No. 25-332

In the

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, 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 *AMICUS CURIAE* OF PROFESSOR JED HANDELSMAN SHUGERMAN IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Jed Handelsman Shugerman is a Professor of Law at Boston University. He holds a JD and a PhD in History. Shugerman subscribes to the interpretation of the Constitution based on original public meaning (i.e., originalism). He has written extensively on the history of presidential power and the original public meaning of Article II.[2]

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[1] No counsel for a party authored this brief in whole or in part. No counsel, party, or person other than *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See Venality: A Strangely Practical History of Unremovable Offices and Limited Executive Power*, 100 Notre Dame L. Rev. 213 (2024) [hereinafter *Venality*]; *Movement on Removal: An Emerging Consensus and the First Congress*, 63 Am. J. Legal Hist. 258 (2023) [hereinafter *Movement on Removal*]; *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. Penn. L. Rev. 753 (2023) [hereinafter *Indecisions*]; *Vesting*, 74 Stan. L. Rev. 1479 (2022); *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 Yale J. L. & Humanities 125 (2022) [hereinafter *Removal of Context*]; *Presidential Removal: The Marbury Problem and the Madison Solutions*, 89 Fordham L. Rev. 2085 (2021) [hereinafter *Marbury Problem*]; Andrew Kent, Ethan J. Leib, & Jed H. Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111 (2019) [hereinafter *Faithful Execution*].

Shugerman and Gary Lawson have co-written "Presidential Removal as Article I, not Article II,"[3] offering originalist alternatives to limit Congress's power to restrict presidential removal power, while allowing good-cause conditions in traditional exceptional cases. This amicus brief summarizes these alternatives and shows how they are consistent with the Court's holdings in *Myers*, *Free Enterprise*, and *Seila Law*: "Tenure protections and agency structures must be necessary and proper for executing federal power . . . . The Necessary and Proper Clause is a stronger originalist basis to replace *Humphrey's Executor*, to limit congressional power, and to confirm narrow traditional exceptions for the FTC and the Federal Reserve."[4]

SUMMARY OF ARGUMENT

Many legal scholars have argued that, as a matter of original public meaning, Article II does not imply an indefeasible presidential removal power. In response, unitary executive theorists have warned that such an interpretation would leave Congress with unlimited power to create a Fourth Branch. New historical evidence shows that this dichotomy between

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[3] Gary Lawson and Jed H. Shugerman, *Presidential Removal: Article I Necessary and Proper, not Article II Executive Power* (2025) [hereinafter *Presidential Removal*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5736583 (B.U. Sch. of L. & Univ. of Fla. Levin Coll. of L. research paper forthcoming).

[4] *Id.*

unconditional presidential power and unlimited congressional power has always been false.

This originalist amicus brief addresses the first Question before the Court, arguing that statutory removal protections for members of the Federal Trade Commission (FTC) do not violate the separation of powers. Article I's Necessary and Proper Clause is the starting point for both Congress's power to create offices and the limits on that power. While the Government's maximal interpretation of Article II lacks support from original public meaning, this Article I basis for a limited congressional power is more historically grounded and consistent with the Court's recent precedents. Tenure protections and agency structures must be for a necessary end and with proper means. The Necessary and Proper Clause is thus an originalist basis to support the result in *Humphrey's Executor,* to limit congressional power consistent with *Myers*, *Free Enterprise*, and *Seila Law*, and to confirm narrow traditional exceptions for the FTC and the Federal Reserve. The original public meaning of the Take Care clause provides a similar principle for distinguishing between valid and invalid congressional conditions. The Government's assertion of unconditional presidential power not only fails the original public meaning of Articles I and II, but it would lead to inconsistencies, uncertainties, and serious social and economic consequences.

ARGUMENT

I. Article I's "Necessary and Proper" Clause.

A. The "Necessary and Proper" Clause Grants Legislative Power to Create Offices—and Conditions on Removal—if the Ends Are Necessary and if the Means Are Proper, Proportional, and Effective.

The Necessary and Proper Clause gives Congress power "[t]o 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." U.S. Const. art. I, § 8, cl. 18. The Necessary and Proper Clause is the starting point for any constitutional question about the law of offices because it is the source of Congress's power to create offices. The Necessary and Proper Clause contains its own limits on Congress's power over offices—and those limits are more grounded in original public meaning than the interpretations of "executive power" and Article II posited by the Government.

The Constitutional Convention debates clarify that the office-creating meaning was inherent to the clause. James Madison and Charles Pinckney moved to have the Clause read "make all laws and establish all offices necessary and proper." But Gouverneur Morris, James Wilson, John Rutledge, and Oliver Ellsworth responded that the additional language

about office creation "could not be necessary,"[5] meaning it was already sufficiently (and perhaps obviously) implied. The motion was voted down 9-2.[6] Moreover, by vesting the office-creating power in Congress, the Constitution made a deliberate and crucial change from English practice, under which the monarch could unilaterally create offices and appoint officers.[7] The President has no such unilateral power—a limitation confirmed by the Appointments Clause, which requires Senate confirmation for principal officers and refers to the appointments of officers "which shall be established *by Law,*"[8] meaning by statute. Accordingly, no executive offices other than the presidency and vice presidency (if one considers the latter an executive office) exist unless Congress first creates them. The overall meaning of Article I's Necessary and Proper Clause and Article II's Appointments Clause is consistent: more congressional power over offices, and less presidential power over offices, relative to England's balance.

Professor Geoffrey Miller reviewed the use of the terms "necessary" and "proper" in hundreds of corporate charters from around this era to construct the original public meaning of this Clause. He concluded that "necessary" meant that a law "must be

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[5] *See* 2 *The Records of the Federal Convention of 1787* 345 (Max Farrand ed., 1911).

[6] *Id.* at 337, 345.

[7] *See* 1 William Blackstone, Commentaries *262-63.

[8] U.S. Const. art. II, § 2 cl. 2 (emphasis added).

a reasonably close connection between constitutionally recognized legislative ends and the means chosen to accomplish those ends. To be 'proper,' the analysis suggests that a law must not, without adequate justification, discriminate against or otherwise disproportionately affect the interests of individual citizens."[9] Miller found that colonial charters often used the language of "proper" for more discretion in the creation of offices, and he suggests that Article I's additional word "necessary" signaled less discretion.[10]

Thus, scholars have concluded that the Necessary and Proper Clause originally meant a grant of "discretionary authority," but with limits and requirements of reasonableness, fairness, efficacy, proportionality, and rights protections.[11] "Necessary and Proper" also had an original background meaning

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[9] Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, 79 Geo. Wash. L. Rev. 1, 32 (2010).

[10] *Id.* at 7-8 (Virginia Charter of 1611, Connecticut Charter of 1662, and Massachusetts Bay Company Charter of 1629), 9-10 (a series of clauses from North Carolina and Connecticut); *see also id.* at 8-9 (the First Bank of the United States, in Act of June 1, 1789, ch. 10, 1 Stat. 190, 191-95; the Second Bank of the United States, in Act of Apr. 10, 1816, ch. 44, 3 Stat. 266, 269).

[11] Gary Lawson et al., *The Origins of the Necessary and Proper Clause* 6-7 (2010).

of limited discretion that we now label "fiduciary."[12] Whereas the evidence about Article II "executive power" shows that the phrase did not imply powers, the Necessary and Proper Clause was designed to do just that[13]—but in order to cabin those implied powers and avoid abuse, the term "necessary and proper" signals textual and traditional limits on the scope of implied powers.[14]

In England and in continental Europe, it had been practically necessary to offer tenure protections (even granting some offices as inheritable property, life tenure, and unremovable terms of years) in order to attract competent candidates for these offices. This background explains why legislative power included discretion to protect officers from removal at pleasure, and why executive power did not include a general removal power.[15]

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[12] Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 Case W. Rsrv. L. Rev. 243, 284-87 (2004).

[13] John Mikhail, *The Necessary and Proper Clauses*, 102 Geo. L.J. 1045, 1047-50 (2014).

[14] *Cf.* William Baude, *Sharing the Necessary and Proper Clause: The Indeterminacy of Deference*, 128 Harv. L. Rev. F. 39, 47 (2014); Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183, 220-21 (2003).

[15] *See Venality* at 242-57; *Presidential Removal* at 20, *supra* note 3, at 20.

The First Congress's debates reflected the language of the "necessary and proper" clause, the appropriateness of some conditions, and the inappropriateness of excessive independence. *See infra* Part I.C.

B. The First Congress Did Not Make the "Decision of 1789," but it Reflected "Necessary and Proper" Limits on Congressional Power Over Removal.

Before digging into the details of the First Congress, a caveat: Post-ratification history is less probative of original public meaning than the ratification history. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 35 (2022) ("We must . . . guard against giving post-enactment history more weight than it can rightly bear."). Indeed, some unitary theorists who had filed amicus briefs in *Seila Law v. CFPB* in 2019 have now conceded "uncertainty" about the First Congress[16] and have

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[16] Ilan Wurman, *Removal Power and the Original Presidency*, L. & Liberty (Oct. 15, 2025) ("I *agree* . . . with Shugerman about the uncertainty regarding the so-called 'Decision of 1789.'"), https://lawliberty.org/removal-power-and-the-original-presidency/; Michael D. Ramsey, *Presidential Power and What the First Congress Did Not Do*, 99 Notre Dame L. Rev. Reflection 47, 48, 50-51 (2023) ("[T]he records of [the First Congress's] debates have been extensively, if inconclusively, parsed.").

acknowledged erroneous historical claims in those briefs.[17]

Meanwhile, originalists are also questioning the unitary theorists' originalist claims. Professor Caleb Nelson recently concluded, "Starting with Justice Brandeis and continuing through a litany of scholars . . . , many people who have looked closely at the debates and votes in the First Congress have convincingly argued that they do not show a consensus for any particular interpretation of the Constitution."[18] Gary Lawson has reached a similar

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[17] Ilan Wurman, *Some Thoughts on My* Seila Law *Brief*, Yale J. on Regul. Notice & Comment Blog (Dec. 1, 2021), https://www.yalejreg.com/nc/some-thoughts-on-my-seila-law-brief-by-ilan-wurman/; Michael Ramsey, *Blackstone on Removal Power: Reprise*, The Originalism Blog (Dec. 2021), https://originalismblog.com/blackstone-on-removal-power-reprisemichael-ramsey/; *see* Jed H. Shugerman, *Movement on Removal: An Emerging Consensus on the First Congress*, 63 Am. J. Leg. Hist. 258, 269 (2024) (discussing Michael McConnell's acknowledgement of errors in claiming removal was an "executive power" from the royal prerogative).

[18] Caleb Nelson, *Special Feature: Must Administrative Officers Serve at the President's Pleasure?*, Democracy Project (Sep. 29, 2025), https://democracyproject.org/posts/must-administrative-officers-serve-at-the-presidents-pleasure. In addition to Brandeis, Nelson cited Edward S. Corwin, *The President's Removal Power Under the Constitution* (1927); David P. Currie, *The Constitution in Congress* (1994); and this Amicus's article, *Indecisions*.

conclusion about the First Congress and the original public meaning of Article II "Executive Power."[19]

It has been widely observed that the final statute enacted by the ostensible "Decision of 1789" offered no textual sign of a decision about a removal power or its source.[20] One of the most committed unitary theorists conceded that some members of the House likely thought "the amended bill left presidential removal to shadowy implication," and that the debates did not address the indefeasibility question at the heart of this case.[21] The bill's text did not specify a removal power, but referred to removal only obliquely through a contingency plan, identifying an inferior officer "who, whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy, shall during such vacancy have the charge and custody of all records, books and papers appertaining to the said department."[22] The First Congress often added explanatory clauses or preambles to spell out

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[19] *Presidential Removal* at 5-9, 20-22.

[20] *See, e.g.*, John Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 Harv. L. Rev. 1, 46 n.271 (2014); John F. Manning, *Separation of Powers As Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 2031 (2011).

[21] Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Corn. L. Rev. 1021, 1052, 1073 (2006).

[22] An Act for Establishing an Executive Department, to Be Denominated the Department of Foreign Affairs.(a), Pub. L. No. 1-4, § 2, 1 Stat. 28, 29 (1789).

purposes or context, but in this case, Congress deleted a clearer clause in favor of obscurity. Why?

When one digs into the debates day by day, the reason becomes apparent: The supporters of a presidential removal power did not have the votes in the House or Senate for their interpretation, and they needed to retreat to strategic ambiguity in order to enact even this indirect and indecisive language. This is not mere speculation: The opponents of the presidentialists openly mocked their retreat, and some presidentialists themselves admitted their strategy of ambiguity before and after the bill's passage.[23] Even Madison and other presidentialists worried that they had "blundered" with these maneuvers, leading to widespread confusion about the debates.[24]

Only nine out of 54 House members who voted on these bills explicitly endorsed the Article II "presidential" interpretation of removal, and only seven more voted with the presidentialists (i.e., voting yes on their three relevant steps). Even if one sets aside the problem that any of these votes may have been for strategic ambiguity, rather than a sincere interpretation of Article II, this total of 16 was still less than a third of the House.[25]

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[23] *Indecisions* at 785-87, 790-95, 825.

[24] *Id.* at 825-26.

[25] *Id.* at 865 (Table C).

The bill passed the House because the congressionalists, a bloc of roughly the same size, were willing to compromise: an ambiguous text was better than nothing.[26] These compromises over strategic ambiguity broke down in August 1789, underscoring the dissensus over a removal power.[27]

Yet, even the congressionalists acknowledged limits on Congress's power to shield offices based upon what protections were necessary to explain why Congress could require cause. Congress could not grant executive officers life tenure during good behavior.[28]

The debates during the ostensible "Decision of 1789" reveal support for this interpretation of the Necessary and Proper Clause as a limit on congressional power. This amicus brief distinguishes between *fully* independent (e.g., Article III judges and the Senate veto, as full protections from presidential removal that are invalid for significant executive offices), *mixed* independent (commissions that included removable and unremovable officers); and *semi*-independent offices (e.g., presidential power to remove with cause).

A pivotal congressionalist, Rep. John Laurance, offered a menu of legislative options for offices and tenure, starting his list with two *fully* independent

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[26] *Id.* at 802-06.

[27] *Id.* at 834-40.

[28] *See Presidential Removal* at 23-24.

forms, adding *semi*-independent forms, and then dependent forms:[29]

- "hold[ing] for three years" (a legally protected office under English law);[30]
- "good behaviour" (a similarly protected office);
- by legislative declarations of "unfitness and incapacity";
- "causes of removal"; and
- "mak[ing] the president alone judge of this case"

When forced to pick a side on the pivotal day of June 22, Laurance voted with the congressionalist side: "[T]he legislature had power to establish offices on what terms they pleased."[31] At the same time, he

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[29] *The Congressional Register* (May 19, 1789), reprinted in 10 *The Documentary History of the First Federal Congress of the United States* 733 (Charlene Bangs Bickford et al. eds., 2019) [hereinafter *Documentary History of the First Federal Congress*].

[30] *See* Jane Manners & Lev Menand, *Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 Colum. L. Rev. 1, 5-6 (2021) [hereinafter *Three Permissions*] (explaining the default rule for offices held for a term of years).

[31] *The Congressional Register* (June 22, 1789), reprinted in 11 *Documentary History of the First Federal Congress* at 1034.

recognized limits to this legislative power against life tenure and "good behaviour" tenure. Earlier, Laurance paraphrased the Necessary and Proper Clause in a speech describing the scope of Congress's power:

> From all of these circumstances, he concluded that the Congress had the right and that it was their duty to supply the deficiency in the constitution. The same constitution, which had given them the power of establishing offices, had given them a right of making all the particular provisions, whenever the constitution was silent, *which were necessary to carry that general power into effect*.[32]

Laurance also echoed this language in describing a removal power as "absolutely essential to the administration," and given the Constitution's silence, "who are to make this provision and [address] the defect? Certainly the legislature is the proper body."[33] Laurance seemed to understand that life tenure was neither necessary nor proper for executive branch offices, but other conditions and protections might be appropriate in certain cases.

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[32] 11 *Documentary History of the First Federal Congress* at 888 (emphasis added).

[33] *Id.* at 888, 909.

C. The First Congress Enacted Only Limited Forms of Protected Executive Offices.

Consistent with a limited scope of congressional power to grant offices protections from presidential removal, the First Congress enacted only one short-term commission with full independence, and it enacted only one mixed commission. In each case, Congress identified a specific, important, and complex governmental task—the management of public debt—and crafted protections to serve that function, i.e., necessary ends and proportionate means.

1. Full Independence. Fully independent offices are familiar: "good behaviour" tenure protects Article III Judges from presidential removal, whether at will or for cause. The only form of full independence that the First Congress enacted was a Revolutionary War Debt Commission. In 1789, Congress enabled this commission to continue from the Articles of Confederation era, when its commissioners were not independent. In 1790, Congress was unable to create a new commission, so it extended these officers for two more years, as a limited term with no removal clause.[34] Thus under the statutory default rule, they

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[34] Victoria Nourse, *The New History of Multi-Member Commissions at The Founding, 1789-1840* 4, 8 (2025), https://ssrn.com/abstract=5628110; Christine Kexel Chabot, *The Interstitial Executive: A View from the Founding* 19-20 (2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5673491 (explaining that George Washington confirmed their independent status in the wording of their commissions).

were protected from removal.[35] Hamilton described these commissioners as "distinct and Independant [sic] Officers" tasked with impartial executive adjudication of debt claims.[36] Notably, the First Bank of the United States, enacted in 1790, was also fully independent. But it was a private entity with private officers, and Congress did not grant it any public executive power or enforcement power, so it was not a relevant model for executive office structures. Later, in 1801, Congress created non-Article III Justices of the Peace with "unremovable" five-year terms, as recognized by Chief Justice Marshall in *Marbury v. Madison*. *See infra* Part II.X.

2. Mixed independence. In 1790, Hamilton proposed a Debt Sinking Fund Commission with three unremovable members out of five: the Vice President, the Speaker of the House, and the Chief Justice. [37] The First Congress enacted a more semi-independent

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[35] Manners & Menand, *Three Permissions* at 5; Justice Story confirmed that Congress could use limited duration to foreclose removal short of impeachment, stating "[A]ll others [besides judges] must hold their offices during pleasure, unless congress shall have given some other duration to their office." 3 Joseph Story, *Commentaries on the Constitution of the United States* 388 (1833). *See generally id.* at 388-90.

[36] Nourse, *supra* note 34, at 8.

[37] Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 Notre Dame L. Rev. 1, 35 (2020) (*citing* 2 Annals of Cong. 2045 (1790)).

version, adding the Secretary of State instead of the House Speaker.[38]

3. Semi-independence. Semi-independent offices are also familiar: presidential removal for good cause. The First Congress did not enact such good cause conditions, but the debates acknowledged them as part of English common law tradition. Many members referred to the English writ process of removal for cause (*scire facias* and *mandamus*), and they assumed the same process would apply to American offices.[39] Laurance referred to various good-cause conditions on his menu of legislative power:

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[38] *Id.* at 3-4 (*citing* Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186). The "mixed independence" structure helps address Justice Alito's questions in *Collins v. Yellin* about the scope of the Debt Sinking Fund's independence, 141 S. Ct. 1761, 1785 n.19 (2021) (Alito, J.) (observing that the Commission was a "multi-member" agency that never "operated beyond the President's control," as three of the five Commissioners "were part of the President's Cabinet and therefore removable at will"). Indeed, the First Congress did not go all the way to "full independence." That the Commission was a mix of removable and fully unremovable officers reflects at least as much structural independence as semi-independent officers subject to presidential removal for cause. After all, if fully independent officers could serve as commissioners with executive power, then *a fortiori* semi-independent officers also can. *See also* Christine Kexel Chabot, *Rejecting the Unitary Executive*, 2025 Utah L. Rev. 1016 n.89 (2025).

[39] *Indecisions* at 846-50.

legislative declarations of "unfitness and incapacity" and "causes of removal."[40]

Just a few days after the Decision of 1789 debate, Madison proposed a semi-independent comptroller.[41] The lengthy debate confuses modern readers who infer our modern default assumption: that the phrase "unless sooner removed by the president" would imply "removed [at pleasure]." However, the eighteenth century had a different set of background assumptions. The June 1789 debate makes sense in light of eighteenth-century default rule: "unless sooner removed by the president [*for cause*]."[42] Madison dropped this proposal, but it illustrates just how little consensus emerged from these debates. Not even Madison himself had made a personal Decision of 1789: He had endorsed a congressionalist position during Ratification in *Federalist* No. 39; in May 1789, he repeated the congressional interpretation and acknowledged that he had recently been persuaded by the senatorial interpretation;[43] and five days after leading the presidentialist bloc on the Foreign Affairs bill, he was

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[40] 10 *Documentary History of the First Federal Congress* at 733 (May 19, 1789).

[41] *Indecisions* at 824-34.

[42] *Id.*; Manners & Menand, *Three Permissions* at 20-23.

[43] *Indecisions* at 776 (*citing* 10 *Documentary History of the First Federal Congress* 730, 735 (May 19, 1789)).

arguing for a congressionalist proposal for a semi-independent comptroller.

The alternative "necessary and proper" basis makes more sense of Madison's shift. Madison's explanation echoed this logic of necessary ends and proper means of particular offices:

> It is necessary, said he [Madison] to consider the nature of this office, to enable us to come to a decision on the subject; in analyzing its properties, we shall easily discover that they are not purely of an executive nature. It seems to me that they partake of a judiciary quality as well as executive . . . The principal duty seems to be deciding the lawfulness and justice of the claims and accounts subsisting between the United States and the particular citizens; this partakes strongly of the judicial character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of government . . . [A] modification by the legislature may take place in such as partake of the judicial qualities, and that the legislative power is sufficient to establish this office on such a footing, as to answer the purposes for which it is prescribed.[44]

Madison not only endorsed congressional power to make offices semi-independent, but he also provided an analysis of necessity, purposes, and

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[44] 11 *Documentary History of the First Federal Congress* 1080 (June 29, 1789).

proportionality, and he provided an example of an office mixing executive and judicial functions as a special case for semi-independence (what *Humphrey's Executor* would call "quasi-judicial"). Madison's explanation is consistent with a history and tradition of a general rule of unconditional presidential removal (i.e., the rule in *Myers* and *Seila Law*) and a narrow exception for semi-independent commissions with mixed roles (e.g., the Federal Reserve and the FTC).

Thus, statutory removal protections for members of the Federal Trade Commission do not violate the separation of powers. The Constitution grants Congress a limited power to create offices, and the scope of that power must take into account the importance of presidential control, the necessity of the ends, and the proportionality of the means when evaluating any exceptions to unconditional presidential removal power.

This Article I approach is consistent with the Supreme Court's holdings from *Myers* through *Free Enterprise* and *Seila Law*. When Congress delegated the Senate a veto (*Myers*) or created an independent agency with an insulated single head (*Seila Law*), these statutes went too far; they were improper and unnecessary intrusions on presidential supervision. However, Congress has more discretion to grant semi-independence to traditional staggered multi-membered commissions like the Fed and FTC, as limited exceptions with proportionate means to achieve necessary ends.

"Necessary and proper" analysis is more grounded in text, history, and tradition than the alternatives: the vague language in *Humphrey's Executor* and the

fuzzy inferences of absolute presidential removal without originalist evidence. It also strikes a better balance on the separation of powers, as a balance of Article I, Article II, and Article III powers. By contrast, it is the Government's maximal interpretation of Article II that would violate the separation of powers by overreaching into Article I powers and by overstretching the judiciary beyond its Article III powers. *See infra* Part III.

II. Article II Did Not Imply Unconditional Presidential Removal as a Matter of Original Public Meaning.

A. The Executive Vesting Clause Did Not Imply Presidential Removal.

Article II, Section 1 provides: "The executive Power shall be vested in a President of the United States of America." Unitary executive theorists suggest that "executive power" implied removal.[45] Historians and legal scholars, however, have dug into Anglo-American history to show that "executive power" did not imply removal.[46]

1. The Convention Debates, the *Federalist Papers*, and the Ratification Debates offer no evidence that

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[45] Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 Harv. L. Rev. 1756, 1760, 1766-70 (2023).

[46] *See* Manners & Menand, *Three Permissions*: at 19-20 (2021).

the Executive Vesting Clause implied removal.[47] In the *Federalist Papers*, both Hamilton and Madison contradicted the unitary executive theorists' interpretations of Article II.[48] The Anti-Federalists often criticized the Constitution's expansion of executive power, and they would have had every reason to warn that future presidents might claim a general removal power—and yet not a single Anti-Federalist offered such an interpretation in the voluminous historical records.[49] This silence suggests that any interpretation that "executive power," the Take Care Clause, or the Appointments Clause implied removal was so far out of the mainstream, the

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[47] *See Indecisions* at 769-74; *Vesting* at 1493-1505, 1534-39; *cf. Venality* at 215-18, 221, 261-64; Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 Stan. L. Rev. 175, 182-83, 197-204 (2021); Noah Katz & Andrea Scoseria Rosenblum, *Removal Rehashed*, 136 Harv. L. Rev. F. 404, 408-10 (2023).

[48] The Federalist No. 77, at 386-87 (Alexander Hamilton) (Ian Shapiro ed., 2009); The Federalist No. 39, at 194 (James Madison) (Ian Shapiro ed., 2009); *Indecisions* at 758, 778; Michael Stokes Paulsen, *The Interpretive Force of Alexander Hamilton's Early Expositions of Presidential Power*, 53 Pepp. L. Rev. (forthcoming 2026) (manuscript at 18 n.46) (emphasis added), https://ssrn.com/abstract=5648310; Jeremy D. Bailey, *The Traditional View of Hamilton's Federalist No. 77 and an Unexpected Challenge: A Response to Seth Barrett Tillman*, 33 Harv. J.L. & Pub. Pol'y 169, 171 (2010).

[49] Jonathan Gienapp, *Removal and the Changing Debate Over Executive Power at the Founding*, 63 Am. J. L. Hist. 229, 233-35 (2023); *Venality* at 278-79.

Anti-Federalists had no reason to consider it a question worth raising. In response to many legal scholars' critiques over the past decade, unitary theorists have attempted and failed to identify a single sentence from the voluminous Ratification Debates suggesting Article II "executive power" implied removal.[50]

2. Unitary executive theorists rely heavily on the English Crown and the royal prerogative as originalist evidence of a removal power. *See, e.g.*, Aditya Bamzai & Saikrishna B. Prakash, The Executive Power of Removal, 136 Harv. L. Rev. 1756, 1790-1791 (2023). But even the English Crown did not have a general removal power. Thus, *unitary executive theorists imagine a presidency with even more power over officers than English kings had.*

First, there is no evidence from Blackstone or any English treatise writers that either the royal prerogative or "executive power" included a general removal power.[51] Some unitary theorists who had made such claims have subsequently conceded their error.[52] Second, Blackstone and English treatise

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[50] Jed H. Shugerman, *Misuse of Ratification-Era Sources*, 58 U. Mich. J. L. Reform 591, 626 (2025).

[51] *Removal of Context* at 156-60; *Venality* at 277-78 & n.436 (addressing Giles Jacob as an outlier who did not even suggest a general removal power, but only a narrow removal power over about a half-dozen "great officers").

[52] *Movement on Removal* at 21-22 (noting acknowledgements from Michael McConnell and Ilan Wurman).

writers clearly identified that many English offices were freehold property, protected from removal. Even some members of the late-eighteenth century cabinet were unremovable.[53] This background rule explains why Chief Justice Marshall described William Marbury as "not removable" and described his office as a vested property interest. *See infra* II.A. Third, scholars have also identified that Parliament's legislative power included the power to protect offices.[54]

Even if English kings and queens did have a general removal power, it stretches *Common Sense* and the originalist evidence to suggest that the republican Framers' model for Article II was the English Crown and monarchy.[55] The architects of Article II rejected the notion that the royal prerogative was a model for their republican president: James Wilson, perhaps the leading supporter of a single powerful chief executive, agreed with Madison that presidential powers "should be confined and defined" in the document, rather than implied, and added that he "did not consider the [p]rerogatives of the British Monarch as a proper

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[53] *See Venality* at 258-68.

[54] Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 Stan. L. Rev. 175, 214-28 (2021).

[55] Thomas Paine, *Common Sense* (1776); *see also The Declaration of Independence* paras. 4-34 (U.S. 1776).

guide in defining the [e]xecutive powers."[56] As the Ratification process began, Madison repeated: "The President . . . [has] no latent Prerogatives, nor any Powers but such as are defined and given him by law."[57] From the hundreds of pages of the First Congress's debates, unitary theorists have been unable to identify a single supporter of an Article II removal power citing to the English Crown or colonial governors as positive evidence. [58] Moreover, there is ample evidence that one reason the Framers chose the title "President" and not "Governor" was to avoid any associations with royalty or colonial governors, and to avoid associations with unchecked centralized power.[59]

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[56] 1 *The Records of the Federal Convention of 1787* 66 (Max Farrand ed., 1911) ("The President . . . [has] no latent Prerogatives, nor any Powers but such as are defined and given him by law.").

[57] Letter from Edmund Pendleton to James Madison (Oct. 8, 1787), *reproduced in* Founders Online, National Archives, https://founders.archives.gov/documents/Madison/01-10-02-0140 [https://perma.cc/BM49-VNPR].

[58] Their only support for this English "backdrop" was taken out of context: It turns out that the source was *an opponent of presidential removal*, and he was tying a removal power to monarchy in order to discredit the presidential removal side as anti-republican. *See Venality* at 227.

[59] Jed H. Shugerman, *Presidents, Opinions, and Independent Officers* 11 (2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5740263.

B. The Government's Maximal Interpretation of Presidential Removal is Inconsistent with Article II's Text, Context, and Precedents.

Article II, Section 3 provides: The President "shall take Care that the Laws be faithfully executed." The Take Care Clause, along with the Presidential Oath, imposed a duty of faithful execution, a legal concept from centuries of English law that limited the discretion of executive officials—not an expansion of their power. [60] One can argue that this duty implies a power, but only an implied power —and even under the unitary theory framework above, that implied power would be defeasible and conditional.[61] The Take Care Clause imposes a duty of faithful execution that also implies some degree of control over execution and a removal power - but not an absolute one.[62] Because Article II imposes a duty of "faithful execution," a good cause requirement is consistent with such a duty. Congress can specify requirements of "neglect of duty" or "inefficiency" only in exceptional cases, because the Take Care Clause also includes a principle that limits Congress's power: Congress may

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[60] *See Faithful Execution* at 2118-19, 2128, 2180-81.

[61] Unitary theorists have provided no originalist evidence that the Take Care Clause or the structure of separation of powers implied "indefeasible" unconditional presidential removal power. *Vesting* at 1517-21; Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 J. Const. L. 323, 334-44 (2016).

[62] *Faithful Execution* at 2189-90.

not set conditions that would substantially disable the Executive from ensuring that the laws are faithfully executed.

One problem for supporters of an indefeasible removal power is the original public meaning of Article II's Appointments Clause. As Justice Scalia explained in his concurrence in *NLRB v. Noel Canning*, the "self-evident purpose of the Clause [was] to preserve the Senate's role in the appointment process—which the founding generation regarded as a critical protection against " 'despotism,'" by clearly delineating the times when the President can appoint officers without the Senate's consent."[63] "The Senate's check on the President's appointment power was seen as vital because 'manipulation of official appointments' had long been one of the American revolutionary generation's greatest grievances against executive power."[64] As a matter of original public meaning and inference, this context shows that the Framers did not intend unconditional presidential removal: it would be an anomalous textual reading to imply an unfettered removal authority, with no allowable Congressional role, in light of the explicit constitutional sharing of the appointment authority.

The Opinions in Writing Clause is also a persistent textual problem for the claim that Article II implies an indefeasible removal power: If the Framers believed they had given the president an

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[63] 573 U.S. 513, 579 (2014).

[64] *Id.* at 595 (*citing Freytag v. Comm'r*, 501 U.S. 868, 883 (1991)).

unconditional removal power, why would they also specify a lesser power merely to ask for opinions? New historical research confirms this textual problem was also contextual: early state constitutions, the Ratification debates, and the First Congress indicate that the Opinions Clause's original public meaning signaled independence of department heads, or at least the possibility of congressional requirements like good cause.[65]

C. Even if One Infers a Removal Power from Article II, Its Text and Original Public Meaning Indicate That Congress Would Still Have Some Power to Require Cause.

According to Michael McConnell, the Opinions Clause has a specific function: Without such an explicitly granted power, "nothing in the Constitution would have prevented Congress from using its Necessary and Proper authority to insulate officers from any such demands. . . . The Opinions in Writing Clause forecloses this kind of congressional interference."[66] McConnell posits that the Framers expressly named powers in Article II, Section 2 (e.g., commander in chief, opinions, and pardons) to make them "indefeasible," whereas implied "residual powers" are "defeasible" by Congress.[67] Removal is not specified in the Constitution, so according to

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[65] Shugerman, *Presidents*, s*upra* note 59, at 3-4.

[66] Michael W. McConnell, *The President Who Would Not Be King: Executive Power Under the Constitution* 244-45 (2020).

[67] *Id.* at 277-78.

McConnell's interpretation of Article II, if removal is implied, Congress would have some power to set conditions.

III. The First and Second Banks of the United States Are Not a Historical Basis for a "Fed Exception" To Distinguish Between the Fed and the FTC.

A. Unlike the Fed, the First and Second Banks Were Private, Fully Independent, and Lacked Executive Power.

The Court's order in *Trump v. Wilcox* signaled an exception to the president's removal power for the Federal Reserve Board: "The Federal Reserve is a uniquely structured, quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States."[68] Relying on the First and Second Banks as the "tradition" first has a series of historical problems and then a series of jurisprudential problems:

- Did the First or Second Banks exercise any "executive powers" or regulatory powers? Scholars seem to be divided on this question.[69] Perhaps the most relevant evidence that they did not is that when incorporating the first Bank

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[68] 145 S. Ct. 1415 (2025).

[69] *Compare* Shane, *supra* note 61, at 355-56, *with* Aditya Bamzai & Aaron Nielson, *Article II and the Federal Reserve*, 843 Corn. L. Rev. 851, 906-08 (2024).

in 1791 after long debates about legislative power, Congress delegated no executive power or enforcement power in 1791.[70] By contrast, Congress has delegated many significant executive and enforcement powers to the Federal Reserve.[71] Indeed, unitary executive theorists have argued in recent scholarship and in an amicus in *Cook* that the Fed's independence and its many executive powers are incompatible.[72]

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[70] The First Congress's statute, An Act to Incorporate the Subscribers to the Bank of the United States.(b), Pub. L. No. 3-10, 1 Stat. 191 (1791), contained no substantive delegation of federal monetary policy, or similar public duties or public powers in its text. An Act Supplementary to the Act Intituled "An Act to Incorporate the Subscribers to the Bank of the United States," Pub. L. No. 3-11, 1 Stat. 196 (1791), also did not delegate any law execution or enforcement.

[71] Congress has delegated significant regulatory and enforcement power to the Federal Reserve Board. 12 U.S.C. § 248(f), (j), and (p) (2018); 12 U.S.C. § 263 (2018), 12 U.S.C. § 343(3)(B)(i) (2018); 12 U.S.C. § 461 (2018), 12 U.S.C. § 1818 (2018); *see also* Bamzai & Nielson, *supra* note 69, at 851-852.

[72] Bamzai & Nielson, *supra* note 69, at 908; Brief of Amicus Curiae Professor Aaron L. Nielson in Support of Neither Party, *Trump v. Cook*, No. 25A312, 2025 WL 3093478, at *20 (Oct. 29, 2025).

- The First and Second Banks of the United States were private.[73] The Federal Reserve is public.

- The Banks were *fully* independent from presidential control and removal.[74] The Federal Reserve is only *semi*-independent, because the president can remove for cause.

In short, reliance on the First and Second Banks of the United States for a "Fed exception" is misplaced.

B. Reliance on the Banks Would Require Holding Much of the Fed Is Unconstitutional, Leading to a Cascade of Litigation . . .

If the Court follows its reasoning from *Wilcox* to strike down the FTC's independence but carve out a Fed exception, then the Court will need to reconcile the Fed's many incompatibilities with the Banks and with this new interpretation of Article II, triggering a complex series of questions with unknown consequences. Amicus unitary executive theorists in *Cook* acknowledge this problem for the Fed: "Granted, Congress has also tasked the Fed with functions that

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[73] Bamzai & Nielson, *supra* note 69, at 851.

[74] Shane, *supra* note 61, at 355; Brief of Amicus Curiae Professor Aaron L. Nielson in Support of Neither Party, *Trump v. Cook*, No. 25A312, 2025 WL 3093478, at *13 (Oct. 29, 2025) ("[T]he First and Second Banks existed outside of the federal government's sovereignty.").

do require executive power, and one day the Court may need to decide the implications of those functions, including whether (and, if so, how) severability should apply."[75] Those unitary theorists also argued that much of the Federal Reserve Act would be unconstitutional under their maximal interpretation of Article II.[76] However, they declined to give courts guidance (in the article nor in the brief) about how many of the Federal Reserve Act should be struck down, how to distinguish overlapping powers, and how to resolve a thorny non-severability problem that they acknowledged.[77]

To preserve the Fed's independence based on the Banks' precedent, would this Court need to go through the statutes relating to the Federal Reserve's powers clause by clause to declare which ones are delegations of "executive power" and thus unconstitutional? Or would this Court invite case-by-case, clause-by-clause litigation in many lower courts over many years, at the risk of financial uncertainty and circuit splits? It would be ironic if an ostensibly originalist

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[75] Brief of Amicus Curiae Professor Aaron L. Nielson in Support of Neither Party, *Trump v. Cook*, No. 25A312, 2025 WL 3093478, at *4 (Oct. 29, 2025).

[76] Bamzai & Nielson. *supra* note 69, at 892-93.

[77] *Id*. at 905-08. The Federal Reserve Act has a Savings Clause at Section 30 (not included in the U.S. Code), but given how much of the Act they would appear to find unconstitutional, it is understandable that their argument nonetheless implicates a non-severability question. Federal Reserve Act, Pub. L. No. 63-43, 38 Stat. 251 (1913).

interpretation of Article II would lead to Article III judges re-writing or reconstructing the Federal Reserve Act clause-by-clause, which would seem inconsistent with original understanding of "judicial power."

C. . . . or It Leads *A Fortiori* to the Constitutionality of the Structure of FTC, Other Similar Commissions, and Private Enforcement of Public Rights.

Alternatively, if this Court interprets the *fully* independent First and Second Banks as valid precedents for the Federal Reserve's independent exercise of executive power, then *a fortiori* the *semi-independent* Federal Trade Commission would be constitutional.

Moreover, if this Court accepts the private enforcement of public law by the early Banks of the United States for a Fed exception, it would be acknowledging that private entities can exercise executive power and enforce federal law, consistent with the Anglo-American writs like *qui tam* and *quo warranto*—contradicting the unitary executive theory.[78]

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[78] In *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992), Justice Scalia held that Congress may not "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right'" on similar separation-of-powers grounds. *Cf. Morrison v. Olson*, 487 U.S. 654, 705, 710 (1988) (Scalia, J., dissenting).

By contrast, the Article I "Necessary and Proper" Clause is a more historically grounded and more workable limitation on congressional power. The Court in *Wilcox* was right to return to the Banks of the United States as relevant to the history and tradition of implied powers, but the Court overlooked the more directly relevant constitutional clauses implicated by the creation of the Banks: not Article II "executive power," but Article I "necessary and proper" powers. The Bank debate is part of an Article I tradition about the scope of Congress's implied powers under the Necessary and Proper Clause, from the First Congress through *McCollough v. Maryland* to today. By contrast, the records of the First Congress show no objection based on the separation of powers or presidential powers. When Andrew Jackson vetoed the bill to re-charter the Bank, his 8,000-word message to Congress also contained no such objections.[79]

Wilcox erroneously relied on the Banks as the historical basis for a Fed Exception. If the Court strikes down the FTC's independence in *Slaughter*, then the same logic would lead to striking down the Fed's for-cause protections. The First and Second Banks do not provide originalist support for distinguishing the Fed.

CONCLUSION

Article I's Necessary and Proper Clause is the constitutional starting point for evaluating Congress' power to create offices and their terms, and it also

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[79] Shane, *supra* note 61, at 359-60.

establishes limits on the scope of that power from its own text and original meaning. It is consistent with a general rule of presidential control, with narrow exceptions for necessary ends and proper means. It makes sense of all of the Court's removal precedents from *Myers* through *Free Enterprise* and *Seila Law*: Congress's enactment of single-headed independent agencies (*Seila Law*) and Senate vetoes (*Myers*) went too far, but traditional staggered, multi-membered commissions like the FTC, Federal Reserve, and the National Labor Relations Board are limited exceptions. It is an originalist basis for replacing the reasoning of *Humphrey's Executor* while supporting its outcome, recognizing such narrow exceptions based on necessity and proportional means. It is consistent with the separation of powers, balancing Article I's grant of congressional power to create offices with Article II's principles and duties of faithful execution. And this balance of Article I "Necessary and Proper" and Article II's duty of faithful execution is more consistent with history and tradition than the Government's maximal interpretations and inferences from Article II.

Thus, statutory removal protections for members of the Federal Trade Commission do not violate the separation of powers.

Respectfully submitted,

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November 14, 2025