exercise his acknowledged powers.

ARGUMENT

I. The executive power includes the power to appoint and remove officers.

On any account of the Constitution's grant of executive power, the President must be able to remove principal officers. The President's power is, at minimum, the power to oversee the execution of the laws. Prior to the adoption of the Constitution, this power of superintendence included as an essential element the right to appoint officers to assist in law execution. And, at common law, the power to remove was incident to the power to appoint. Because the Constitution assigns the appointment power to the President and Senate together, that raises several possibilities for the removal power. Congress debated these possibilities in 1789 and generally concluded that the President must have the constitutional right to remove.

A. The executive power is, at a minimum, the power to see to the execution of the laws by others.

At the Founding, "the executive Power" vested in the President likely did not include a constitutional right personally to execute the laws. Wurman, *Original Presidency*, *supra* at 30-32.¹ *But see* Saikrishna

¹ In a famous dispute with King James I, who wanted to adjudge certain cases personally, Sir Edward Coke exhorted that the king could not personally sit in judgment in cases. Nor could the king personally make

Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701 (2003) (arguing the President has a constitutional right to do so). Many Founding-era statements, although not establishing that the President was unable to execute the laws personally as a constitutional default, strongly suggest that the President's power was principally one of superintendence rather than personal execution. The Constitution, of course, provides that the President shall "take care that the laws be faithfully executed," U.S. CONST. art. II, § 3, a recognition that other officers would be doing most of the execution.

When writers spoke of this clause, or the importance of unity in the person charged with executing the laws, they tended to confirm that the relevant power was to "superintend" or "see to" law execution. At the Virginia Ratifying Convention, Edmund Randolph argued that unity in the executive was critical, which is why the President was vested with an uncontroversial prerogative "[t]o see the laws executed,"

arrests because of his sovereign immunity; the use of officers was therefore critical if the subjects were to have legal remedies for wrongs done to them at the hands of executive officers. 7 THE REPORTS OF SIR EDWARD COKE 108-09 (George Wilson ed., 5th ed. 1777). William Blackstone similarly wrote in his influential eighteenth-century commentaries that the king has "the whole executive power of the laws," but because "it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust," it was necessary that "courts should be erected, to assist him in executing this power." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 267 (Oxford: Clarendon Press 1765).

a power which “every Executive in America has.” 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 201 (Jonathan Elliot ed., 2d ed. 1836). James Wilson said in Pennsylvania’s ratifying convention that a power “of no small magnitude” with which the President was entrusted was the power to “take care that the laws be faithfully executed.” 2 *id.* at 513. William McClaine of North Carolina similarly explained that the President’s power was to “take[] care to see the laws faithfully executed.” 4 *id.* at 136. James Iredell in the same ratifying convention said with reference to the President: “The office of superintending the execution of the laws of the union is an office of the utmost importance.” 4 *id.* at 106. *See also, generally*, Wurman, *Original Presidency*, *supra*, at 33-34 (cavassing additional evidence).

B. The power to appoint was incident to the power to execute.

The inability of the monarch (or the President) personally to execute the laws, whether as a practical or constitutional matter, explains why in both Britain and America the appointment and removal of officers were understood to be part of “the executive power” to oversee the execution of the laws. More precisely, the power to appoint was understood to be part of the power to oversee the execution of the laws, and it was a well-established maxim that one who appoints may also remove—if for no other reason than by virtue of making a new appointment. Thus, both appointment and removal were essential to guarantee the ability to “superintend” or “see to” the execution of the laws.

Giles Jacob’s law dictionary was the most prominent such dictionary in America at the Founding. *See*

Wurman, *Original Presidency*, *supra*, at 35. In that influential dictionary, he wrote that the king “names, creates, makes and removes the great officers of the government.” GILES JACOB, A NEW LAW-DICTIONARY 544 (J. Morgan ed., 10th ed. 1782). In another treatise, he wrote, “He [the king] hath alone the Choice and Nomination of all Commanders, and other Officers at Land and Sea, the Nomination of all Magistrates, Counsellors, and Officers of State.” GILES JACOB, LEX CONSTITUTIONIS: OR, THE GENTLEMAN’S LAW 72 (1719).

Blackstone wrote with respect to officers that “the law supposes, that no one can be so good a judge of their several merits and services, as the king himself who employs them,” from which principle “arises the prerogative of erecting and disposing of offices.” BLACKSTONE, *supra* note 1, at 262. Charles I argued that “[h]e cannot perform the Oath of protecting His people if He abandons this power, and assume others into it.” HENRY PARKER, OBSERVATIONS UPON SOME OF HIS MAJESTIES LATE ANSWERS AND EXPRESSES 38 (1642).

The same default rule prevailed in America. Numerous early American sources indicate that “the executive power was often viewed as either logically entailing or functionally implying the appointment of ‘assistances.’” Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1325 (2020). For example, George Mason thought that the Senate should have no role in “the appointment” of “public officers” because it was an executive power. 2 HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST 11 (1981). James Wilson thought similarly: “there can be no good Executive without a respon-

sible appointment of officers to execute.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 538-39 (Max Farrand ed. 1911). In the Constitutional Convention, Madison argued that the “extent of the Executive authority” was the “power to carry into effect[] the national laws” and “to appoint to offices in cases not otherwise provided for.” 1 *id.* at 66-67. Wilson similarly argued that “Exstive. powers are designed for the execution of Laws, and appointing Officers not otherwise to be appointed.” *Id.* at 70.

The Antifederalist writer Hampden wrote that “the most important and most influential portion of the executive power” was “the appointment of all officers.” 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 667 (Merrill Jensen ed., 1976). Brutus, Centinel, and Richard Henry Lee, among others, agreed. Mortenson, *supra*, at 1329-30 & nn.315-20. As did Publius: “the appointment to offices . . . is in its nature an executive function.” THE FEDERALIST NO. 47 (James Madison), at 305 (Clinton Rossiter ed., 1961).

C. The power to remove was incident to the power to appoint.

More pertinently for the present case is the connection between appointment and removal. Jacob’s prominent law dictionary stated: the king “names, creates, makes *and removes* the great officers of the government.” JACOB (1782), *supra*, at 544 (emphasis added). And the famous Act of Settlement, 12 & 13 Wm 3 c.2, which granted good behavior tenure for judges, was necessary because otherwise the king had the power to remove them. Wurman, *Original Presidency*, *supra*, at 38.

Commentators have pointed out, however, that very few writers on either side of the Atlantic wrote about removal at all. But there is an explanation for such silence: the power to remove was incident to the power to appoint. Thus, the appointment power included removal by default because an officer could be removed by the very act of appointing someone new—and the power to appoint was part and parcel of the executive power.

This tradition was “enshrined in Latin” maxims, “[u]numquoque dissolvitur, eodem modo, quo ligatur” and “[c]ujus est instituere ejus abrogate,” translating to “[e]very obligation is dissolved by the same method with which it is created” and “whose right it is to institute, his right it is to abrogate.” Jed Handelsman Shugerman, *The Indecision of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753, 820 (2023); *see also* 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS [DHFFC] 448-49 (Charlene Bangs Bickford et al. eds., 1988) (Senators invoking these maxims in the 1789 debates over establishing the executive departments).

Other sources also support this maxim. Dalton’s treatise on Justices of the Peace was widely distributed in founding-era America. Wurman, *Original Presidency*, *supra*, at 36. It provided as to high constables that “[a]lso in such manner as they are to be chosen, in the same manner, and by the like Authority are they to be removed; for, *eodem modo quo quid constituitur, dissolvitur*.” MICHAEL DALTON, THE COUNTRY JUSTICE: CONTAINING THE PRACTICE OF JUSTICES OF THE PEACE 49 (1666); *see generally* Wurman, *Original Presidency*, *supra*, at 35-38 (canvassing additional evidence).

This maxim was so well engrained in the law that, in 1779, Thomas Jefferson wrote in a letter that “Lawyers know,” as to “offices held during will,” that “issuing a new commission” terminates the old one. 3 THE PAPERS OF THOMAS JEFFERSON 242 (Julian P. Boyd ed. 1951). That explains why the power of appointment implied the power to remove—the possessor of the power could always make a new appointment. There are numerous examples from colonial Virginia of the governor-in-council removing individuals in the very commissions appointing new officers. Kenton J. Skarin, *Our Captain General and Governor in Chief: Executive Power over Lower Officials in Colonial America* 144 & nn.486-88 (unpublished manuscript on file with counsel).² In one illustrative episode, the council “Ordered That a New Commission of the Peace Issue for the County of Lancaster and that Nicholas Martin & Henry Lawson who have refused to act be left out of the said Commission & that Abraham Currell & Thomas Pinckard be added in their Room.” 5 EXECUTIVE JOURNALS OF THE COUNCIL OF COLONIAL VIRGINIA (November 1, 1739–May 7, 1754), at 105 (Wilmer L. Hall ed. 1945).

And in 1780 Thomas Jefferson wrote in a private note: “The power of appointing and removing executive officers inherent in Executive. Executive inadequate to every thing. Appoint deputies.... He who appoints may remove.” 4 PAPERS OF THOMAS JEFFERSON, *supra*, at 281. On this point Alexander

² The manuscript, with a wealth of additional data, is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5508278.

Hamilton agreed. When he appointed Tench Coxe as the assistant secretary of the Treasury pursuant to the act establishing the Treasury Department, he noted in the commission that he could remove Coxe even though the statute was silent. 6 THE PAPERS OF ALEXANDER HAMILTON 411 (Harold C. Syrett & Jacob E. Cooke eds. 1962); *see also* Aditya Bamzai & Saikrishna B. Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756, 1834 (2023). That, too, implies the understanding that the power of removal followed the power of appointment.

This Court subsequently adopted this proposition. At least “[i]n the absence of all constitutional provision, or statutory regulation,” this Court held early on, “it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment.” *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839). Other prominent antebellum Americans did as well. Chancellor Kent wrote in a letter to Daniel Webster that “the power to appoint and reappoint, when all else is silent, is the power to remove.” Letter from Chancellor Kent to Daniel Webster, *in* 1 THE PRIVATE CORRESPONDENCE OF DANIEL WEBSTER 486, 487 (Fletcher Webster ed., 1857). And Daniel Webster wrote in another letter, the power to remove is “incident to the power of appointment.” Letter from Daniel Webster to Mr. Dutton, *in id.* at 483. *See also, generally*, Bamzai & Prakash, *supra*, at 1834 n.573.

D. Congress debated the implications of sharing the appointment power between President and Senate in 1789 and generally concluded that the President must have the power to remove.

The maxim that removal follows from appointment also supplies an explanation for why the Constitutional Convention never discussed the issue. When Madison and Wilson and others agreed that the only power strictly executive in nature was the “power to carry into effect[] the national laws” and “to appoint to offices in cases not otherwise provided for,” 1 FARRAND, *supra*, at 67, that *included* removal.

That is because one who appoints also removes. The initial drafts of the Constitution to come out of the Committee of Detail assigned the appointment power over ambassadors and judges of the Supreme Court entirely to the Senate, and the appointment of other officers to the President alone. 2 *id.* at 183, 185. There was no need to think about removal at all; the Senate, acting alone, would remove ambassadors, and the President, acting alone, would remove other officers. The appointment power was not shared between President and Senate until the Committee of Postponed Matters in the final days of the Convention on September 4. 2 *id.* at 495; *see also* MCCONNELL, *supra*, at 79-80. The Framers had no time to think about the implications that sharing the appointment power would have for removal.

Thus, in the famous debates over the removal power in 1789, when Congress established the first executive departments, representatives could draw different conclusions from this maxim. Several representatives believed that, because of this maxim, the

President and Senate together had the power to remove, as both together had the power to appoint. Daniel Webster, reflecting on the debates in 1789, forcefully articulated this view in 1835 in a related debate over executive patronage:

If the power of removal, when not otherwise regulated by Constitution or law, be part and parcel of the power of appointment, or a necessary incident to it, then whoever holds the power of appointment holds also the power of removal. But it is the President and the Senate, and not the President alone, who hold the power of appointment; and therefore, according to the true construction of the Constitution, it should be the President and Senate, and not the President alone, who hold the power of removal.

DANIEL WEBSTER, *THE GREAT SPEECHES AND ORATIONS OF DANIEL WEBSTER* 400-01 (Edwin P. Whipple ed. 1894). In Chancellor Kent's letter to Webster discussed above, Kent similarly recognized that removal followed from appointment but was unsure whether that implied the Senate was to have a role. 1 *PRIVATE CORRESPONDENCE*, *supra*, at 487.

Although this "senatorial" view is logical, and within the range of plausible original meanings, there are strong arguments against it. Webster agreed that the Constitution might derogate from this general rule, as it does in the case of judges. WEBSTER, *supra*, at 400-01. He was too quick to find the Constitution otherwise silent on this question. At least, others in 1789 argued that the Constitution supplied another

rule. Some representatives agreed with the common-law maxim but maintained that it was the President who did the appointing and the Senate merely advised and consented to that act. *See, e.g.,* Bamzai & Parkash, *supra*, at 1775 & n.136.

Even James Madison agreed that in general “the power to annul an appointment is, in the nature of things, incidental to the power which makes the appointment.” 11 DHFFC, *supra*, at 922; 1 ANNALS OF CONG. 496 (1789) (Joseph Gales ed., Gales & Seaton 1834). He argued that if all the Constitution said on this score was that the President and Senate shall appoint, then he would agree that the President and Senate together must remove. Because the Constitution included both the Executive Vesting Clause and the Take Care Clause, however, he thought otherwise. The power to remove may follow from the power to appoint, but the power to appoint is—as noted in the previous section of this brief—ultimately an incident of executive power. “[I]f any thing in its nature is executive,” Madison stated, “it must be that power which is employed in superintending and seeing that the laws are faithfully executed.” 11 DHFFC, *supra*, at 926; 1 ANNALS, *supra*, at 500.

Thus, Madison argued, both appointment and removal were ultimately incidents of executive power. The Constitution then derogates from that principle with respect to appointments, but not for removals. “[T]he executive power shall be vested in a president of the United States,” Madison urged, and the “association of the Senate with the President in exercising that particular function, is an exception to this general rule,” which exception must be “taken strictly.” 11 DHFFC, *supra*, at 922; 1 ANNALS, *supra*, at 496.

The Take Care Clause further supports this proposition, Madison argued, because it implied that the President was “intended” to “have that species of power which is necessary to accomplish” the duty of faithful execution. 11 DHFFC, *supra*, at 922; 1 ANNALS, *supra*, at 496. That is, giving the Senate a check on removal effectively transfers the take-care duty from the President to the Senate. If the President believes the laws are not being faithfully executed and seeks to remove an officer, but the Senate disagrees, the Senate would have the ultimate say over whether the laws were being faithfully executed. The Constitution instead gave that final say, and assigned that duty, to the President.

Still a third position, maintained by other representatives, was that Congress could vest the removal power either in the President alone or in the President and Senate together pursuant to the Necessary and Proper Clause. *See* U.S. CONST. art. I, § 8, cl. 18 (“Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

One problem with this view is that it begs the question: if the executive power includes removal, then giving the Senate a check would derogate from that power. Relatedly, whatever one thinks of the Vesting Clause, giving the Senate a legislative veto over a removal would, as noted above, effectively transfer the take-care duty to the Senate. Still another problem is that it is unclear why Congress would

have discretion to vest removal in the Senate but not, say, in the House itself. Madison explained:

[W]hen I consider, that, if the Legislature has a power, such as is contended for, they may subject and transfer at discretion powers from one department of our Government to another; they may, on that principle, exclude the President altogether from exercising any authority in the removal of officers; they may give it to the Senate alone, or the President and Senate combined; they may vest it in the whole Congress, or they may reserve it to be exercised by this House. When I consider the consequences of this doctrine, and compare them with the true principles of the Constitution, I own that I cannot subscribe to it.

11 DHFFC, *supra*, at 921-22; 1 ANNALS, *supra*, at 495-96.

With the various arguments on the table, the House devoted over five full days of debate to the question. After the first day, a majority agreed to retain the clause that the principal officer would be “removable by the President.” 1 ANNALS, *supra*, at 371, 383. A majority further rejected a proposal to include the modifying phrase “by and with the advice and consent of the senate.” *Id.* at 382.

After the fifth day, the House altered the bill to ensure that its language would not be construed as a conferral of the removal power. The amended provision stated that “whenever the said principal officer shall be removed from office by the President,” the

departmental papers would then be under the control of the department's clerk. 11 DHFFC, *supra*, at 934; 4 DHFFC, *supra*, at 689; 1 ANNALS, *supra*, at 578. As Representative Egbert Benson, the sponsor of this amendment, explained, the alteration was intended "so that the law may be nothing more than a declaration of our sentiments upon the meaning of a Constitutional grant of power to the President." 11 DHFFC, *supra*, at 932; 1 ANNALS, *supra*, at 505. The amendment passed by a vote of 30-18, 3 DHFFC, *supra*, at 91-93; 1 ANNALS, *supra*, at 580, and the Senate agreed by a vote of 10-10, with Vice President John Adams breaking the tie. WILLIAM MACLAY, JOURNAL OF WILLIAM MACLAY 116 (E. Maclay ed. 1890).

Although some scholars have contended that the congressional discretion group also voted for this language and therefore it was not a constitutional determination as to the President's executive power, *see, e.g.*, Shugerman, *supra*; Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 362-63 (1927); *Myers v. United States*, 272 U.S. 52, 285-86 n.75 (1926) (Brandeis, J., dissenting),³ almost all who spoke or wrote about this decision subsequently, even those who had opposed a presidential removal power, agreed that the House had made a constitutional de-

³ *See also* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 40-41 (1997). Despite his uncertainty about whether there was a consensus in 1789, Professor Currie wrote that his "own view" was that the argument in favor of presidential removal put forward by Representative Fisher Ames and others was "overpowering." CURRIE, *supra*, at 41 n.240.

termination as to the President's executive power. *See, e.g.,* Bamzai & Prakash, *supra*, at 1775-77 (collecting sources).

Madison, for his part, argued that Congress's decision would become the "permanent exposition of the Constitution." 11 DHFFC, *supra*, at 921; 1 ANNALS, *supra*, at 495. Alexander Hamilton and Chief Justice Marshall had no doubt that Congress's decision reflected its constitutional interpretation that the removal power was constitutionally vested in the President. *See* 15 THE PAPERS OF ALEXANDER HAMILTON, *supra*, at 33, 40; 5 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 200 (1807). And Chancellor Kent, in his letter to Webster, although expressing doubts about the correctness of the decision, stated: "[I]t is too late to call the President's power in question, after a declaratory act of Congress and an acquiescence of half a century." 1 PRIVATE CORRESPONDENCE, *supra*, at 487. And this Court stated in 1839: "No one denied the power of the President and Senate, jointly, to remove, where the tenure of the office was not fixed by the Constitution; which was a full recognition of the principle that the power of removal was incident to the power of appointment. But," the Court added, "it was very early adopted, as the practical construction of the Constitution, that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution." *Ex parte Hennen*, 38 U.S. at 259.

In summary, in 1789 there was general agreement with the maxim of law that the power to appoint included the power to remove. But one could draw at least two plausible conclusions: the Senate and Pres-

ident together remove or the President alone removes. Both are within the range of original meanings. The former view seems more consistent with the practice that removals are often effected by new appointments. The latter view makes sense, however, if “the executive power” was understood to include the power to appoint and remove, and the appointment function was shared with the Senate but the removal function was not. And it makes good sense of the Take Care Clause because the senatorial view would seem to transfer the take-care duty from the President to the Senate and give to the Senate what is effectively a legislative veto. Congress seems to have been persuaded by this latter argument. What matters more than any “decision” from Congress, however, is the strength of the arguments presented for a presidential removal power.

II. For-cause removal restrictions on principal officers are impermissible under the Necessary and Proper Clause

The for-cause removal restrictions at issue in the present case pose a slightly different question. Such restrictions do not transfer the take-care duty to the Senate, but rather purport to limit the reasons for which the President may exercise the power to remove. Moreover, as Jefferson noted in the 1770s, lawyers know that as to “offices held during will,” issuing a new commission terminates the old one. 3 PAPERS OF THOMAS JEFFERSON, *supra* at 242. This Court in *Hennen* similarly stated the rule that removal is incident to appointment “[i]n the absence of all constitutional provision, or statutory regulation.” *Ex parte Hennen*, 38 U.S. at 256.

The constitutional default rule, in other words, is that the executive power includes the power to remove principal officers. And, for the reasons discussed above, Congress does not have the power to transfer the removal power to the Senate, or to any part of itself. But whether Congress can create offices not held “during will” is a separate question of Congress’s powers under the Necessary and Proper Clause. Parliament could limit the king’s removal power because Parliament was supreme; Congress, however, only has those powers delegated to it in the Constitution.

Several reasons indicate that Congress cannot under the Necessary and Proper Clause restrict the President’s exercise of the removal power: because (1) the arguments discussed above suggest the President’s principal power to oversee law execution is removal, and Congress can no more restrict the President’s reasons for removal than it can restrict the President’s reasons to exercise the pardon power; (2) for-cause restrictions, if judicially reviewable, would transfer the take-care duty to the courts; (3) such restrictions would create some degree of property interests in federal offices, which are generally incompatible with republicanism; and (4) if the executive power includes the right to direct the execution of all federal law, that would be an additional reason why for-cause restrictions are unconstitutional.

A. For-cause restrictions would impermissibly interfere with the President’s removal power.

The arguments described in the previous part for a presidential removal power, it seems to the present author, are dispositive of the constitutional question

regarding for-cause removal restrictions on principal officers. The Framers and subsequent generations disagreed over whether the President had a constitutional right to control the discretion of subordinate officers—more on that below—but all generally accepted, especially after the debates of 1789, that the President had a constitutional right to remove.

Once it is established that the President has a constitutional power to superintend the execution of the laws through the removal power, Congress can no more restrict the President's exercise of that power than it can restrict the President's exercise of the pardon power or the power to demand opinions. Just as Congress cannot pass a law providing that the President may only demand opinions from the principal officers if there is "good cause" to doubt their faithful execution of the laws, and just as Congress cannot pass a law providing that the President may only pardon individuals if there is "good cause" to believe their convictions were unjust, Congress cannot restrict the reasons for which the President may exercise the power to remove.

Put differently, it is often said that Congress's greater power to establish offices includes the "lesser" power of structuring an office's tenure, duties, and even the removal of officers. That argument is partly true: establishing offices, specifying duties, requiring qualifications for the officeholder, and like provisions help the President carry law into execution. It does not follow that Congress can also limit the President's power to remove the officer, which would hinder the President's constitutional power. Congress has the power to establish federal crimes, too, but no one would conclude that it therefore has the "lesser" pow-

er of restricting the reasons for which the President may pardon individuals who are convicted of committing those crimes.

To be clear, the President must faithfully execute the laws that Congress enacts. But the Constitution vests the President with independent powers of law execution for the same reasons it grants courts independent powers of judgment, although the courts, too, must faithfully follow the law. That is because each department of government was structured to accomplish its assigned function (legislation, execution, adjudication) well, and to avoid the blending of powers that ought to be kept separate for the preservation of liberty. And it is well established that Congress, through the exercise of its necessary and proper power, cannot alter the allocation of powers set forth in the Constitution.

B. Judicially enforceable restrictions would impermissibly transfer the take-care duty from the President to the courts.

Another reason for-cause restrictions on principal executive officers are problematic, at least if they are judicially enforceable, is that they would transfer the take-care duty to the judiciary. Giving final say to courts over whether a removal is proper would seem no better than giving the Senate final say. *See generally* Ilan Wurman, *The Necessary and Proper Clause and the Law of Administration*, 93 GEO. WASH. L. REV. 1196, 1218-20 (2025).

It is possible to conceive of for-cause restrictions without judicial review, however, in which such restrictions might still do some work. Perhaps they force the President to provide reasons for the remov-

al, which reasons Congress can then scrutinize. Congress would be aided in that scrutiny if the President must first engage in an executive-branch adjudication to establish cause for the removal. That appears to be how then-President Taft understood the imposition of such restrictions. *See* Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 U. RICH. L. REV. 691 (2018) (explaining that President Taft removed for cause two members of the Board of Appraisers for incompetence and for having engaged in self-dealing, but first appointed a board of inquiry to investigate the matter).⁴

And if Congress determined that the President abused the removal power, impeachment would be a remedy. As Madison said in 1789, the “wanton removal of meritorious officers would subject [the President] to impeachment and removal from his own high trust.” 11 DHFFC, *supra* at 897; 1 ANNALS, *supra*, at 498. On this account, such restrictions would not too seriously interfere with presidential supervision, but would have much less teeth than traditionally believed. And, to repeat, they would not be judicially enforceable, otherwise the courts would usurp the President’s take-care duty.

C. For-cause tenure protections impermissibly create property rights in offices.

A third reason that for-cause protections may be problematic under the Necessary and Proper Clause

⁴ Though President Taft expressed uncertainty whether he was unable to remove without cause. Bamzai, *supra*, at 732 & n.242.

is that they create property interests in holding federal office.

Jane Manners and Lev Menand have documented the history of “inefficiency, neglect of duty, and malfeasance in office” removal provisions and have argued that such provisions are removal permissions rather than removal protections. Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 (2021). Their work demonstrates that property rights in offices were common in England prior to the eighteenth century, a practice Parliament sought to restrict over the course of the eighteenth century as the political system became more republican. *See id.* at 18-20, 29, 33-34. It established shorter tenures through legislation providing that several offices would be for fixed terms of years. *See id.* at 18-19. These offices were still property for the duration of their statutory terms, so Parliament sought to make them even more accountable by allowing removal for specified causes. *See id.* at 31-34. These reforms, in other words, diminished property rights in officeholding in England in service of republican principles.

There are not many American cases on the question, but those that exist suggest the American revolutionary generation rejected the idea of property rights in office. As this Court said in *Hennen*, “The tenure in [English] cases depends, in a great measure, upon ancient usage. But with us, there is no ancient usage which can apply to and govern the tenure of offices created by our Constitution and laws.” 38 U.S. at 260. This Court would eventually say, “The decisions are numerous to the effect that public offic-

es are mere agencies or trusts, and not property as such.” *Taylor v. Beckham*, 178 U.S. 548, 577 (1900). Manners and Menand agree that property in office was “roundly rejected” by the Founding generation. Manners & Menand, *supra*, at 20.

If Americans rejected property interests in federal office, then it would seem to be a great and important power to grant property interests in their offices to principal officers, such that this power would not have been left to implication. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 559 (2012) (holding that the Necessary and Proper Clause does not grant important prerogatives); Wurman, *Necessary and Proper*, *supra*, at 1200-1215 (similar); *id.* at 1220-23 (discussion of property interests in offices). And the grant of for-cause protections effectively creates property rights in important offices with significant discretion for the term of years provided by the statutes establishing the offices.⁵

⁵ This Court long ago established that for-cause tenure protections are permissible for inferior officers whose appointments have been vested in the department head. *See, e.g., United States v. Perkins*, 116 U.S. 483 (1886). In 1796, Congress provided that the Surveyor General could appoint deputies but only remove them for “negligence or misconduct in office.” An Act providing for the Sale of the Lands of the United States . . . , Ch. 29, 1 Stat. 464, § 1 (May 17, 1796). It is true that, because of the common law maxim, if Congress vests the appointment in the principal then the removal power comes with it. Whether it was correct to conclude that Congress can also thereby protect the inferior officer from removal may well be doubted. *See generally* Wurman, *Original Presidency*,

D. For-cause restrictions are also problematic if the executive power includes the power to direct and control subordinates.

There is substantial evidence from the Founding period and afterward that the executive power included the power to direct and control officers in the exercise of their discretion—although there is much counterevidence, too, *see* Part III below—such that that view is within the range of plausible original meanings. Under that view, for-cause restrictions are also problematic because their central purpose is to prevent the President from removing an officer merely because of policy disagreements.

For example, Blackstone’s description of a “proclamation power” would seem to indicate that the President has the power to direct subordinates as part of the executive power of law execution. Blackstone wrote that the king’s proclamations have “binding force, when . . . they are grounded upon and enforce the laws of the realm.” 1 BLACKSTONE, *supra* note 1, at 260-61. Although lawmaking is the work of the legislative branch, “yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate.” *Id.* at 261. Therefore, the king’s “proclamations, are binding upon the subject, where they do not either contradict the old laws, or tend to establish

supra, at 54. Regardless, inferior officers must, by definition, follow the directions of their principals or have their decisions reviewable by them, suggesting tight control by politically accountable principal officers, making such property interests less problematic.

new ones; but only enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary.” *Id.* That prerogative does seem to imply that any discretion left by law is for the king—and the President—to exercise. McConnell similarly argues that the proclamation power is “the President’s power to direct executive officers to exercise power they already have, by virtue of statutes, in a particular way.” MCCONNELL, *supra*, at 114.

There are also statements in favor of presidential direction at the Founding. For example, the Antifederalist Federal Farmer wrote that law execution would be under the “direction” of the President. 2 STORING, *supra*, at 310. James Wilson explained that the President would “direct all the subordinate officers” of the executive department. JAMES WILSON, LECTURES ON LAW, *in* 1 THE WORKS OF THE HONOURABLE JAMES WILSON 404 (Bird Wilson ed., 1804). Several statements detailed earlier in this brief acknowledged the idea that the President would “superintend” the execution of the laws. Noah Webster’s famous 1828 dictionary defined the term “superintend” to include the ability “to oversee with the power of direction.” 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, at dclxxx (1828). This is more evidence that perhaps the President would have a power of direction.

This Court need not resolve this question to resolve the present case. To the extent the executive power does, however, include the power to direct and control, that would be evidence against the constitutionality of for-cause removal provisions.

III. The Opinions Clause is not superfluous if the President has a power to remove.

One classic argument against a presidential removal power is that, if such a power exists, the Opinions Clause would be superfluous. That clause provides that 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.” U.S. CONST. art. II, § 2, cl. 1. And, to be sure, some Founders did think the clause was superfluous. THE FEDERALIST NO. 74, *supra*, at 447 (Alexander Hamilton). Redundancy and superfluity should be avoided if possible, but some redundancy is expected in constitutions. Nevertheless, there are several reasons why the Opinions Clause is not superfluous even if the President has a power to remove.

First, some scholars have taken the view that the President, even if he has a constitutional right to remove principal officers, does not have a constitutional right to direct the exercise of their discretion, although Congress often statutorily provides that authority. *See generally* Wurman, *Original Presidency*, *supra* at 39-46. For example, after studiously avoiding the implication that Congress was conferring the removal power on the President, Congress’s statute in 1789 establishing the Department of Foreign Affairs provided, “the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct.” An Act for establishing an Executive Department, to be denominated the Department of Foreign Affairs, Ch. 4, 1 Stat. 28, 29 (July 27, 1789). Presidents Washington, Jefferson,

and even Taft—the author of the *Myers* decision—all thought it was impermissible to interfere with the duties of the Comptroller of the Treasury in the absence of malpractice. Wurman, *Original Presidency*, *supra*, at 42-43, 46.

Daniel Webster, in arguing that President Jackson abused his removal power when he removed the Secretary of the Treasury for having refused to withdraw the U.S. Treasury deposits from the Second Bank of the United States, argued,

All are able to see the difference between the *power to remove* the Secretary from office, and the *power to control him*, in all or any of his duties, while in office. The law charges the officer, whoever he may be, with the performance of certain duties. The President, with the consent of the Senate, appoints an individual to be such officer, and this individual he may remove, if he so please; but, until removed, he is the officer, and remains charged with the duties of his station; duties which nobody else can perform, and for the neglect or violation of which he is liable to be impeached.... The President, it is true, may terminate his political life; but he cannot control his powers and functions, and act upon him as a mere machine, while he is allowed to live.

DANIEL WEBSTER. MR. WEBSTER'S SPEECH ON THE PRESIDENT'S PROTEST: DELIVERED IN THE SENATE OF THE UNITED STATES, May 17, 1834, at 5-6 (Gales & Seaton 1834) (emphasis added). If this understanding

of executive power is correct, then the President would have a removal power and the Opinions Clause would still be necessary to obtain information from the subordinate officers.

Even if the President does, however, have a power to direct and control as well as a power to remove, the Opinions Clause would still be necessary to compel the *officer* to provide the requisite information. After all, the President could always direct, and the officer could always ignore the President. The President could always threaten to remove the officer, but nothing compels the officer to provide information to the President merely because of that threat. It makes eminent sense to require principal officers as a matter of constitutional obligation to supply the President with the information necessary so that the President may exercise his acknowledged powers—whether those powers include only removal or both removal and direction.⁶

⁶ Michael Rappaport has also recently argued that the Clause would have done important clarifying work. In many state constitutions, governors were required to seek written advice from an executive council. The Opinions Clause confirms, however, that the President may, but is not required, to seek such advice, and that Congress could not impose such a requirement on the President. See Michael B. Rappaport, *Reconciling the Unitary Executive and the Opinions Clause*, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5586770.

CONCLUSION

The executive power, at a minimum, includes the power to oversee the execution of the law by others. That power was understood to include the power to appoint officers to assist in that task, and the power to remove was an incident to the power to appoint. Both, therefore, were an incident of the executive power. The Constitution shares the appointments power with the Senate, but not the removal power. And, regardless of one's view of the Vesting Clause, giving Congress or the Senate a legislative veto over removals would effectively transfer the take-care duty away from the President.

Although Congress has significant discretion under the Necessary and Proper Clause to establish offices, structure their tenure, and provide qualifications for holding office, none of those powers derogates from the President's power to oversee the execution of the laws. Restricting the President's removal power does so derogate, however, and Congress can no more restrict that power than it can restrict the President's pardon power.

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