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The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity

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ARTICLE

THE INDECISIONS OF 1789: INCONSTANT ORIGINALISM AND STRATEGIC AMBIGUITY

JED H. SHUGERMAN†

The unitary executive theory relies on the First Congress and an ostensible “Decision of 1789” as an originalist basis for unconditional presidential removal power. In light of new evidence, the First Congress was undecided on any constitutional theory and retreated to ambiguity in order to compromise and move on to other urgent business.

Seila Law’s strict separation-of-powers argument depends on indefeasibility (i.e., Congress may not set limits or conditions on the president’s power of civil removal). In fact, few members of the First Congress defended or even discussed indefeasibility. Only nine of fifty-four participating representatives explicitly endorsed the presidentialist view that Article II implied a presidential removal power. The debates indicate that some of the sixteen or so House members assumed to be “presidentialist” are just as explainable as “strategic ambiguity”: in the face of opposition, they retreated to an unclear text that was more likely to achieve compromise or could be presented flexibly to different members.

† Professor of Law, Fordham University School of Law. My special gratitude to Ethan Leib and Andrew Kent, two thirds of the “faithful trio,” and to Jane Manners and Lev Menand, the “three permissions” duo. Thanks to Aditya Bamzai, Jack Beermann, Mary Bilder, Kristin Collins, Christine Kexel Chabot, Nestor Davidson, Dan Farbman, Marty Flaherty, Jonathan Gienapp, Kent Greenfield, Rick Hills, Andrea Scoseria Katz, Gary Lawson, Tom Lee, Jenn Mascott, Gillian Metzger, John Mikhail, Michael McConnell, James Pfander, Mike Ramsey, Noah Rosenblum, Gerardo Vildostegui, and Ilan Wurman; the participants at the Stanford Conference on “Histories of Presidential Power”; faculty workshops at Boston University, Fordham, Northeastern, and Seton Hall; Kelly Leong for library assistance; Michael Albalah and Daniel Kweon for research assistance; and Alyssa Hunt, Colin Jones, Matt Nelson, and Katherine Rohde for outstanding editing. My indefeasible, unconditional thanks to Danya Handelsman.

This new “strategic ambiguity” interpretation turns on overlooked sources—a Senator’s diary and other senators’ notes—and two new approaches to analyzing the First Congress’s debates. Senator William Maclay’s diary shows growing Senate opposition to Madison’s overall legislative agenda just before Madison retreated to a more ambiguous text. Maclay and other senators documented opposition to presidential removal, followed by an obfuscating debate, reflecting follow-through on the strategy of ambiguity.

A new interpretive approach gives more weight to the only day of debate—Monday, June 22—that separated the unitary presidentialists from the congressionalists (who thought Article I gave Congress the power to delegate removal), revealing that a solid House majority rejected even a weak form of presidentialism.

A second new approach puts this debate in the context of the urgent and sprawling legislative agenda in the summer of 1789. Madison and other presidentialists knew they might not have the votes either in the House (for their presidential theory) or Senate (for presidential removal under any theory). A study of the First Congress’s drafting practices reveals that explicit explanatory clauses and preambles were common, but Madison went in the opposite direction. Madison’s opponents called it a retreat, and even Madison and key allies hinted at an explanation of “strategic ambiguity.” Madison and “Court Party” supporters of the Washington administration spun the retreat as a victory. Madison’s myth-making has succeeded again two centuries later, as the Roberts Court and modern unitary theorists rely on Madison’s letters more than the debates themselves. The unitary theorists’ widespread errors, even though made in good faith, raise questions about the reliability of originalism.

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INTRODUCTION

This Article challenges the historical foundation for a series of major Supreme Court precedents, both old and new, concerning presidential removal. It is also a cautionary tale about the growth of presidential power, the flawed practice of originalism, and the construction of Founding myths. This case study identifies so many oversights, errors, and misuses of historical documents in precedents and scholarship that it raises broader questions about the reliability of originalism as a method of constitutional interpretation.

The unitary executive theory rests on three textual and historical pillars: Article II’s Vesting Clause; the Take Care Clause (or Faithful Execution Clause); and the “Decision of 1789.” Because the Constitution is silent on removal, and because the Vesting and Take Care Clauses are inescapably ambiguous, unitary theorists turn to the Foreign Affairs debate in the First Congress in June 1789, which they claim confirmed broad unchecked presidential power over the executive branch and removal. “Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary,” Chief Justice John Roberts wrote in *Free Enterprise Fund v. Public Company Accounting Oversight Board* in 2010 and again in *Seila Law LLC v. CFPB* in July 2020.¹ He was referring to the ostensible “Decision of 1789,” when the First Congress created the first three departments: Foreign Affairs, War, and Treasury. Federal

¹ *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2198 (2020).

judges have extended these precedents to strike down agency independence and curtail other parts of the administrative state and public law.²

To give credit where credit is due, this Article confirms that Justice Louis Brandeis and Edward Corwin were close enough when they gave a rough estimate that the presidentialists (those who supported a constitutional presidential removal power) had only about a third of the House vote, and they concluded that the debate was ineluctably unclear.³ Notwithstanding their observations, both the Taft Court and the Roberts Court revived a myth that Madison had spun after his retreat to “strategic ambiguity” when he did not have the votes for his presidentialist position.

There have always been good reasons to question the reliability of postratification debates as evidence of meaning before and during ratification, especially based on such a fragmentary and confusing legislative history.⁴ On top of those longstanding concerns, this Article offers the first head count of

² See, e.g., *Jarkesy v. SEC*, 34 F.4th 446, 464 (5th Cir. 2022) (holding that removal protections for SEC administrative law judges are unconstitutional); cf. *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1136-37 (11th Cir. 2021) (Newsom, J., concurring) (arguing that standing should be denied when Congress attempts to vest executive power in private plaintiffs by “providing a right to sue on behalf of the community and seek a remedy that accrues to the public”).

³ See *Myers v. United States*, 272 U.S. 52, 285 n.73, 286 n.75 (1926) (Brandeis, J., dissenting) (breaking down the removal positions of several House factions and the ambiguous resolution of the debate); see also EDWARD S. CORWIN, *THE PRESIDENT’S REMOVAL POWER UNDER THE CONSTITUTION* 12-23, 12 n.22 (1927) [hereinafter CORWIN, *THE PRESIDENT’S REMOVAL POWER UNDER THE CONSTITUTION*] (describing in detail several factions in the removal debate and its eventual resolution); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801*, at 37-42 (1997) [hereinafter CURRIE, *THE CONSTITUTION IN CONGRESS*] (offering a similar discussion of the differing views of presidential power, but without a head count); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 662-63 (2004) (“[T]he ultimate vote on the removal provision was too complicated and uncertain to show even a consensus in favor of an Article II power of removal . . .”); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1810 n.446 (1996) [hereinafter Flaherty, *The Most Dangerous Branch*] (discussing Madison’s change in position on removal); J. DAVID ALVIS, JEREMY D. BAILEY & F. FLAGG TAYLOR, *THE CONTESTED REMOVAL POWER, 1789-2010*, at 116-122 (2013) (outlining the complex voting patterns in the House); JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 160-62* (2018) [hereinafter GIENAPP, *THE SECOND CREATION*] (“[E]ven though the Department of Foreign Affairs had been created, at the head of which would be a secretary . . . to be removed (if necessary) by the president alone, the question of exactly why the president had this power—the source of the surprising and prolonged debate—was as confused as ever.”); John F. Manning, *Separation of Powers As Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2031 (2011) [hereinafter Manning, *Separation of Powers*] (“Madison and his allies succeeded in their motions not because a majority of the House subscribed to the Madisonian view of presidential power, but rather because their strategic sequencing of motions allowed them to build coalitions on particular points with proponents of the other constitutional positions.”).

⁴ See, e.g., Michael Bhargava, Comment, *The First Congress Canon and the Supreme Court’s Use of History*, 94 CALIF. L. REV. 1745, 1748, 1789-90 (2006) (“[T]he First Congress canon raises a range of theoretical issues challenging whether the actions of the first legislature can be used to divine the original intent or understanding of the founders.”).

the House vote with categories for each constitutional theory, which is more accurate than adding up a confusing series of “yes” or “no” votes for a deliberately unclear text. Only nine of fifty-three participating members of the House explicitly endorsed even the weaker version of the presidentialist interpretation of Article II: a presidential removal power without resolving whether Congress could set conditions (the Roberts Court’s crucial “indefeasibility” rule). Even among those nine, some wavered, endorsed opposing theories, or reversed themselves, including Madison.⁵ Even fewer suggested that the President had a constitutional power to remove at pleasure.⁶ Moreover, the sixteen or so House votes that have been assumed to be “presidentialist” are just as explainable as a “strategic ambiguity” bloc.

This Article offers a modest version of its argument: the First Congress reflected a series of indecisions rather than a decision on presidentialism. Many readers of this new research admit that they find it challenging to keep track of the twists and turns, the confusing statutory texts, and the different votes. That confusion is the basic point here: ambiguity and confusion were part of the strategy to allow each side to have its own narrative. Madison deliberately created a confusing maze in the House; Maclay’s diary reveals the same confusion in the Senate; and this Article shows that the unitary theorists have been so confused by these debates that they misinterpreted many sources. The primary goal of this Article is to correct the historical record. Once a series of misreadings and omissions are corrected, it is unclear what evidence remains for the Taft/Roberts interpretation of the Decision of 1789.

Once one navigates Madison’s deliberately messy maze, this Article then offers a stronger argument: the real Decision of 1789 was a rejection of the unitary model. The most reasonable reading of the historical records indicates that a significant majority opposed the interpretation that Article II implied a general removal power, and even among the minority claimed by the unitary theorists, there was explicit opposition to the claim of legislative indefeasibility. Contrary to the unitary theorists’ claim that the question of “unabateable” presidential powers and indefeasibility “were never really contested” or “never squarely addressed,”⁷ the First Congress indeed addressed, contested, and rejected indefeasibility in the Foreign Affairs

⁵ The members of the House that endorsed presidentialism were Madison, Ames, Benson, Boudinot, Clymer, Moore, and Vining, plus Fitzsimons and Goodhue in private letters. *See infra* Section III.E and notes 260–262.

⁶ *See infra* Section III.E and Appendix I (breaking down the positions of House and Senate members).

⁷ Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1072 (2006) [hereinafter Prakash, *New Light*].

debate,⁸ the Treasury debate,⁹ and the Judiciary Act text.¹⁰ Even when it came to the War and Foreign Affairs Departments—the most traditional executive powers of war and peace—a majority of Congress still rejected Article II presidentialist removal powers.

Moreover, this Article offers a broader argument that the persistent misinterpretations of Founding-era sources by the Roberts Court and unitary executive theorists should raise some deeper questions about the practice of originalism. Given the weight of the *Federalist Papers* and other originalist evidence against their textual inferences from Article II's Vesting Clause and the Take Care Clause,¹¹ the unitary theorists turned in good faith to the First Congress out of necessity, but necessity became a mother of ahistorical inventions.¹²

⁸ See *infra* Section VI.A.

⁹ See *infra* Section VI.B.

¹⁰ See *infra* Part VII.

¹¹ There is ample originalist evidence against presidential removal. See THE FEDERALIST NO. 77, at 387 (Alexander Hamilton) (Ian Shapiro ed., 2009) (“The consent of that body [the senate] would be necessary to displace as well as to appoint.”); THE FEDERALIST NO. 39, at 194 (James Madison) (Ian Shapiro ed., 2009) (“The tenure of the ministerial offices generally will be a subject of legal regulation, conformably to the reason of the case, and the example of the State Constitutions.”); Jonathan Gienapp, *Removal and the Changing Debate over Executive Power at the Founding* (2022) (unpublished manuscript) (on file with author); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 5 (2021) (“[This article] refutes the conventional interpretation of removal provisions as ‘protections’ . . . [r]ather, it shows that the default runs in the other direction—against removal, not for it.”); Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1, 3 (2020) [hereinafter Chabot, *Is the Federal Reserve Constitutional?*] (making the originalist case for the constitutionality of independent agencies, including evidence from the First Congress); Jed Handelsman Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J. L. & HUMANITIES 125, 128 (2022) (“This article will focus on the use and misuse of William Blackstone in the work by unitary executive theorists”); Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479, 1485 (2022) (“[My recent scholarship] suggest[s] that none of the three pillars [of unitary executive theory] can support the unitary theory’s claim of indefeasible executive power.”); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2117 (2019) (“The Faithful Execution Clauses are linked not only by common words, but also by a common historical purpose: to limit the discretion of public officials.”); Jed Handelsman Shugerman, “Despotic Displacement,” *Vénalité*, and *Virtue*: Why “Executive Power” Did Not Include Removal (Aug. 31, 2022) (unpublished manuscript) (on file with author) [hereinafter Shugerman, “Despotic Displacement”] (“[T]he *Federalist Papers* (Nos. 39 and 77) are solid evidence against the unitary theory”; see also *infra* Part II (discussing pre-1789 understandings and preferences for the removal of officers)).

¹² The most recent scholarship reviving the Decision of 1789 relies on misreadings of seven congressmen’s speeches and letters, plus misinterpretations of James Madison’s speeches, John Adams’s letters, other letters to and from senators, and the puzzling omission of Maclay’s diary. See generally Prakash, *New Light*, *supra* note 7. In this Article, I identify and address some of these misreadings. See *infra* Section III.F. For further discussion of the errors in *New Light*, see Jed Handelsman Shugerman, *The Indecisions of 1789: Appendices on the Misuse of Historical Sources*

Here is the accurate part of the unitary “Decision of 1789” story:¹³ when Congress was creating the first executive departments (Foreign Affairs, War, and Treasury), it recognized a gap in the Constitution’s text about who had the power to remove executive officers. A few congressmen posited that the Constitution recognized impeachment and only impeachment as the means of congressional removal. A substantial number cited a tradition that removal mirrored appointment—thus, if the Senate confirms appointments, the Senate must also share a power to confirm firings. This group has been labeled a “senatorial” bloc, favoring a senatorial power to assent to (or reject) presidential removals. A House majority, meanwhile, thought that the President alone should have sole removal power over these three departments, but it divided into two factions. One faction (a “congressionalist” bloc) thought it was within *Congress’s discretion* whether or not to grant this power to the President; another faction (Madison’s “presidentialist” bloc) thought the *Constitution itself* granted this power to the President.

Here is the incorrect part of the unitary story: the presidentialist bloc prevailed in the House, with a majority voting for Madison’s language that endorsed his interpretation of Article II. Then the Senate split 10–10 on the bill, and Vice President John Adams broke the tie in favor of presidential power (note the irony in this strict separation-of-powers fable of an executive officer casting the deciding legislative vote). The unitary claim is that a majority of both Houses endorsed the unitary interpretation of the Constitution,¹⁴ and therefore the First Congress, with a vote as a “clear-cut test of strength,”¹⁵ “settled,”¹⁶ “concluded,”¹⁷ “codified,”¹⁸ “confirmed,”¹⁹ “establish[ed],”²⁰ and “liquidated”²¹ that the Constitution grants the President exclusive powers like removal, beyond the reach of Congress.

in Unitary Executive Theory (Feb. 27, 2023) (unpublished manuscript) [hereinafter Appendix II], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359596 [<https://perma.cc/V6GA-NZJP>].

¹³ See *infra* Section III.A (recounting the factual details of the removal debate).

¹⁴ See, e.g., Prakash, *New Light*, *supra* note 7, at 1026, 1060–62, 1074 (arguing that both chambers affirmed the unitary executive theory in the First Congress).

¹⁵ CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY* 154 (1922).

¹⁶ *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010).

¹⁷ MICHAEL W. MCCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION* 167 (2020).

¹⁸ AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICAS CONSTITUTIONAL CONVERSATION, 1760–1840*, at 359 (2021).

¹⁹ *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020).

²⁰ *Id.* at 2206.

²¹ THE FEDERALIST NO. 37, at 182 (James Madison) (Ian Shapiro ed., 2009). Some think of the Decision of 1789 as a liquidation of removal power, but to his credit, William Baude recognized the lack of clarity in the Decision of 1789 as to what was decided. See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 9 n.38 (2019).

But a closer look at the “Decision of 1789” reveals a textualist problem hiding in plain sight in the House debate. The House had first passed a clear statement on Friday, June 19: the head of the Department of Foreign Affairs would “*be removable by the President.*”²² Then, returning the following Monday, June 22, Madison and his ally Egbert Benson suddenly reversed course and proposed replacing the clear statement, ostensibly because one might wrongly infer that the clear statement was Congress *granting* removal power, instead of inferring that the Constitution had already granted such a power.²³ Yet rather than explicitly clarify the removal power, Madison and Benson moved to replace the clear statement with a confusing clause about “vacancy” backup plans for handling departmental books and records with no explanation of how removal worked and no identification of a source of a removal power.²⁴ The new text described a future contingency plan in case of vacancies with a reference to removal, but the text was not clear if a removal power actually existed, or if it was merely a future possibility. Madison’s supporters worried that his new text was too unclear, and his opponents called it a retreat and mocked Madison for not being “candid and manly.”²⁵

Modern skeptics agree that the *vote totals* were not a reliable measure of support, but they too easily assume that the new text did in fact “imply” or “acknowledge” a presidential removal power.²⁶ Such “implication” was not textual, but it was merely asserted by Benson and Madison—a one-sided legislative history. In an effort to explain away the vote total problem, the unitary interpretation contradicts its clarity argument (that the text was clearly enough presidential), by simultaneously speculating that the text was so ambiguous, and such “shadowy implication,”²⁷ that the faction others label “congressionalist” could have been voting against the new ambiguity.

Even those who see the textual ambiguity take this ambiguity for granted, viewing it as a static problem.²⁸ The key question: *why* was it so ambiguous?

²² 1 ANNALS OF CONG. 371 (1789) (Joseph Gales ed., 1834) (emphasis added).

²³ See *id.* at 578 (“[Benson] moved to amend the bill . . . so as to imply the power of removal to be in the President.”).

²⁴ Foreign Affairs Act, ch. 4, § 2, 1 Stat. 28, 29 (1789).

²⁵ The Congressional Register (June 22, 1789) (criticisms from Reps. Page and Smith), reprinted in 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789–3 MARCH 1791, at 1028–30 (Charlene Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds., 1992) [hereinafter 11 DOCUMENTARY HISTORY].

²⁶ See, e.g., Manning, *Separation of Powers*, *supra* note 3, at 2030 n.450 (Madison and his allies feared that his phraseology would imply that the President’s removal authority depended on a congressional grant); CURRIE, THE CONSTITUTION IN CONGRESS, *supra* note 3, at 40 (discussing Benson’s argument that the bill should be amended to “acknowledge the President’s constitutional prerogative” of removal).

²⁷ See Prakash, *New Light*, *supra* note 7, at 1052.

²⁸ See *Myers v. United States*, 272 U.S. 52, 198 n.3 (1926) (McReynolds, J., dissenting) (recounting in a footnote that “the much-challenged clause was stricken out and the ambiguous

Madison claimed to be clarifying a constitutional interpretation, but he actually obfuscated the core removal question. If Madison wanted to establish a constitutional basis for presidential removal, he could have added an explanatory clause to the bill saying so. It turns out that the First Congress often added explanatory clauses to statutes, but not here.²⁹ Later that summer, when a Senate majority opposed this clause, one key congressman contrasted the ambiguous clause with an “explanatory resolution” or an “authentic act” (i.e., a declaratory act that would have spelled out its meaning).³⁰ After a long impasse, the three major factions avoided an “explanatory resolution” and retreated back to the ambiguous clause—which, by implication, was no “authentic act.” Instead, they *forged* a compromise.

This Article posits Madison and other presidentialists likely knew they did not have the votes, either in the House for their constitutional theory or in the Senate for presidential removal under any theory. If they could not muster a majority for explicit presidential removal power, a fuzzier hint at the power was their backup strategy. Strategic ambiguity can allow opposing sides to compromise by papering over disagreement to avoid a sharper and clearer conflict; it can allow advocates to claim different meanings for different audiences; and it can allow each side to claim victory.³¹ Madison and his allies appear to have used the ambiguous clause to do all three. They knew that the Senate was likely to resist the previous week’s “win,” the explicit removal language, so it was not a win worth keeping. They sacrificed their clear bill to paper over the looming conflict with the Senate and to give each side a plausible claim of victory—or at least a plausible denial of defeat. Indeed, Benson hinted

one . . . was inserted”); *see also id.* at 194 (“[The text] was susceptible of different interpretations and probably did not mean the same thing to all.”).

²⁹ *See infra* Section III.D.

³⁰ Letter from Thomas Hartley to Jasper Yeates (Aug. 16, 1789), *reprinted in* 16 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789–3 MARCH 1791, at 1332 (Charlene Bangs Bickford, Kenneth R. Bowling, Helen E. Veit & William Charles DiGiacomantonio eds., 2004) [hereinafter 16 DOCUMENTARY HISTORY]; *see also* Letter from Thomas Hartley to William Irvine (Aug. 17, 1789) (“The Senate has not yet passed the Treasury bill—they are called upon by our Committee to restore the Clause in which they struck out, or by an explicit Resolution acknowledge of the power of removal in the President and in the mode contended for in the House of Representatives.”), *reprinted in* 16 DOCUMENTARY HISTORY, *supra*, at 1337.

³¹ For discussions on strategic ambiguity in constitutional and statutory law, *see generally* Roderick M. Hills, *Strategic Ambiguity and Article VII’s Two-Stage Ratification Process: Why the Framers (Should Have) Decided Not to Decide* (N.Y.U. Sch. of L., Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 19-56, 2019), Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627 (2002), and Andrei Marmor, *The Pragmatics of Legal Language*, 21 RATIO JURIS. 423 (2008).

at this strategy as he introduced it,³² and one of Madison's allies conceded on the House floor that the new clause would be "more likely to obtain the acquiescence of the [S]enate on a point of legislative construction."³³ In other words, the senatorials might be more willing to compromise and accept an ambiguous hint—and the congressionalists would be, too.

Rather than acknowledge the role of strategic ambiguity, unitary scholars claim the Decision of 1789 shows that a majority of House members endorsed presidentialism. This scholarship has never attempted a head count in the House by constitutional theory, but has instead claimed to find additional votes by misreading a series of floor speeches and private letters.³⁴ This Article adopts a new approach to clarify these debates: a focus on Monday, June 22—the only day of debate that separated the presidentialists from the congressionalists in the House—to provide an accurate count of each camp.³⁵ Before the pivotal debate on June 22, the members did not have to take a side between "presidentialists" and "congressionalists" because members who generally supported removal in the original bill drew flexibly on both kinds of arguments. Members could also change their minds. On June 22, Madison's maneuvers forced many to finally choose a side. Giving that day more evidentiary weight cuts through long-standing confusion. This focus dispels the unitary executive theorist's "enigmatic" framing and corrects its errors.³⁶

This Article also seeks to put this debate in the context of the tasks of the momentous summer of 1789: drafting a Bill of Rights; debating revenue, debt, spending, and customs; establishing the first federal judiciary, as well as establishing departments and appointments; and fighting over where to put a national capital.³⁷ Facing more urgent and concrete matters, many House members were likely open to compromise, after losing patience with long days debating constitutional theory.

32 See The Congressional Register (June 22, 1789) ("[Benson] hoped his amendment would succeed in reconciling both sides of the house in the decision, and quieting the minds of gentlemen."), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 1028.

33 See *id.* at 1035-36 (providing Rep. Vining's comments).

34 See *infra* Appendix II, *supra* note 12.

35 See *infra* Section III.C. For the closest previous attempt to count, see CORWIN, THE PRESIDENT'S REMOVAL POWER UNDER THE CONSTITUTION, *supra* note 3, at 12-23. Corwin gave only an estimate for each camp without naming them or providing citations, with some errors. *Id.* at 12 n.22.

36 See Prakash, *New Light*, *supra* note 7, at 1043 (characterizing the representatives that voted against Benson's second amendment but for the final House Bill as an "enigmatic faction"); see also *infra* Appendix II, *supra* note 12 (detailing Prakash's misreadings).

37 See GIENAPP, THE SECOND CREATION, *supra* note 3, at 125-26 (describing how the question of removal power arose amid the "mountain of responsibilities" facing the First Congress). For additional background on the various decisions facing congress, see generally FERGUS M. BORDEWICH, THE FIRST CONGRESS: HOW JAMES MADISON, GEORGE WASHINGTON, AND A GROUP OF EXTRAORDINARY MEN INVENTED THE GOVERNMENT (2017), and Kent Greenfield, *Original Penumbra: Constitutional Interpretation in the First Year of Congress*, 26 CONN. L. REV. 79 (1993).

This Article is also the first to focus on the role of the Senate in the “Decision” of 1789 and on Senator William Maclay’s overlooked diary. Ironically, the unitary theory’s formalism about the separation of powers also produces a strict interpretation of bicameralism,³⁸ but here, they rely on a unicameral half-legislative history. Surprisingly, they omit the widely available notes from the Senate debate, including Senator William Maclay’s diary.³⁹ Unlike the House, the Senate debated behind closed doors with no official record.⁴⁰ For other constitutional questions, legal scholars and judges have relied on Maclay’s diary as a definitive resource,⁴¹ and Chief Justice Taft relied on his tie vote count, while ignoring the rest, in *Myers*.⁴²

Maclay’s diary provides three key insights. First, just as the House was passing its clear presidential removal language in the Foreign Affairs bill, the Senate blocked Madison’s anti-British tariff plan and dug in against the House.⁴³ Senate resistance to Madison helps explain why Madison quickly returned to the House to replace his apparent win (the explicit removal clause) with an ambiguous clause that was more likely to placate the Senate. Second, in mid-July, when the Senate took up the Foreign Affairs bill, Maclay recorded initial opposition to presidential removal and pro-administration insiders needing to lobby just for a tie vote and following a strategy of ambiguity and obfuscation.⁴⁴ The notes of Vice President Adams and two

³⁸ See *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983) (applying a formalistic view of bicameralism to strike down one-house legislative vetoes).

³⁹ See generally *The Diary of William Maclay*, reprinted in 9 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789–3 MARCH 1791 (Charlene Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds., 1988) [hereinafter 9 DOCUMENTARY HISTORY]. As of 2020, the only pro-unitary legal scholar who quoted from Maclay’s diary on the removal debate was Charles Thach in 1923, but he used Maclay in support of the unitary interpretation, only quoting from July 16, 1789, but missing the key moments. See THACH, *supra* note 15, at 154–57. He misinterpreted the Senate debate as a “clear-cut issue” that “eliminated” the legislative-grant theory. *Id.* at 155. In his 2021 book *The Words That Made Us*, Akhil Reed Amar selectively quoted one short passage of Maclay’s diary to support his unitary conclusions, overlooking the earlier and later entries. See AMAR, *supra* note 18, at 359. Unitary critics Curtis Bradley and Martin Flaherty briefly summarized Maclay but overlooked the key passages that undermined the unitary view. See Bradley & Flaherty, *supra* note 3, at 663–64 (briefly referencing Maclay’s diary to support the existence of disagreement over the implications of the Vesting Clause but determining that no conclusions from the Senate’s discussions could be made).

⁴⁰ See 1 ANNALS OF CONG. 15 (1789) (Joseph Gales ed., 1834) (“[T]he Legislative as well as Executive sittings of the Senate were held with closed doors until the second session of the third Congress.”).

⁴¹ See, e.g., *Trump v. Vance*, 140 S. Ct. 2412, 2435 (2020) (Thomas, J., dissenting) (citing Maclay’s diary in a discussion about whether the Constitution affords the president absolute immunity). For scholars relying on Maclay’s Diary, see *infra* note 139.

⁴² *Myers v. United States*, 272 U.S. 52, 115 n.1 (1926).

⁴³ See *infra* Section III.B.

⁴⁴ See *infra* Part IV.

senators generally corroborate Maclay.⁴⁵ Third, Maclay identified emerging “Court Party,” a pro-administration faction that would later coalesce into the Federalist Party, engaging in what we would today call “spin.”⁴⁶

In this light, the animating force behind Madison’s ambitious strategy makes more sense: his personal ambition. Out of necessity and opportunity, Madison cultivated his role as Washington’s closest advisor in 1789. He had reason to adopt a more pro-executive-power interpretation of the Constitution in 1789 than he had either before or after. He also had reason to impress Jefferson. Madison exaggerated his successes in letters, spinning a tale that he persuaded Congress to adopt a pro-presidentialist decision, and insiders built up this myth over the years. Madison’s strategy has succeeded again two centuries later, as an unwitting Roberts Court and modern unitary theorists rely on Madison’s propaganda. History is written by the victors. Washington, Adams, Hamilton, John Marshall,⁴⁷ and other Federalists wrote their version of this history, even after Madison reversed himself again and defected from the Federalists. Finally, this Article takes a closer look at the Treasury Act debate, the Judiciary Act, and other statutes passed between 1789 and 1791, as well as the earlier acts of the Confederation Congress and later federal statutes, to further show that the First Congress rejected infeasible presidential powers.⁴⁸ Building on outstanding recent work,⁴⁹ this Article shows that Madison proposed “good behaviour” tenure for the comptroller.⁵⁰ The Treasury debates reveal a traditional understanding of offices as property protected from removal, and they reveal that a majority of the Senate opposed the presidential theory and compromised on the ambiguous language, as Madison’s allies had hoped.⁵¹ These debates and statutes show that, not only was it a mistake to assume the First Congress interpreted Article II to imply presidential removal, Chief Justice Taft and then-Judge Kavanaugh also were wrong to assume that it “confirmed” or “established” a general rule of removal “at will” or “at pleasure.”⁵²

⁴⁵ See Debate on the Foreign Affairs Act [HR-8] (July 15, 1789) (providing the notes of Adams, Johnson, and Paterson on the Foreign Affairs Act), reprinted in 9 DOCUMENTARY HISTORY, *supra* note 39, at 465-67, 483-89.

⁴⁶ See *infra* Part VIII.

⁴⁷ For example, Chief Justice Taft relied heavily on these Federalists’ statements and writings long after June 1789. See *Myers*, 272 U.S. at 136-44.

⁴⁸ See *infra* Parts VI–VII.

⁴⁹ See *Manners & Menand*, *supra* note 11, at 5-8 (describing the history of removal permissions to refute the conclusion that the President may remove the head of an independent agency for failure to follow the President’s policy agenda).

⁵⁰ See *infra* Section VI.A.

⁵¹ See *infra* Part VI.

⁵² See *Myers*, 272 U.S. at 147 (referring to “removal from office at pleasure” and “the construction of the Constitution in this regard as given by the Congress of 1789” (quoting *Parsons v. United States*, 167 U.S. 324, 339 (1897))); see also *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881

Part I summarizes the main precedents and the return of the Decision of 1789 from exile during the Roberts Court. Part II reviews the Constitution's text, the Convention, and the *Federalist Papers*, showing the lack of support for presidential removal powers before 1789. Part III turns to the Decision of 1789, focusing on the House debates—especially Monday, June 22—and adding the context of Senate resistance and intrigue from Maclay's diary. Part IV shifts to the messy Senate debate in July, with Senator Maclay's diary and other notes showing how the strategy of ambiguity played out. Part V shows that, at each stage, the senatorial and congressionalist blocs cited traditional legal authorities or concepts, indicating a foundation of original public meaning for those positions, while the presidentialists had only thin textual inferences. Parts VI and VII turn to the other departmental bills (War and Treasury), Madison's proposal for an independent comptroller, the Judiciary Act, and other statutes, as evidence against presidential removal and against a default rule of tenure "during pleasure." Part VIII reveals how Madison, likely motivated by his own ambitions and political self-interest to lead a pro-administration "Court Party," spun a myth about his own influence. A separate Appendix II documents the unitary theorists' misuse of historical sources.⁵³ The conclusion points out that this case study of good-faith errors offers a cautionary tale about originalist methods and the problems of confirmation bias.

I. THE DECISIONS OF 2010, 2020, AND 2021

The unitary executive theory was an idea in exile—until the Roberts Court. In *Myers v. United States* in 1926, Chief Justice William Howard Taft (the former president, of course) relied heavily on the "Decision of 1789"—in detail or by reference in almost sixty pages of his seventy-two-page opinion—to invalidate a statute requiring Senate consent to remove a postmaster.⁵⁴ Justices Brandeis and McReynolds wrote dissents that were almost as long, going into even more detail to question Taft's claims.⁵⁵ Justice McReynolds described the text of the Benson/Madison amendment as "ambiguous" and "susceptible of different interpretations and probably did

F.3d 75, 168 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) ("In 1789, the First Congress confirmed that Presidents may remove executive officers at will."); see also *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 692 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("[T]he constitutional text and the original understanding, including the Decision of 1789, established that the President possesses the power under Article II to remove officers of the Executive Branch at will."). For further discussion, see *infra* Part VII.

⁵³ See *infra* Appendix II, *supra* note 12, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359596 [<https://perma.cc/V6GA-NZJP>].

⁵⁴ See generally *Myers*, 272 U.S.

⁵⁵ *Id.* at 178-240 (McReynolds, J., dissenting); *id.* at 240-95 (Brandeis, J., dissenting).

not mean the same thing to all.”⁵⁶ Justice Brandeis’s argument about a divided “presidential” and “congressional” majority was relegated to two paragraphs and a long footnote, but with only incomplete examples, no head count, cursory descriptions, and even some errors.⁵⁷

A decade later, the Supreme Court narrowed *Myers*’s reach in *Humphrey’s Executor*, permitting limits on presidential removals for independent agencies.⁵⁸ Independent regulatory commissions proliferated in the 1930s through the 1970s.⁵⁹ This *Myers/Humphrey*’s balance was a stable settlement for over seventy years. In 1988, Justice Scalia tried to revive the theory in *Morrison v. Olson*, but he dissented all by himself in a 7–1 decision.⁶⁰ However, an academic project followed Scalia’s dissent to support his historical assertions, and the unitary executive theory filled law reviews in the 1990s.⁶¹ These scholars resurrected Taft’s interpretation of the First Congress,

⁵⁶ *Myers*, 272 U.S. at 194, 198 n.3 (McReynolds, J., dissenting).

⁵⁷ See *Myers*, 272 U.S. at 285 n.73, 286 n.75 (Brandeis, J., dissenting). Brandeis erroneously counted Sherman as congressional, rather than senatorial. See *The Daily Advertiser* (June 20, 1789) (indicating that Sherman thought Senate concurrence, rather than Congressional, was required for officer removal), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 892. Brandeis also counted Baldwin as explicitly presidentialist, though his speeches were unclear. See *infra* Section III.C; see also CORWIN, THE PRESIDENT’S REMOVAL POWER UNDER THE CONSTITUTION, *supra* note 3, at 12 n.22. Corwin undercounted the senatorial delegates and overcounted the congressional delegates, perhaps because he transposed the numbers (it is more likely that he actually counted sixteen senatorial delegates and thirteen congressionalist delegates). See *infra* Section III.C.

⁵⁸ *Humphrey’s Executor v. United States*, 295 U.S. 602, 627–32 (1935).

⁵⁹ See generally ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS (1941); see also Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1116 n.14 (2000) (documenting the proliferation of agencies established during the Progressive Era and New Deal); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 776–78 (2013) (describing the history of independent agencies, beginning with the Interstate Commerce Commission in 1887 and tracing the development of other independent agencies through the mid-twentieth century).

⁶⁰ *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

⁶¹ See, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155, 1203 n.244, 1204 (1992); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 568–69 (1994) [hereinafter Calabresi & Prakash, *The President’s Power to Execute the Laws*]; Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1382 nn.17–18 (1994); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 234 (2001). More recently, scholars have elaborated on the theory of the unitary executive in book projects. See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3–4, 34–35 (2008) (recounting the history of a belief in the unitary executive from the Constitutional Convention through contemporary times); SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 8 (2015) [hereinafter PRAKASH, IMPERIAL FROM THE BEGINNING] (reiterating the view that Article II grants all executive power); MCCONNELL, *supra* note 17, at 258–62 (2020) (describing the unitary executive power as defeasible because the powers can be regulated by Congress if there is an enumerated power to do so but exercising the power requires no advance authorization from Congress).

particularly in a 2006 article, *New Light on the Decision of 1789*.⁶² Four years later, in *Free Enterprise Fund vs. Public Company Accounting Oversight Board*, Chief Justice Roberts, writing for a 5–4 majority, revived Taft’s expansive reading of the Decision of 1789 and presidential power.⁶³ The Roberts Court invalidated a double-layer structure of good-cause protection from presidential removal.⁶⁴ The Court inferred that an appointee at the Securities and Exchange Commission (SEC) was protected from removal at will and held that an explicit protection for the Public Company Accounting Oversight Board (PCAOB) went too far to restrict presidential control.⁶⁵

The Roberts Court then extended the doctrine in *Seila Law* in 2020 and *Collins v. Yellen* in 2021.⁶⁶ In *Seila Law*, the Court confronted the unusual structure of the Consumer Financial Protection Bureau, which was headed by a single chair insulated from presidential removal: “[t]he President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.”⁶⁷ This formula had been a traditional protection in independent agencies for over 130 years,⁶⁸ but the Roberts Court took issue with these protections being granted to a single Director, rather than a multi-member board.⁶⁹ Even though the holding focused on a single-head structure, the Court’s language about Article II was sweeping, calling into question the independence of the Federal Reserve, the Federal Trade Commission, and the Nuclear Regulatory Commission.⁷⁰ Roberts opened his analysis in the Court’s opinion by emphasizing the Decision of 1789.⁷¹ Instead of explaining the

⁶² See Prakash, *New Light*, *supra* note 7, at 1026 (“Chief Justice Taft was right all along”). Not all unitary theorists count on the Decision of 1789. Gary Lawson, a supporter of a version of the unitary theory, stands out as a skeptic of the Decision of 1789. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1245 n.75 (1994) (calling into question the ordinary meaning interpretations of other unitary executive theorists); Steven G. Calabresi & Gary Lawson, Essay, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1023 n. 104, 1044–45 (2007) (acknowledging Lawson’s “lingering doubts about the constitutional pedigree of this removal power”).

⁶³ See 561 U.S. 477, 483 (2010) (“Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary.”).

⁶⁴ *Id.* at 514.

⁶⁵ *Id.* at 486–87, 495–98.

⁶⁶ *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020); *Collins v. Yellen*, 141 S. Ct. 1761 (2021).

⁶⁷ 12 U.S.C. § 5491(c)(3) (2018).

⁶⁸ See Jed Handelsman Shugerman, *The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Tenure of Office Act, and the Rise of Modern Campaign Finance*, 31 J.L. & POL. 139, 144–45 (2015) (tracing similar language to the Interstate Commerce Act of 1887); Manners & Menand, *supra* note 11, at 6 (“When Congress first used the now-talismanic [inefficiency, neglect, or malfeasance] phrase in 1887, it defined these circumstances using terms that were already well-known.”).

⁶⁹ *Seila L.*, 140 S. Ct. at 2197.

⁷⁰ Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 S. CT. REV. 83, 112 (2021).

⁷¹ *Seila L.*, 140 S. Ct. at 2197.

Decision of 1789, Chief Justice Roberts and Justice Thomas in concurrence instead relied on something like historical *res judicata* and how Supreme Court precedents “confirm[]” this received wisdom about 1789.⁷² This *stare decisis* for judicial interpretations of history is odd for an ostensibly originalist argument, given that many originalists put primary sources above later precedent.⁷³ It is also notable that Justice Thomas’s concurrence relied on his former clerk Prakash’s article, *New Light on the Decision of 1789*,⁷⁴ as did petitioner Seila Law, respondent CFPB, and several amicus briefs in this litigation and the earlier *Free Enterprise* case.⁷⁵ Section III.F and a separately published Appendix II identify the many errors in Prakash’s article.⁷⁶

In *Collins v. Yellen* in 2021, Justice Alito similarly relied on precedent and the Decision of 1789 to invalidate the “for cause” protections for the single head of the Federal Housing Finance Agency.⁷⁷ Justice Kagan deferred to *Seila Law* as a matter of precedent, while noting that she had dissented in that case “vehemently.”⁷⁸

The unitary executive theory and its assumptions about the Founding era are poised to undo longstanding precedents. Trump’s Department of Justice suggested that the Supreme Court should consider overturning *Humphrey’s Executor*,⁷⁹ and Justice Kavanaugh has signaled his interest in

⁷² *Id.* at 2197; *id.* at 2217-18 (Thomas, J., concurring). One of the few original sources in Chief Justice Roberts’s decision was a letter from James Madison interpreting the Foreign Affairs vote, but Madison had an interest in telling his own version of his strategy. *See id.* at 2197; *see also infra* Part VIII.

⁷³ *See, e.g.*, Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1012 (2003) (“[T]he preclusive effect of precedent raises due process concerns, and, on occasion, slides into unconstitutionality.”); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 24 (1994) (arguing that in some cases applying precedent is unconstitutional); Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as it Sounds*, 22 CONST. COMMENT. 257, 258 (2005) (“[T]he biggest single challenge facing originalists is reconciling originalism with precedent.”); Michael Stokes Paulsen, *The Inherently Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005) (“*Stare decisis* contracts the premise of originalism—that it is the original meaning of the words of the text, and not anything else, that controls constitutional interpretation.”); John Tuskey, *Do As We Say and Not (Necessarily) As We Do: The Constitution, Federalism, and the Supreme Court’s Exercise of Judicial Power*, 34 CAP. U. L. REV. 153, 180-81 (2005) (suggesting that following precedent for precedent’s sake demonstrates a value judgment of the judicial decision over the Constitution).

⁷⁴ Prakash, *New Light*, *supra* note 7.

⁷⁵ *Seila L.*, 140 S. Ct. 2183, 2213 n.1 (2020) (Thomas, J., concurring); Brief for Separation of Powers Scholars as Amici Curiae Supporting Petitioner at 19 n.3, *Seila L.*, 140 S. Ct. 2183 (No. 19-7); Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioner at 10-12, *Seila L.*, 140 S. Ct. 2183 (No. 19-7); Brief of Law Professors as Amici Curiae in Support of Petitioners at 14, *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010) (No. 08-861).

⁷⁶ *See* Appendix II, *supra* note 12, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359596 [<https://perma.cc/V6GA-NZJP>].

⁷⁷ 141 S. Ct. 1761, 1783-84 (2021).

⁷⁸ *Id.* at 1799-1800 (Kagan, J., concurring).

⁷⁹ Brief for the Respondent at 16 n.2, *Seila L.*, 140 S. Ct. 2183 (No. 19-7).

doing just that.⁸⁰ In January 2021, a Ninth Circuit panel noted that *Seila Law* and *Free Enterprise* raised “substantial questions” about the constitutionality of administrative law judges within the Federal Trade Commission—the same independent agency that the Supreme Court permitted in the canonical *Humphrey’s Executor*.⁸¹ The Fifth Circuit also cited this line of cases to invalidate the independence of administrative law judges in the SEC.⁸² President Biden’s Office of Legal Counsel relied on these decisions to validate Biden’s removal of the Commissioner of Social Security.⁸³

The Decision of 1789 and its line of cases are about more than removal powers. These same historical questions shape the separation of powers and executive power debates in even more high-profile cases. In the D.C. Circuit’s ruling on whether the House Oversight Committee could subpoena financial documents concerning President Trump, Judge Rao’s dissent relied on *Myers* and *Free Enterprise*.⁸⁴ And in a controversial concurrence in May 2021, an Eleventh Circuit judge concluded that the unitary interpretation of Article II “prevents Congress from empowering private plaintiffs to sue for wrongs done to society in general or to seek remedies that accrue to the public at large,” broadly calling into question statutory standing because, apparently, only the executive branch can enforce laws for the public interest.⁸⁵ The unitary theory, now being taken to an extreme, threatens to overturn the vital tradition of private rights of action.

II. THE ANTI-UNITARY DECISIONS OF 1787 AND 1788

Before digging into 1789, it helps to understand that the Framers and Ratifiers in 1787 and 1788 were either silent or opposed to the unitary theory and in favor of congressional checks and balances. This background is vital to

⁸⁰ See *In re Aiken Cnty.*, 645 F.3d 428, 441 (D.C. Cir. 2011) (Kavanaugh, J., concurring) (“*Humphrey’s Executor* thus approved the creation of ‘independent’ agencies—independent, that is, from presidential control and thus from democratic accountability.”); see also Jed Shugerman, *Brett Kavanaugh’s Legal Opinions Show He’d Give Donald Trump Unprecedented New Powers*, SLATE (July 19, 2018, 2:45 PM), <https://slate.com/news-and-politics/2018/07/brett-kavanaugh-would-give-donald-trump-unprecedented-new-powers.html> [<https://perma.cc/KES7-GHXE>] (arguing Kavanaugh’s speeches and judicial opinions suggest he would overturn agency independence).

⁸¹ *Axon Enter., Inc. v. Fed. Trade Comm’n*, 986 F.3d 1173, 1187 (9th Cir. 2021).

⁸² *Jarkesy v. SEC*, 34 F.4th 446, 464 (5th Cir. 2022).

⁸³ *Constitutionality of the Commissioner of Social Security’s Tenure Protection*, 45 Op. O.L.C., slip op. at 1, 3, 5-6 (July 8, 2021).

⁸⁴ See *Trump v. Mazars USA*, 940 F.3d 710, 750, 783, *vacated and remanded*, 140 S. Ct. 2019 (2020) (“[U]sing the legislative power to target and uncover illegal conduct by executive officials provides Congress with an additional form of control over executive officials who otherwise must be within the direction and control of the President.” (citing *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 493 (2010))).

⁸⁵ *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1115, 1132-37 (11th Cir. 2021) (Newsom, J., concurring).

understand the open-ended nature of the debate in the First Congress and that the “congressional” and “senatorial” interpretations were just as plausible as the “presidential” interpretation.

The unitary scholarship appears to have a problem of confirmation bias: it assumes that the Vesting and Take Care Clauses meant indefeasible presidential powers, then it finds its friends in the 1789 legislative history and some (but not most) of Madison’s 1789 speeches and writings, and that friend-finding confirms their initial assumptions about the Vesting and Take Care Clauses.

However, a closer study of each “pillar” breaks this feedback loop. Neither the Vesting nor the Take Care Clause supports the unitary theory that the President’s executive powers are exclusive, indefeasible, and unlimited, nor do they include an implied removal power.⁸⁶ Moreover, even if one assumes *arguendo* the strained argument that the English Crown was the relevant model for the republican Framers—despite their rejection of such a notion—there is little evidence that the phrase “executive power” signaled a general removal power in the eighteenth century, considering that many English offices were nonremovable.⁸⁷

The Faithful Execution Clauses have an original meaning of duty-imposing rather than power-expanding.⁸⁸ Some unitary theorists continue to rely on the Take Care Clause language, assuming without evidence that its origins are from the royal prerogative.⁸⁹ To the contrary, the English legal

⁸⁶ See Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2119 (2019) (arguing that the Take Care Clause imposes duties similar to fiduciary duties); Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479, 1493-99, 1517-20 (2022) (challenging originalist readings of the word “vesting” in early sources, suggesting that the term was a grant of powers but did not implicate the permissibility of legislative conditions for removal). Modern assumptions about “vesting” for official powers reflect semantic drift from property rights and ahistoric projections from the later Marshall Court doctrine of “vested rights,” as recently demonstrated by Richard Epstein’s anachronistic assertions in 2020. See RICHARD A. EPSTEIN, *THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW* 36 (2020) (“[U]se of the term ‘vested’ brings back images of vested rights in the law of property; that is, rights that are fully clothed and protected.”).

⁸⁷ See Jed Handelsman Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J.L. & HUMANS. 125, 132, 151-72 (2022) (surveying Blackstone and historical research on “the English law of offices-as-property”); Shugerman, *Vénalité*, *supra* note 11 (manuscript at 27-29) (documenting how the First Congress’s debates are consistent with the law of offices-as-property).

⁸⁸ The Faithful Execution Clauses provide that the President “shall take Care that the [l]aws be faithfully executed,” and take an oath to “faithfully execute the [o]ffice.” U.S. CONST. art. II, § 3; U.S. CONST. art. II, § 1, cl. 8. For a discussion on the ordinary meaning of these clauses, see generally Kent, Leib & Shugerman, *supra* note 11.

⁸⁹ See, e.g., MCCONNELL, *supra* note 17, at 68, 161-69 (“[T]he Take Care Clause, which is a duty that implies the power to supervise all officials engaged in execution of the law, has the hallmarks of prerogative.”). I have documented these errors previously. See Shugerman, *Vénalité*, *supra* note 11 (manuscript at 16) (challenging McConnell’s reliance on the Take Care Clause for lack of evidentiary

tradition of “faithful execution” imposed duties limiting discretion, similar to fiduciary duties (reflecting the same root *fides* for faith and *fiducia* for trust).⁹⁰ It would be incongruous and ahistorical for those limited duties to imply indefeasible powers greater than the duty.

In the Convention, the executive branch emerged from the Virginia Plan in limited form. The delegates clarified that executive power would have a narrow scope and would rely on enumeration, not implied powers.⁹¹ Madison invoked the phrase “ex vi termini,” i.e., “from the force of the word or boundary” to establish that presidential power “should be confined and defined.”⁹² Otherwise, executive power would become “large” and would risk “the [e]vils of elective [m]onarchies.”⁹³ James Wilson, considered perhaps the leading unitary executive delegate,⁹⁴ agreed with Madison, and said the President’s powers should be limited to the “strictly [e]xecutive”: “those of executing the laws, and appointing officers, not (appertaining to and) appointed by the [l]egislature.”⁹⁵ He explicitly rejected the royal model, and specified that he “did not consider the [p]rerogatives of the British Monarch as a proper guide in defining the [e]xecutive powers.”⁹⁶

support); Jed Shugerman, *Originalism and the Seila Law Brief, Part II: Prerogative vs. Royalism, Blackstone vs. Schmitt, McConnell vs. Amicus* (Jan. 11, 2022) [hereinafter Shugerman, *Originalism the Seila Law Brief*], <https://shugerblogger.wordpress.com/2022/01/11/originalism-and-the-seila-law-brief-part-ii-prerogative-vs-royalism-blackstone-vs-schmitt-mcconnell-vs-amicus> [<https://perma.cc/6LZN-TASS>] (“The problem is that I cannot find a reference to removal or anything like it on any list of prerogatives in Blackstone or Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown*, which McConnell stated were his two ‘principal sources for the law of prerogative.’”).

⁹⁰ See Kent, Leib & Shugerman, *supra* note 11, at 2119 (“[T]he Faithful Execution Clauses are substantial textual and historical commitments to what we would today call fiduciary obligations of the President.”); Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*, 17 GEO. J.L. & PUB. POL’Y 463, 466 (2019) (describing “faithful execution” constraints as “core fiduciary obligations”).

⁹¹ See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 63-64, 70 (Max Farrand ed., 1911) [hereinafter 1 FARRAND] (showing that the delegates’ desire to specifically enumerate the power of the executive).

⁹² *Id.* at 70

⁹³ *Id.*

⁹⁴ See William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901, 950-51 (2008) (“[O]ver the course of the Convention [Madison] was following Wilson on these matters [of executive power] rather than the other way around.”); Calabresi & Prakash, *The President’s Power to Execute the Laws*, *supra* note 61, at 608 (“James Wilson . . . [was] perhaps the intellectual father of Article II’s vigorous, independent Executive”); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 724 [hereinafter Prakash, *The Essential Meaning of Executive Power*] (“[T]he Committee of Detail contained the well-known champion of an energetic executive, James Wilson of Pennsylvania.”).

⁹⁵ 1 FARRAND, *supra* note 91, at 66; see also Letter from Edmund Pendleton to James Madison (Oct. 8, 1787), in *Founders Online*, NATIONAL ARCHIVES, <https://founders.archives.gov/documents/Madison/01-10-02-0140> [<https://perma.cc/BM49-VNPR>] (“The President . . . [has] no latent Prerogatives, nor any Powers but such as are defined and given him by law.”).

⁹⁶ *Id.*

Of course, the Convention never enumerated removal, even after two delegates proposed language for the tenure of department heads. On August 20, Gouverneur Morris proposed (and Charles Pinckney seconded) a “Council of State,” an executive council of six department heads to “assist the President in conducting the [p]ublic affairs,” and who would serve “during pleasure.”⁹⁷ It appears that there was no discussion of this proposal; it was one of many submitted to the Committee of Detail on August 20, 1787,⁹⁸ but it died in committee.⁹⁹ The rejection of a council proposal may have solidified the “unity” of the executive branch, but it also appears to have rejected “at pleasure” tenure without otherwise addressing tenure default rules or any other removal-at-pleasure rules.¹⁰⁰ One part of this proposal has been overlooked: it listed as its first and leading member of this “Council of State” the Chief Justice:

The Chief Justice of the Supreme Court, who shall from time to time recommend such alterations of and additions to the Laws of the U.S. as may in his opinion be necessary to the due administration of Justice, and such as may promote useful learning and inculcate sound morality throughout the Union: He shall be President of the Council in the absence of the President.¹⁰¹

Thus, even the most “unitary” of removal proposals in the Convention proposed a remarkably non-unitary, anti-separation-of-powers council structure to be led by an unremovable member.

The Committee of Eleven rejected this proposal from Morris and Pinckney and “balked” at their removal provision.¹⁰² It reemerged as the Opinions clause, which creates a problem for the unitary theory: If the

⁹⁷ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 342-43 (Max Farrand ed., 1911) [hereinafter 2 FARRAND]. In addition to the six department heads, the Chief Justice would also serve on the Council. *Id.*

⁹⁸ The Convention Journal indicated at the beginning of the day’s notes that the propositions “passed in the affirmative.” *Id.* at 334. From Farrand’s collection of three sources, the context of this vote remains unclear, but it seems more likely that there was no debate and no vote on Morris’s proposal. *Id.* at 334-66.

⁹⁹ See *id.* at 542 (“The question of a Council was considered in the Committee, where it was judged that the [President] by persuading his Council—to concur in his wrong measures, would acquire their protection for them . . .”). On the workings of the Committee of Detail, see John R. Vile, *The Critical Role of Committees at the U.S. Constitutional Convention of 1787*, 48 AM. J. LEG. HIST. 147, 165-66 (2006). For more on this proposal reemerging as the Opinions Clause, see Calabresi & Prakash, *The President’s Power to Execute the Laws*, *supra* note 61, at 628-29.

¹⁰⁰ For more on this Morris/Pinckney proposal and the significance of its rejection, see THACH, *supra* note 15, at 125.

¹⁰¹ 2 FARRAND, *supra* note 97, at 342. This structure previewed Alexander Hamilton’s Sinking Fund structure. See discussion *infra* Section VI.A.

¹⁰² See Zachary J. Murray, *The Forgotten Unitary Executive Power: The Textualist, Originalist, and Functionalist Opinions Clause*, 39 PACE L. REV. 229, 265 (2018) [hereinafter Murray, *The Forgotten Unitary Executive Power*].

Vesting and Take Care clauses already implied the far greater powers of control, orders, and removal, one would not need an opinions clause to empower the president merely to ask for opinions.¹⁰³ If the logic is that this power needed to be stated explicitly because otherwise Congress could limit it as a merely implied power, then that explanation creates another problem for the unitary theory: even if one accepts, *arguendo*, that removal was implied by Article II, this argument concedes that an *implied* removal power could be regulated or limited by Congress.

Turning now to the *Federalist Papers*, Madison wrote that Congress had significant power to shape executive offices and removal. In *Federalist* No. 39, Madison discussed removal of executive offices in a remarkably pro-legislative, open-ended way:

The tenure by which the judges are to hold their places, is, as it unquestionably ought to be, that of good behavior. The tenure of the ministerial offices generally will be a subject of legal regulation, conformably to the reason of the case, and the example of the State Constitutions.¹⁰⁴

The Founding era commonly used “ministerial” for principal officers, even heads of departments. *Marbury v. Madison* applied the label “ministerial officer” to the Secretary of State.¹⁰⁵

In *Federalist* No. 77, Hamilton wrote in favor of the senatorial view:

The consent of [the Senate] would be necessary to displace as well as to appoint. A change of the chief magistrate therefore would not occasion so

¹⁰³ See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 31-38, 72 (1994) (“No doubt, standing alone in the fact of clear evidence that the framers were adopting the strong unitary conception, [the Opinions Clause] would be a slender reed, and a redundancy.”); Flaherty, *The Most Dangerous Branch*, *supra* note 3, at 1795-98; Morton Rosenberg, *Congress’s Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration’s Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 689 (1989) (“A broad reading of the Take Care Clause would have the effect of reducing the Opinions Clause . . . to surplusage.”); Murray, *The Forgotten Unitary Executive Power*, *supra* note 102, at 233-34. *But see* THE FEDERALIST NO. 74, at 376 (Alexander Hamilton) (Ian Shapiro ed., 2009) (stating that the Opinions Clause is a “mere redundancy”); Calabresi & Prakash, *The President’s Power To Execute The Laws*, *supra* note 61, at 628-29; Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 YALE L.J. 991, 1004 (1993) (arguing that the Opinions Clause supports the unitary theory because “the President may ask for the considered opinions of the department heads and implies that the President will make the ultimate decision.”); Akhil Reed Amar, Essay, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 648-49 (arguing that sometimes redundancies are, indeed, redundancies or additional description).

¹⁰⁴ THE FEDERALIST NO. 39, at 194 (James Madison) (Ian Shapiro ed., 2009); *see also id.* at 193 (describing three different kinds of tenure: “during pleasure, for a limited period, or during good behavior”).

¹⁰⁵ 5 U.S. (1 Cranch) 137, 138, 150 (1803).

violent or so general a revolution in the officers of the government, as might be expected if he were the sole disposer of offices.¹⁰⁶

As discussed below, both Madison and Hamilton would endorse presidential removal during the Foreign Affairs debate, and later reverse back in favor of independent executive officers.¹⁰⁷ But their *Federalist Papers* writings show there was no apparent consensus on removal among the Founders in 1787 and 1788, and if anything, the general tide was against a presidentialist interpretation.

III. MAY–JUNE 1789: STRATEGIC AMBIGUITY IN THE HOUSE

A. May–June 19: Adopting a Clear Clause

On March 4, 1789, the first members of Congress gathered in the new temporary capital, New York City.¹⁰⁸ The legislative agenda was enormous, and the schedule was tight. The first legislative session would last seven months, during which time they had to transform a few short articles on parchment into a fully functional government, and also add a series of new amendments to that parchment by holding a mini-Constitutional Convention.¹⁰⁹ Public and private debt were still enormous problems, and the

¹⁰⁶ THE FEDERALIST NO. 77, at 387 (Alexander Hamilton) (Ian Shapiro ed., 2009). For an explanation that this senatorial position was Hamilton's sincere view, and not just a play to public opinion, see FORREST McDONALD, ALEXANDER HAMILTON 125-26, 130-31 (1979); 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, 184 (2010). *But see* Seth Barrett Tillman, *The Puzzle of Hamilton's Federalist No. 77*, 33 HARV. J.L. & PUB. POL'Y 149, 149-54 (2010) (arguing that Hamilton intended "displace" to connote differently than "remove").

¹⁰⁷ Both Madison and Hamilton endorsed presidential removal during the Foreign Affairs debate. *See* The Congressional Register (June 16, 1789) (stating that "[t]he constitution affirms, that the executive power shall be vested in the president" and that "inasmuch as the power of removal is of an executive nature . . . it is beyond the reach of the legislative body"), *reprinted in* 11 DOCUMENTARY HISTORY *supra* note 25, at 869; *infra* notes 130–131 & accompanying text (describing Hamilton's change in position during the Foreign Affairs debate in favor of presidential removal). They subsequently reversed in favor of independent executive officers. *See infra* Section VI.A (discussing Madison's support for removal protections for the comptroller); *infra* notes 462–465 & accompanying text (describing Hamilton's later proposal for an independent Sinking Fund Commission); *see also* Christine Kexel Chabot, *Interring the Unitary Executive Theory*, 98 NOTRE DAME L. REV. 129, 172 (2022) [hereinafter Chabot, *Interring the Unitary Executive Theory*] (explaining the President had limited control over Hamilton's proposed Sinking Fund Commission).

¹⁰⁸ Journal of the First Session of the House of Representatives (March 4, 1789), *reprinted in* 3 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789–3 MARCH 1791, at 3 (Linda Grant De Pauw, Charlene Bangs Bickford & LaVonne Siegel Hauptman eds., 1977) [hereinafter 3 DOCUMENTARY HISTORY].

¹⁰⁹ *See generally* GIENAPP, THE SECOND CREATION, *supra* note 3 (describing the many challenges the First Congress faced in implementing the new Constitution); BORDEWICH, *supra* note 37 (documenting the achievements of the First Congress in establishing a functioning

new Congress had to deal with a credit crisis and a fiscal mess that had mounted throughout the 1780s.¹¹⁰ The new government urgently needed to create revenue and start spending from scratch. For most of the first two months, the House focused on revenue: the Impost Act (the Tariff of 1789) and the Tonnage Act.¹¹¹

Then, on May 19, Congress began the debate about creating a functional administration.¹¹² The Articles of Confederation had three executive departments for Foreign Affairs, War, and Finance (plus a Post Office Department, and surprisingly, the Marine Department, similar to a navy, which was placed under Finance).¹¹³ Reflecting the urgency of financial policy, Elias Boudinot and a handful of others wanted to establish Treasury, then turn to others incrementally.¹¹⁴ However, Egbert Benson of New York wanted to start with a general plan, to resolve the number of departments before working out their details.¹¹⁵ Madison agreed that they should “determine the outlines” and “principles” first, including the point that department heads ought “to be removeable by the president.”¹¹⁶ With

government); Greenfield, *supra* note 37 (describing the methods of constitutional interpretation utilized by the First Congress).

¹¹⁰ See Ralph Clark Chandler, *Public Administration Under the Articles of Confederation*, 13 PUB. ADMIN. Q. 433, 445 (1990) (listing the many financial problems faced by Congress in 1789).

¹¹¹ Subjects Debated in the House of Representatives, in 10 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789–3 MARCH 1791, at lxi-lxii (Charlene Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds., 1992) [hereinafter 10 DOCUMENTARY HISTORY].

¹¹² See The Congressional Register, (May 19, 1789) (showing Boudinot’s statement that the Constitution contemplated executive departments and that Congress must “carry this intention into effect” by organizing them), *reprinted in* 10 DOCUMENTARY HISTORY, *supra* note 111, at 722-40.

¹¹³ See 19 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 43-44, 125-26 (Gaillard Hunt ed., 1912) (documenting the creation of executive departments under the Articles); see also Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 274 (2001) (describing the creation of the Department of Foreign Affairs and other “civil executive departments” such as Treasury, Marine, and War); JENNINGS B. SANDERS, EVOLUTION OF EXECUTIVE DEPARTMENTS OF THE CONTINENTAL CONGRESS, 1774-1789, at 162 (1935) (describing the establishment of the three main executive departments as well as the Marine Department and Post Office); Chandler, *supra* note 110, at 443-449 (describing the establishment of the three main executive departments as well as the Marine Department and Post Office).

¹¹⁴ See The Daily Advertiser (May 20, 1789) (“[Boudinot] then moved as the first clause in the resolution, that a Secretary of Finance be appointed for the purposes, and with the powers therein described.”), *reprinted in* 10 DOCUMENTARY HISTORY, *supra* note 111, at 718.

¹¹⁵ See *id.* (“[Benson] seconded the general propositions, but did not agree in the propriety of entering into the particulars of the arrangement, till the house had determined the general question, how many departments should be established.”).

¹¹⁶ The Congressional Register (May 19, 1789), *reprinted in* 10 DOCUMENTARY HISTORY, *supra* note 111, at 725.

Benson's support, Madison moved to create three departments with heads removeable "by the president alone."¹¹⁷

Immediately, they confronted the removal dilemma, or really, a quadrilemma: Corwin labeled three of the factions "presidential," "congressional," and "senatorial"; a fourth tiny group believed that the text offered only impeachment.¹¹⁸ Historian Jonathan Gienapp observed that this debate over removal was "unexpected," and the removal question was treated as if it were "covering new ground," with no hint of any "prior discussions" during the Convention about removal.¹¹⁹

As this novel debate unfolded, a majority gradually emerged for presidential removal, without needing Senate de-confirmation. However, this majority espoused different and conflicting arguments: that Article I assigned the power to Congress both to create executive offices and legislate removal rules (later labeled "congressionalism"); and that Article II established a presidential removal power by implication (later labeled "presidentialism").¹²⁰ Some members emphasized only one set of arguments, but some offered both interpretations, despite the tension between them, and often without recognizing that the two arguments were in tension. There was no need (yet) to pick a side.

In fact, Madison himself did not pick a side. He first spoke in favor of the *congressional* grant position: "it is in the discretion of the legislature to say upon what terms the office shall be held, either during good behaviour, or during pleasure."¹²¹ In a speech later that day, he conceded that a colleague's senatorial position "appears to have more weight, than any thing hitherto suggested," if only at "first view,"¹²² and then argued it would be "inconvenient." He gave a

¹¹⁷ Gazette of the United States (May 20, 1789), reprinted in 10 DOCUMENTARY HISTORY, *supra* note 111, at 720. One account indicates support for removal "at pleasure," but the other records do not corroborate this assertion. See New-York Daily Gazette (May 20, 1789) ("A debate ensued upon the propriety of giving power to the President to remove officers at pleasure; which, after a long and interesting discussion, was agreed to by a vote on the first proposition."), reprinted in 10 DOCUMENTARY HISTORY, *supra* note 111, at 720.

¹¹⁸ CORWIN, THE PRESIDENT'S REMOVAL POWER UNDER THE CONSTITUTION, *supra* note 3, at 12-13, 12 n.22.

¹¹⁹ Jonathan Gienapp, *Removal and the Changing Debate over Executive Power at the Founding*, 63 AM. J. LEGAL HIST. (forthcoming 2023).

¹²⁰ See *id.*; Prakash, *New Light*, *supra* note 7, at 1023 (2006) (describing the various camps of opinion that existed surrounding the removal power); GIENAPP, THE SECOND CREATION, *supra* note 3, at 126-28 (detailing early debate about the "great constitutional question" that was presidential removal power); ALVIS, BAILEY & TAYLOR, *supra* note 3, at 116-22 (describing the initial votes over the removal power).

¹²¹ The Congressional Register (May 19, 1789), reprinted in 10 DOCUMENTARY HISTORY, *supra* note 111, at 730.

¹²² *Id.* at 735.

mix of policy and constitutional arguments for presidential removal, with an unclear combination of congressionalism and presidentialism.¹²³

On May 19, the House voted in favor of Madison's resolution stating that the heads of the departments would be removable by the President.¹²⁴ On May 21, the House again approved of a short resolution to create the three departments with heads "removable by the president" and to create a committee of eleven to draft specific bills.¹²⁵ The resolutions on May 19 and May 21 made no reference to any constitutional interpretation, nor recorded any specific head counts.¹²⁶ The committee reported out bills for a war department and a foreign affairs department on June 2, and then a treasury department on June 4.¹²⁷ The committee's Foreign Affairs bill contained the explicit removal language, again with no constitutional explanation, that the department heads were "to be removable from office by the President of the United States."¹²⁸

From Tuesday, June 16 to Friday, June 19—four full days and 122 pages of the *Annals of Congress*¹²⁹—the House debated this one clause and whether the President should share the removal power with the Senate. This Article

¹²³ There were several congressional perspectives on the tradition of offices-as-property provided during the debates. *See, e.g., id.* at 730 ("It is in the discretion of the legislature to say upon what terms the office shall be held . . ."); *id.* at 734 (stating that during an office for a "term of years," "there is no way of getting rid of a bad officer, but by impeachment," acknowledging a common antiremoval form of office-as-property). For a concession to the senatorial argument, see *id.* at 746 (acknowledging at least the favor upon "first view" of a senatorial member's argument).

¹²⁴ *See id.* at 740 ("The question was now taken, and carried by a considerable majority, in favor of declaring the power of removal, to be in the president.").

¹²⁵ *Journal of the First Session of the House of Representatives of the United States* (May 21, 1789), reprinted in 3 DOCUMENTARY HISTORY, *supra* note 108, at 68-69. The committee of eleven included a plurality of presidentialists: Madison, Benson, Boudinot, Vining, and Fitzsimons. There were only two senatorials: Gerry and Livermore. One was likely congressional: Cadwalader. The other three were silent or surprisingly hard to categorize: Baldwin, Burke, and Wadsworth (a likely congressionalist). *See infra* Appendix I, Table C. Madison and Fitzsimons were also inconsistent. One would have thought the committee that spent more time on these bills than other members would have clear views on the constitutional question, and yet their fuzziness is further evidence of indecision and confusion.

¹²⁶ *See* The Congressional Register (May 19, 1789), reprinted in 10 DOCUMENTARY HISTORY, *supra* note 111, at 740; *Journal of the First Session of the House of Representatives of the United States* (May 21, 1789), reprinted in 3 DOCUMENTARY HISTORY, *supra* note 108, at 68-69.

¹²⁷ *Journal of the First Session of the House of Representatives of the United States* (June 2, 1789), reprinted in 3 DOCUMENTARY HISTORY, *supra* note 108, at 79-80; *Journal of the First Session of the House of Representatives of the United States* (June 4, 1789), reprinted in 3 DOCUMENTARY HISTORY, *supra* note 108, at 81-82.

¹²⁸ *See* The Congressional Register (June 16, 1789) ("The first clause . . . had these words; 'To be removable from office by the president of the United States.'"), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 861; *Gazette of the United States* (June 3, 1789) (describing the introduction of the Foreign Affairs bill), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 798.

¹²⁹ 1 ANNALS OF CONG. 455-577 (1789) (Joseph Gales ed., 1834).

purposely does not focus on these four days, mainly because these debates did not separate the presidentialists from the congressionalists. As long as the only question on the table was who should exercise the removal power, many pro-President speakers, including Madison, flexibly mixed both congressionalist and presidentialist arguments, relying on both legislative and executive powers and making policy arguments more consistent with congressionalism.

There are some highlights from this week worth noting. Early on in the very first day of these debates—indeed, in just the second speech—William Loughton Smith of South Carolina, the leading “impeachment only” member, came prepared with *The Federalist*. Smith argued that he could see only one other constitutional possibility for removing executive officers aside from the impeachment clauses: the “senatorial” position.¹³⁰ He quoted Hamilton’s *Federalist* No. 77 at length, which provided, “[t]he consent of [the Senate] would be necessary to displace as well as to appoint.”¹³¹ Smith recounted the following exchange in a letter:

[T]he next day Benson sent me a note across the house to this effect: that *Publius* [Hamilton] had informed him since the preceding day’s debate, that upon more mature reflection he *had changed his opinion* & was now convinced that the [president] alone [should] have the power of removal at pleasure; [h]e is a Candidate for the office of Secretary of Finance!¹³²

Smith seemed to imply that Hamilton was changing his opinion with personal ambition and insider patronage “court” politics on his mind.

Hamilton was not the only *Federalist* author changing his mind. Madison, as noted earlier, had signaled a congressionalist understanding in *Federalist* No. 39, and in the initial round of departmental debates on May 19, 1789, he reiterated the congressional grant position,¹³³ along with presidentialist arguments. In the mid-June debates, he acknowledged that he initially had favored the Senate position. Madison said his “original impression” was that “the same power which appointed officers should have the right of displacing

¹³⁰ See The Congressional Register (June 16, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 861.

¹³¹ *Id.*

¹³² Letter from William Smith to Edward Rutledge (June 21, 1789), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 29, at 832–33; Prakash, *New Light*, *supra* note 7, at 1038 n.121 (describing the correspondence between Smith and Benson); see also GIENAPP, THE SECOND CREATION, *supra* note 3, at 154–55 (“While [Benson’s note] complicated Smith’s use of the *Federalist*, it only reinforced his broader point: that his opponents were treating the Constitution as an object of freedom rather than constraint.”).

¹³³ The Congressional Register (May 19, 1789) (“[I]t is in the discretion of the legislature to say upon what terms the office shall be held, either during good behaviour, or during pleasure.”), reprinted in 10 DOCUMENTARY HISTORY, *supra* note 111, at 722, 729–30.

them”—i.e., the Senate.¹³⁴ However, he embraced the presidential side for a little over one full week: June 16 to June 24. (As we shall see below, he reversed again on June 29 during the Treasury debates, proposing an independent comptroller and questioning whether there had a broader decision from the Foreign Affairs debate).¹³⁵

On Friday, June 19, after three full days of debate, the House defeated the senatorials' motion to remove Madison's explicit clause by either a 33–20 or a 34–20 vote (with no recorded roll call).¹³⁶ A coalition of congressionalists and presidentialists had agreed the principal officer would be “removable by the president.”¹³⁷ All seemed set to move forward with a clear statement on a President's removal power over the Foreign Affairs Department, albeit without a clear statement about the basis for this power.

This long debate only seemed to be settled. Just three days later, this resolution would be undone and put at risk, but for less textual clarity, not for more.

B. June 17–21: Maclay's Diary Recorded Senate Opposition

The Senate has always been a formal problem for the “Decision of 1789,” and not just because its 10–10 tie in July was hardly evidence of consensus. The Senate also had no official legislative record, so it is difficult to know if all ten “yes” votes were presidentialist, if some were congressionalist, or if some were voting merely for pragmatic and untheorized compromise, driven by a desire to pass a bill and move on with an urgent summer agenda.

¹³⁴ The Daily Advertiser (June 18, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 845–46.

¹³⁵ See *infra* Section VI.A; Jed Handelsman Shugerman, *Presidential Removal: The Marbury Problem and the Madison Solutions*, 89 FORDHAM L. REV. 2085, 2102–08 (2021) [hereinafter Shugerman, *Presidential Removal: The Marbury Problem*] (discussing Madison's proposal for an independent comptroller). Perhaps Madison was a presidentialist only for the most executive of departments, Foreign Affairs and War, and otherwise he was a congressionalist. Alternatively, Madison's fluctuating arguments may reflect his changing political interests over time, rather than reflecting any original public meaning. See, e.g., MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 239–240 (2015) (discussing Madison manipulating records and recollections in the early republic to suit his political agenda); see also *infra* Part VIII.

¹³⁶ The official record was 34–20. 1 ANNALS OF CONG. 576 (1789) (Joseph Gales ed., 1834). The next day, *The Gazette of the United States* reported a vote of 33–20. *Gazette of the United States* (June 19, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 993. See also Foreign Affairs Bill [HR-8] (June 2, 1789), *reprinted in* 4 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789–3 MARCH 1791, at 695 n.2 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) [hereinafter 4 DOCUMENTARY HISTORY] (citing the *Gazette's* 33–20 vote). None of the sources provide a roll call vote.

¹³⁷ The Congressional Register (June 19, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 999.

It is puzzling why judges and scholars have not focused on Senator Maclay's detailed notes on the removal debate. The diary is no new archival discovery. Maclay's diary has been a widely cited and definitive resource for the first Senate's drafting of the Judiciary Act and other proceedings.¹³⁸ Chief Justice Taft and modern unitary scholars cited Maclay's diary for the Senate vote count on the Foreign Affairs Act,¹³⁹ but they did not discuss Maclay's long records of the debate and missed its anti-presidentialist significance.¹⁴⁰

Maclay showed a sophisticated understanding of the constitutional arguments. He was a well-respected lawyer, a veteran of the Revolution, a former member of the Pennsylvania executive council, former state judge, and a former state legislator.¹⁴¹ He was also the very first person chosen for the new Congress—by a near-unanimous vote of the Pennsylvania legislature.¹⁴² He was so widely respected that he was appointed to the Senate committee that drafted the Judiciary Act.¹⁴³ Maclay entered the Senate as a Federalist, but then shifted to an anti-administration critic of centralized power.¹⁴⁴

¹³⁸ For sources citing Maclay's diary, see *Trump v. Vance*, 140 S. Ct. 2412, 2435 (2020) (Thomas, J., dissenting); *Clinton v. Jones*, 520 U.S. 681, 695 (1997); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 60, 63, 67, 72, 76, 96-99, 109 (1923); Akhil Reed Amar & Neal Kumar Katyal, Commentary, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 718 (1995); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 846 (2006); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1600-01 (1990); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RESERVE L. REV. 1451, 1491 n.144 (1997).

¹³⁹ See, e.g., *Myers v. United States*, 272 U.S. 52, 115 n.1 (1926); Prakash, *New Light*, *supra* note 7, at 1032 n. 78; Calabresi & Yoo, *supra* note 138, at 1491 n.144.

¹⁴⁰ To their credit, Martin Flaherty and Curtis Bradley touched very briefly on the diary in 2004, but they missed its significance. See Bradley & Flaherty, *supra* note 3, at 662-64. Still, their reference to Maclay's diary makes it even more surprising that Prakash missed it in his response two years later. Charles Thach, in taking a presidentialist interpretation of the First Congress in 1923, also quoted from Maclay's notes, but only from the early days of the debate. See THACH, *supra* note 15, at 155-57.

¹⁴¹ Introduction to the Diary of William Maclay, in 9 DOCUMENTARY HISTORY, *supra* note 39, at xii; *Maclay, William*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguide.congress.gov/search/bio/Mo00031> [<https://perma.cc/PA47-GBG7>]; Andy Trees, *The Diary of William Maclay and Political Manners in the First Congress*, 69 PA. HIST. 210-11 (2002).

¹⁴² Introduction to the Diary of William Maclay, in 9 DOCUMENTARY HISTORY, *supra* note 39, at xii; Trees, *supra* note 141, at 212.

¹⁴³ Warren, *supra* note 138, at 57 (naming Maclay as a member of the committee tasked with drafting the legislation to create the judiciary).

¹⁴⁴ See Introduction to the Diary of William Maclay, in 9 DOCUMENTARY HISTORY, *supra* note 39, at xi-xvi (pointing out Maclay's opposition early in his Senate career to the Washington Administration's foreign policy, military plans, and recommendations for funding the federal and state governments' debts, as well as his lowered image of President Washington himself). He became a skeptic of presidential power, but he also offered an idiosyncratic view in favor of a unilateral presidential power to create offices. That view was consistent with the English Crown's power to create new offices as a practical balance for the traditional property-law limits on the English Crown's discretion to remove officers. See E. Garrett West, *Congressional Power Over Office Creation*, 128 YALE L.J. 166, 188-

Admittedly, he was vain and cranky, and he loathed John Adams, so his diary must be taken with a grain of salt.¹⁴⁵ He may have been insecure and mildly paranoid, but there is little reason to doubt his credibility on the substance of this debate.¹⁴⁶ Maclay's version is roughly corroborated by the fragmentary notes of Vice President Adams and three other senators, collected in the same volume of the *Documentary History of the First Federal Congress*.

Maclay's diary reveals a major clue about why Madison may have retreated between June 19 and June 22: the Senate blocked Madison's anti-British tariff program, a debate that historians identify as one of the most important of the entire First Congress.¹⁴⁷ The Senate and House were fighting over the Tariff Act the same week as the long removal debate over the Foreign Affairs departmental bill (June 15 through 19). Madison had added a pro-French, anti-British fee to the tariff bill, setting a rate of thirty cents per ton for vessels from "powers with whom the United States have formed treaties" (e.g., France), but fifty cents per ton from other countries.¹⁴⁸ Maclay strongly supported Madison's anti-British tariff measures,¹⁴⁹ and he closely tracked its fate. Both the Senate Legislative Journal and Maclay's diary indicate that the Senate rejected this provision and many others from the House bill on

89 (2018) (arguing that Maclay's support of the President's ability to create new offices without Senate consent tracked the British Constitution's recognition that such powers belong to the monarch).

¹⁴⁵ See Introduction to the Diary of William Maclay, in 9 DOCUMENTARY HISTORY, *supra* note 39, at xi-xiii, xv-xvi (detailing Maclay's caustic and pessimistic attitude as well as his negativity towards Adams upon joining the Senate).

¹⁴⁶ Maclay never revealed his diary, and, at the time of his death, it appears that Maclay had taken no steps to pass down his diary and probably did not expect his diaries to be published. *Id.* at xii-xvi. After his nephew discovered the hidden diaries in 1804, seemingly incidentally, it took years to get them published in 1890. *Id.* at xvi. It was not until 1988 that the *Documentary History of the First Federal Congress* series made them more widely available, nearly a century after the Foreign Affairs debate. *Id.* at xvi-xvii.

¹⁴⁷ Cf. BORDEWICH, *supra* note 37, at 13, 38-42 (discussing the "bold agenda of duties and tariffs" and that "[t]o enact the bills would require all the persuasive power that Madison could muster"); FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 134-135 (1985) (discussing Madison's tariff bills in the context of his economic, commercial, and foreign policy vision). One key congressionalist noted the long unresolved House removal debate in the same paragraph as "much [d]ifficulty concerning the Impost Bill" from the Senate. Letter from Thomas Harley to Jasper Yeates (June 19, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 814; *see also* Letter from William Bingham to James Madison (June 17, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 796.

¹⁴⁸ See Committee of the Whole House Resolutions (Apr. 21, 1789) (providing legislative history of the Impost Act, including the amounts), *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789-3 MARCH 1791, at 967 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) [hereinafter 5 DOCUMENTARY HISTORY]. For the origin as Madison's proposal, see Madison Resolution (Apr. 8, 1789), *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 144, at 952-54.

¹⁴⁹ Diary of William Maclay (June 17, 1789) (expressing his support for the tariff measures), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 38, at 81.

Wednesday, June 17.¹⁵⁰ Then, the House responded immediately with a new version that retained the anti-British provision.¹⁵¹ On Friday, June 19, Maclay noted senators' frustration with the House and their focus on choosing forceful language to express their displeasure with the anti-British measures.¹⁵² Even though Maclay sympathized with the House bill, he worried that the House was being too stubborn and "differing for the sake of the [s]port."¹⁵³ Maclay indicates that the Senate was digging into a fight with the House on the very same day the House was voting on its Foreign Affairs bill, with the "removable by the president" language that would likely provoke key senators even more. The House and Senate would resolve the tariff fight with more compromise over the next month.¹⁵⁴ It seems likely that they turned to compromise in other conflicts between June and July—such as in the departmental and removal bills. A shift to ambiguity would have been one possible compromise.¹⁵⁵

¹⁵⁰ Journal of the First Session of the Senate (June 17, 1789), *reprinted in* 1 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789–3 MARCH 1791, at 68–69 (Linda Grant De Pauw, Charlene Bangs Bickford & LaVonne Marlene Siegel eds., 1972) [hereinafter 1 DOCUMENTARY HISTORY]; Diary of William Maclay (June 17, 1789) (noting that his efforts on behalf of the measure was in vain), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 81. There are some ambiguities in the legislative history on the exact date that the amendments were rejected. *See* Impost Act [HR-2] (July 4, 1789) (noting Senate debate on the bill on June 11 rather than June 17), *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 148, at 951.

¹⁵¹ Diary of William Maclay (June 19, 1789) ("[T]he [I]mpost Bill [w]as sent back from the House of Representatives, with an almost total rejection of our amendments . . ."), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 38, at 83.

¹⁵² *See id.* at 84 ("[A colleague] made a distinction . . . between the [w]ord insist and adhere . . . and it was carried to use the [w]ord *insist*").

¹⁵³ *Id.*

¹⁵⁴ *See* Impost Act [HR-2] (July 4, 1789) (detailing the timeline of back-and-forth between the House and Senate), *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 148, at 951–52; Conference Committee Report (June 27, 1789) (noting areas of disagreement between House and Senate on amendments), *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 148, at 983; Letter from James Madison to Thomas Jefferson (June 30, 1789) (detailing the substantive disagreements and compromises on the tariffs), *reprinted in* 12 THE PAPERS OF JAMES MADISON 268 (Charles F. Hobson, Robert A. Rutland, William M.E. Rachal & Jeanne K. Sisson eds., 1979).

¹⁵⁵ As discussed below, Maclay's diary indicates that when the Senate took up the Foreign Affairs bill in July, there was no majority for even the watered-down removal language. *See infra* Part IV. From Maclay's account, the bill had been poised to fail by a vote of 8–12, or perhaps 7–13, but several senators switched sides and delivered surprise votes late in the debate, which Maclay suggested were the results of "the Court party . . . procuring [r]ecantations or [v]otes," and hinting that votes were bought and "sold." Diary of William Maclay (July 16, 1789) (referring to Dalton, Bassett, and Paterson), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 114–15. If the opaque language passed only by a tiebreaker, and only after intense lobbying, it seems the House presidentialists had good reason to worry that their original explicit removal clause would fail by a vote or two in a hostile Senate. Maclay's account of last-minute backroom lobbying included a note that Representative Fisher Ames, Madison's ally, was coordinating with pro-Administration Senators in July. *See* Diary of William Maclay (July 15, 1789) (referring to Ames), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 38, at 113. It seems likely that Madison and his allies would have been coordinating with Senators in June, too.

In the middle of the impasse over tariffs, and during the key weekend in question right before Madison and Benson's Foreign Affairs flip, Maclay indicated that senators and representatives were talking about the legislative developments. On Sunday, June 21, Maclay wrote that two members of the House, Clymer and Fitzsimons, "passed by" and he "[w]alked a [s]hort way with them" and "gave them [his] [o]pinion in plain language that the [c]onfidence of the [p]eople was departing from [u]s, owing to our unreasonable delays."¹⁵⁶ Maclay's diary does not suggest that he was negotiating a compromise on trade and removal. But Maclay reminds us that senators and representatives were working in the same building, living in the same city, and taking the same walks. Madison and Benson surely had conversations with senators about both the tariff and removal disagreements. The most plausible explanation for Madison's reversal between June 19 and June 22 is that representatives were negotiating or strategizing with senators that weekend. Just two weeks later, one member of the House already had a roughly accurate head count of the Senators' leanings: seven for presidential removal, and thirteen against.¹⁵⁷

This context is a better explanation for why Madison and Benson suddenly abandoned the explicit "removable by the president" language that they had won a few days earlier in favor of compromise language that was more ambiguous and more acceptable. Given what Maclay recorded, Madison likely was engaged in negotiations with the Senate on a series of conflicts, and he had reason to worry about Senate opposition. Madison probably knew that he also did not have the votes in the House for a clear constitutional statement abandoning congressional powers.

C. Monday, June 22: Removing "Removable" and Adding Ambiguity

After winning a vote for the explicit removal clause, Madison and Benson returned from the weekend on Monday, June 22 to delete it and propose a more cryptic clause. They were likely worried about an explicit clause escalating the conflict between the House and Senate, but Benson claimed the change "would more fully express the sense of the [House], as it respected

¹⁵⁶ Diary of William Maclay (July 15, 1789) (referring to Clymer and Fitzsimmons), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 38, at 84.

¹⁵⁷ Letter from William Smith (S.C.) to Edward Rutledge (July 5, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 960; *see also* Letter from Paine Wingate to Jeremy Belknap (July 6, 1789) (showing a senatorial Senator predicting both sides will be "obstinate"), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 970; Letter from Ralph Izard to Edward Rutledge (June 24, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 849 ("The House of Representatives are very jealous of the Senate [and] are desirous of curtailing those powers . . .").

the constitutionality of the decision which had taken place.”¹⁵⁸ This debate would force the majority for some kind of a presidential removal power to split along the lines of a constitutional interpretation: Article I “necessary and proper” legislative powers versus Article II implied executive powers. This split opens up a clarifying “Decision Day” approach, when members in the majority had to choose a side for the first time.

Before June 22, when the House voted 33 to 20 to retain general language in the original bill that the Secretary of Foreign Affairs was “to be removable from office by the President of the United States,”¹⁵⁹ representatives supporting the presidentialist and congressionalist approaches teamed up to defeat senatorialism. It was still an undifferentiated mix without much clarity about the size of the first two camps, or if they were separate camps at all. The supporters of the removal language could—and did—offer both kinds of arguments in their speeches.¹⁶⁰ Even Madison mixed congressionalism into his arguments.¹⁶¹

But on Monday, June 22, the Madison/Benson proposal forced the two sides to debate against each other clearly, and it is appropriate to weigh speeches on this pivotal date much more heavily. This section summarizes each speech that day to clarify categorizations, sometimes correcting the scholarly record, and establishing that the “yes/no/yes” pivotal bloc was not enigmatic, but generally congressionalist.

This Article further argues that Madison and Benson used strategic ambiguity on Monday, June 22, along with a sly sequence of votes, to divide

¹⁵⁸ Gazette of the United States (June 24, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1027.

¹⁵⁹ See Foreign Affairs Bill [HR-8] (June 2, 1789), *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 136, at 694; *id.* at 695 n.2 (noting that a motion to strike out the removability language was rejected by a vote of 33–20 on June 19); Gazette of the United States (June 20, 1789) (recounting the 33–20 vote on June 19), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 993. *But see* The Congressional Register (June 19, 1789) (reporting the June 19 vote total as 34–20 against striking the removal language), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1024.

¹⁶⁰ For examples among House members who later separated into either camp, see Appendix II, *supra* note 12, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359596 [<https://perma.cc/V6GA-NZJP>]. Even the unitary theorists concede that the pivotal members may have supported both theories (though they overclaim presidentialism in this messy mix). See Prakash, *New Light*, *supra* note 7, at 1048 (“[S]ome Representatives may have favored both the executive-power theory and the congressional-delegation theory.”). For clarification that more of these members favored congressionalism, but not presidentialism, see Section II.E and Appendix II, *supra* note 12, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359596 [<https://perma.cc/V6GA-NZJP>].

¹⁶¹ See The Congressional Register (May 19, 1789) (describing Madison’s view that the legislature’s discretion to specify the terms under which an office may be held can be inferred from its power to establish those offices), *reprinted in* 10 DOCUMENTARY HISTORY, *supra* note 111 at 722, 729–30.

and conquer the majority that opposed them.¹⁶² Unitary presidentialism would have lost a yes-or-no vote decisively, but Madison was able, first, to form a coalition combining presidentialists and congressionalists to add his ambiguous clause. Then, he shifted and formed an unlikely coalition with the senatorials to delete the more explicit clause despite their opposite motivations. Senatorials wanted no clear signal of presidential removal power, whereas presidentialists claimed that they wanted a weaker signal in order to imply a stronger foundation from the Constitution (some acknowledged that the weaker signal had an advantage of ambiguity).

The day began with Benson, supported by Madison, proposing to delete the explicit power grant in favor of merely a contingency plan with an unclear reference to removal tacked on at the end.

The first clause of the original bill established a Secretary of the Department of Foreign Affairs to be the principal officer of the department and “to be removable by the President.”¹⁶³ The second clause created a chief clerk under the Secretary who “[i]n case of vacancy in the said office of Secretary . . . for the department of foreign affairs” shall take charge of the records of the department during such vacancy.¹⁶⁴

The new amendments eliminated the reference to removability in the first clause and amended the second clause to read:

[T]here shall be . . . 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.¹⁶⁵

Benson and Madison, who had fought for almost an entire week for the explicit “removable by the president” clause, were now back after the weekend calling for its removal. A week earlier, in arguing for the earlier explicit language, Madison proclaimed that clarity was important for two reasons. He

¹⁶² The Condorcet Paradox is a public choice theory illustrating the problems of collective choices being divided among three or more alternatives and demonstrating how the winner of a vote might not actually be the most popular choice overall. Instead, the apparent “winner” might be the result of multiple choices and vote sequencing. See generally Nicolas de Condorcet, *The Political Theory of Condorcet* 69-80, 152-66 (Univ. Oxford Soc. Stud. Fac. Ctr., Working Paper No. 1/89) (Fiona Sommerlad & Iain McLean trans., 1989). This paradox is frequently the foundation of arguments for ranked-choice voting. See, e.g., Edward B. Foley, *Third-Party and Independent Presidential Candidates: The Need for a Runoff Mechanism*, 85 *FORDHAM L. REV.* 993, 1017-20 (2016) (considering Condorcet voting but noting its drawbacks and ultimately advocating for an alternative voting method).

¹⁶³ See Foreign Affairs Bill [HR-8] (June 2, 1789), reprinted in 4 *DOCUMENTARY HISTORY*, supra note 136, at 694.

¹⁶⁴ Gazette of the United States (June 24, 1789), reprinted in 11 *DOCUMENTARY HISTORY*, supra note 25, at 1027-28.

¹⁶⁵ Foreign Affairs Act, ch. 4, § 2, 1 Stat. 28, 29 (1789).

argued, first, that *explicit* removal language would promote the presidentialist theory.¹⁶⁶ Second, explicit removal language was important for giving clear notice to office-holders about their job security: “we ought to know by what tenure the office should be held” to avoid the risk that “gentlemen may hesitate . . . [.] [h]ence it is highly proper that we and our constituents should know the tenure of the office.”¹⁶⁷

But suddenly, clarity was a problem: the original language appeared to be implying Congress, rather than the Constitution, was creating the power. Madison announced that the earlier language—“removable by the President”—had its own ambiguity problem, because it created a doubt about whether the Constitution or Congress was bestowing the power.¹⁶⁸ The new language, about what would happen *if* a President removed an officer, would resolve this ambiguity and signal that the power pre-existed Congress.¹⁶⁹

Madison’s protests against ambiguity ring hollow. Not only does the new text fail to mention any constitutional interpretation, it also fails on a more basic level to clarify or establish a presidential removal power. Benson and Madison’s new clause reads as a contingency plan for a future event. In this context, “whenever [the Secretary] shall be removed” could refer to a situation where a future Congress delegates removal power; or where a future President claims a removal power unilaterally; or where removal is one step in an undefined process, which might include the Senate or a court permitting a removal, and the President “removing” only after such permission. If Madison really thought his new text expunged ambiguity, he had a funny way of showing it. Other House members were not buying Madison’s explanations, and they immediately piled on with ridicule and insults. Representative Page complained that Benson and Madison were wasting time with confusion.¹⁷⁰ Representative Smith, another opponent of presidential removal, accused Madison of retreating from the explicit text in favor of a “side blow,” as a sign that Madison knew he had been “defeated by fair argument on due reflection.”¹⁷¹ If Madison would “infringe[] on the

¹⁶⁶ See The Congressional Register (June 16, 1789) (suggesting that the original removal provision may have been “a mere declaration of the clear grant made by the constitution”), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 866.

¹⁶⁷ The Congressional Register (June 18, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 986-87.

¹⁶⁸ See The Congressional Register (June 22, 1789) (“[Madison] wished every thing like ambiguity expunged, and the sense of the house [on the question of presidential power to be] explicitly declared.”), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 1029.

¹⁶⁹ *Id.* (stating Madison’s belief that the new language “expressed . . . the meaning of the constitution”).

¹⁷⁰ *Id.* at 1028 (remarking that Benson and Madison were “shifting the ground” and now the House votes “would not declare truly the question which had so long been contested”).

¹⁷¹ *Id.* at 1029.

constitution,” Smith jeered, “it [would be] more candid and manly to do it in direct terms than by an implication like the one proposed.”¹⁷²

Madison defended himself, arguing that the new clause “had no other effect than varying the declaration which the majority were inclined to make; consequently, there was no room for exultation on the part of the minority.”¹⁷³ In other words, his majority was just rephrasing the same point, and he was telling the senatorial bloc not to celebrate a retreat.

Page, a senatorial, disagreed. He argued that Madison and Benson “had changed their ground,” by backing away from “a legislative declaration on [the constitutional] point, which they had heretofore so strongly insisted upon.”¹⁷⁴ From their new proposal, Page argued, any constitutional point “was now left to be inferred.”¹⁷⁵ He asked his colleagues in the majority “if they had not evacuated untenable ground.”¹⁷⁶

It is important to pause here to note that Madison’s and Benson’s opponents understood the politics of the moment. They called out Madison’s new language for being ambiguous, but they weren’t confused about his motives: they called him out for retreating. It may not be an obvious retreat, because on the previous Friday, Madison had just won a vote for the removal language he had proposed in May. On Monday, he asked to replace it. Yet his opponents immediately mocked him for having been “defeated” and “evacuat[ing] untenable ground.”¹⁷⁷ And Madison was reduced to making self-contradicting nonsense arguments.

Madison’s opponents seem to have perceived some other political problem facing presidential removal, and it is probably the same problem that Senator William Maclay recorded: Senate opposition to giving up their own power over removal.

When it came time to vote, the House passed Benson’s first amendment (adding the ambiguous “whenever . . . removed” contingency plan) by a vote of 30–18 (Vote 1).¹⁷⁸ Then the House passed his motion to delete the explicit language (that the Secretary was “to be removable from office by the

¹⁷² *Id.*

¹⁷³ *Id.* at 1030. Madison’s and Benson’s arguments suggesting that their amendment merely clarified the majority’s position are particularly unpersuasive because they would have been well-aware of the use of preambles or “whereas” clauses to serve this exact purpose in other statutes. The First Congress often included them, see *infra* Section III.D, and Madison had been a co-author of the Virginia Constitution’s long preamble in 1776.

¹⁷⁴ The Congressional Register (June 22, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1030.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1029–30.

¹⁷⁸ Journal of the First Session of the House of Representatives (June 22, 1789), *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 108, at 91–92.

President”) by a vote of 31–19 (Vote 2).¹⁷⁹ The vote on the final bill two days later, June 24, was 29–22 (Vote 3).¹⁸⁰

These similar vote totals might appear to reflect votes by a stable majority of roughly 30 and an opposition of roughly 20, but these three votes reflect the rotation of three different factions, each of similar size. The tables at the end of this Article categorize each representative, but here is a summary:

- 1) Thirteen voted “yes,” “yes,” “yes” (YYY) following Madison and Benson’s presidentialist strategy: a) adding the new contingency plan with an ambiguous reference to presidential removal; b) deleting the explicit removal language; and c) voting for the final bill with the contingency/ambiguity language. This faction correlates with “presidentialism” following the Madison/Benson plan, but some of these votes could have been agnostic about the constitutional theory and were merely voting for the strategic ambiguity to get the bill through the Senate. It is possible—and even likely—that some of these votes were not actually “presidentialist” for the converse reason that unitary theorists ask whether some “yes/no/yes” voters were congressionalists: *favoring* ambiguity, rather than opposing it.
- 2) Sixteen voted “no,” “yes,” “no” (NYN): a) opposing the new contingency plan with ambiguous reference to presidential removal; b) in favor of deleting the explicit removal language; and c) opposing the final bill with contingency/ambiguity. This faction included two members of the small “impeachment only” group,¹⁸¹ but otherwise, it is easily identifiable as “senatorial.”¹⁸²
- 3) Thirteen voted “yes,” “no,” “yes” (YNY): a) in favor of the new contingency plan with an ambiguous reference to presidential removal; b) voting no in order to *keep* the original explicit removal language; and c) voting for the final bill with the contingency/ambiguity language. The historical debate is about how to categorize this group, which Corwin labeled “congressional,” but Prakash has called “enigmatic.”¹⁸³ This Article will call it “pivotal,”

¹⁷⁹ *Id.* at 93.

¹⁸⁰ Journal of the First Session of the House of Representatives (June 24, 1789), *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 108, at 95.

¹⁸¹ See *infra* Appendix I, Tables B, C (Smith (SC) and Huntington).

¹⁸² See *infra* Appendix I, Tables B, C. The remaining fourteen were joined by three other members who missed a vote but were explicitly senatorial, bringing the final total to 17.

¹⁸³ See CORWIN, THE PRESIDENT’S REMOVAL POWER UNDER THE CONSTITUTION, *supra* note 3, at 1475 n.22; Prakash, *New Light*, *supra* note 7, at 1043.

both because it was their pivoting between factions that allowed the final bill to pass, and because this debate turns on them.¹⁸⁴

This initial chart helps to visualize the factions, organized by the final 29–22 vote¹⁸⁵ on the bill on June 24 (left in favor, right opposed):

Table 1: Voting Factions by the Final 29–22 Vote on June 24

In favor of Foreign Affairs Bill:		Opposed to Foreign Affairs Bill:	
Presidential or Strategic (YYY)	13	Senatorial (NYN)	16
<i>Pivotal bloc</i> (generally YNY) ¹⁸⁶	13	Impeachment only ¹⁸⁷	3
Unclear final “yes” votes ¹⁸⁸	3	Unclear final “no” votes ¹⁸⁹	3
Total votes: 29		Total votes: 22	

The unitary interpretation of the House turns on the pivotal bloc of yes/no/yes voters, but unfortunately, the unitary theorists do not have evidence to support claiming more than two of them as their own. Of the yes/no/yes members who spoke in these House debates, five endorsed congressionalism, and Boudinot was the only presidentialist.¹⁹⁰ Even if one could count all six silent members of the pivotal group as “presidentialist,” despite their silence, that total still would not be half of the House. And context suggests that they were not likely presidentialists.

In *Myers*, Taft reached his conclusions about the Decision of 1789 without focusing much on the House votes, instead citing unclear secondhand Founding-era claims about what happened.¹⁹¹ Brandeis (dissenting in *Myers*) and his ally

¹⁸⁴ See *infra* Appendix I, Table B. Boudinot and Baldwin are included here and in the Y/N/Y column. Boudinot missed the first vote, but he surely would have voted “yes.” Baldwin missed the last vote, but also would have voted yes.

¹⁸⁵ This chart excludes the members who missed this final vote: Baldwin, Bland, Wadsworth. Their explicit positions are tallied in Appendix I, Table C, *infra*.

¹⁸⁶ This includes the second column (“Pivotal”) of Table B. See *infra* Appendix I, Table B.

¹⁸⁷ This group includes Smith (SC), Huntington, and Jackson.

¹⁸⁸ Cadwalader, Huger, and Schuerman are in the third column (“Unusual Mix” of Table B). Cadwalader is counted at the end as “less clearly” congressional based on his letters. See *infra* Appendix I, Table C.

¹⁸⁹ This includes Leonard, Thatcher, and Tucker (“Unusual Mix” of Table B). Tucker would be explicitly congressional in his speeches. See *infra* Appendix I, Table C.

¹⁹⁰ See discussion *supra* Section III.E concerning Fitzsimons.

¹⁹¹ *Myers v. United States*, 272 U.S. 52, 144 (1926) (quoting Chief Justice Marshall’s 1807 biography of George Washington, *Life of Washington*). Brandeis replied to Taft, “[i]n *Marbury*, it was assumed, as the basis of decision, that the President, acting alone, is powerless to remove an inferior

Corwin disputed this claim, but with little detail, some errors, and no attempt to count votes.¹⁹² Prakash defends Taft and the unitary interpretation by claiming that the bloc of votes that Brandeis and Corwin claimed as “congressional” were more indeterminate, that they could have been voting to keep the original clause because it established a power clearly, not because they had a congressional theory for the power.¹⁹³ Prakash labeled them “enigmatic,” but it is unclear why he assumed that these votes were enigmatic, while he assumed that the yes/yes/yes votes were unquestionably presidentialist. To be more balanced, the same interpretive problems apply to both silent groups.¹⁹⁴

June 22 sharpened a line between the two camps, but even then, the debate was still confusing. Benson’s and Madison’s line in the sand was more *sand* than *line*: their new proposed language was so confusing and ambiguous that the first speeches of the day were a mix of their colleagues mocking their retreat and seeking clarification.¹⁹⁵ Benson claimed the ambiguous language would “establish a legislative construction of the Constitution.”¹⁹⁶ But instead of explaining where this “establishing” was in the text, Benson gave an opposite explanation more consistent with strategic ambiguity and his hope that his amendment “would succeed in reconciling both sides of the house in the decision.”¹⁹⁷

Benson seemed to be admitting the real strategy: reconciliation, rather than clarification. Indeed, ambiguity was more likely to reconcile the opposing sides, rather than establish one side as a winner. A less precise statute could let both sides declare victory and then pass through the Senate. Perhaps Benson was also hinting about reconciliation with the other chamber and “quieting the minds” of skeptical senators.¹⁹⁸ Another House member would address this possibility more directly at the end of the day. In the

civil officer appointed for a fixed term with the consent of the Senate; and that case was long regarded as so deciding.” *Id.* at 242 (Brandeis, J., dissenting) (citations omitted).

¹⁹² See *Myers*, 272 U.S. at 285 nn.73 & 75 (Brandeis, J., dissenting) (noting the voting alignments without highlighting the specific vote totals within each faction); Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 361 n.22 (1927) (describing the general alignment of the three groups); CORWIN, *THE PRESIDENT’S REMOVAL POWER UNDER THE CONSTITUTION*, *supra* note 3, at 1475 n.22 (same). Corwin counted Laurance as a vocal congressionalist. See *id.* However, Prakash is right that Laurance spoke in favor of both sides throughout the debate. See Prakash, *New Light*, *supra* note 7, at 1039 n.133. He undercounted the senatorial and overcounted the congressional, perhaps because he transposed the numbers (it is more likely that he actually counted sixteen senatorials and thirteen congressionals).

¹⁹³ Prakash, *New Light*, *supra* note 7, at 1043.

¹⁹⁴ This Article addresses Prakash’s “enigmatic” framing as a general mistake in Section III.E. His specific misreadings are summarized in Section II.E and Appendix II, *supra* note 12, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359596 [<https://perma.cc/V6GA-NZJP>].

¹⁹⁵ See *supra* notes 170–176 and accompanying text.

¹⁹⁶ The Congressional Register (June 22, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1028.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

meantime, the opponents of a presidential removal power mocked this move from the clear to the ambiguous as a dodge.¹⁹⁹

At this point, members of the swing yes/no/yes bloc took the floor, and they were generally not “enigmatic,” as Prakash would describe them, about their congressionalist views. Sedgwick had already been clear on June 18 that this question was “subject to legislative discretion,”²⁰⁰ and he rose again to oppose Benson’s motion, emphasizing “legislative determination.”²⁰¹

Benson then tried to clarify the meaning of the votes: a “yes” on both motions would mean that Article II guaranteed presidential removal and was a permanent settlement, whereas a “no” vote to retain the “removable” language would be interpreted as a legislative grant that a future Congress could withdraw.²⁰² Madison, similarly, could have refuted the opposition by making this principle clear in the text, but he chose not to. Instead, Madison defensively responded to the taunts of his House colleagues (that he was “shifting” to a “side blow,” “evacuated untenable ground,” and was not being “candid” or “manly”) by implausibly claiming it was really a “declaration.”²⁰³

In earlier speeches, Representative John Laurance had mixed both presidentialist and congressionalist arguments,²⁰⁴ but on the pivotal day of June 22, Laurance took a clearer position as a congressionalist. He rose to explain his “no” vote with a clear congressionalist opening statement: “the legislature had power to establish offices on what terms they pleased.”²⁰⁵ Still, Laurance worried that because judges had tenure “during good behavior,” some members of Congress might “contend” they could give executive officers the same protection and independence; Laurance thought such extensive limits would go too far, because they “might abridge the

¹⁹⁹ See *supra* notes 170–176 and accompanying text.

²⁰⁰ The Congressional Register (June 18, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 983.

²⁰¹ The Congressional Register (June 22, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1029.

²⁰² See *id.* at 1028 (recording Benson’s argument that the “removable by the president” clause “appeared somewhat like a grant” of removal power from the legislature, so replacing that clause with one that assumed the president’s power to remove officers would “establish a legislative construction of the constitution”).

²⁰³ *Id.* at 1028–30. See *supra* notes 170–176 and accompanying text for the taunts.

²⁰⁴ Laurance delivered long remarks on June 17 grappling with these issues. Compare The Daily Advertiser (June 19, 1789) (“He would ask who, by the constitution, had the power of appointing . . . This was given in the strongest language. The appointment was in the[] President, and in him should be also the removal.”), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 887–89, with The Congressional Register (June 17, 1789) (“It is declared [the legislature] shall establish officers by law. The establishment of an officer implies every thing relative to its formation, constitution, and termination; consequently the congress are [authorized] to declare their judgment on each of these points.”), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 907–11.

²⁰⁵ The Congressional Register (June 22, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1034.

constitutional power of the president.”²⁰⁶ Thus, Laurance did refer to both theories, but given the larger context, his view was more congressionalist with a functionalist balance, rather than formally presidentialist. Laurance thought Congress had broad discretion over tenure conditions, but there was a functional limit—“good behavior” tenure would go too far, but other conditions were permissible.

Laurance’s earlier speeches show that he consistently thought Congress could require some conditions, like requiring cause or “incapacity.”²⁰⁷ Over the month of debates, Laurance apparently decided that “good behaviour” was appropriate only for judicial independence, but not for executive officers. Nevertheless, he argued that Congress still had a significant amount of discretion, and a range of lesser conditions were permissible.²⁰⁸ Laurance was thus a congressionalist, given his statements favoring strong congressional protections against removal, even if he had a complex mix of views.²⁰⁹

Then Elias Boudinot of New Jersey, who had endorsed presidentialism in earlier debates, was the only member of the yes/no/yes bloc to endorse presidentialism in the pivotal June 22 debate. He explained that he was breaking from his fellow presidentialists by voting “no,” and voting to keep the explicit “removable” text because he supported “making a legislative declaration, in order to prevent future inconvenience.”²¹⁰ Put simply, the new language was too ambiguous. He also complained that the House had already

²⁰⁶ *Id.*

²⁰⁷ On May 19, Laurance discussed a menu of options for congressional conditions, arguing that it was “the will of the legislature” to choose the “conditions upon which [an officer] shall enjoy the office,” including “good behaviour,” “unfitness and incapacity,” “causes of removal and make the president alone judge of this case,” as well as removal for “any cause [the president] thinks proper.” *The Congressional Register* (May 19, 1789), reprinted in 10 DOCUMENTARY HISTORY, *supra* note 111, at 733.

²⁰⁸ Although Laurance did not have a fully formed notion of the modern independent agency, his list foreshadowed the tools Congress would later use in setting up those agencies. And Laurance was not the first to consider conditions on officer removal, which had a long history in English common law. See Manners & Menand, *supra* note 11, at 28-37 (excavating the history of removal provisions in English and colonial common law).

²⁰⁹ Corwin counted Laurance as congressional. See CORWIN, THE PRESIDENT’S REMOVAL POWER UNDER THE CONSTITUTION, *supra* note 3, at 12 n.22; see also AMAR, *supra* note 18, at 356-57 (describing Laurance as the emblematic congressionalist). Prakash called him “much more equivocal” and “arguably” presidentialist. Prakash, *New Light*, *supra* note 7, at 1054 & n.218. I categorize him in the “less clear” side of the congressionalist column, because he rejected the unitary presidential model of indefeasibility but had a more moderate view of congressional power, with some limits to protect a president’s constitutional role. If the unitary theorists want to claim Laurance as a moderate presidentialist, they would need to concede that some presidentialists explicitly rejected legislative “indefeasibility” and accepted congressional power to set restrictions on presidential powers—a concession that would be fundamentally opposed to the unitary argument in *Free Enterprise* and *Seila Law*.

²¹⁰ *The Congressional Register* (June 22, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 1034.

spent four days on the explicit clause.²¹¹ He preferred to keep the original language, but he just wanted to move on.²¹²

After Boudinot, the next speaker was South Carolina's Thomas Tudor Tucker, the only member who would vote no/no/no. He confessed embarrassment about voting against every proposal, but he explained that he was most forcefully opposed to any constitutional interpretation, whether presidential or senatorial, because the Constitution was entirely silent on removal.²¹³ Tucker had voted against presidential removal the previous week and "doubted if the president was the proper person to exercise this authority."²¹⁴ But now he said he would reverse and vote to keep this language because he preferred the congressionalist approach, as a statute was impermanent and could be repealed.²¹⁵ He now voted "no" to keep the clear "removable" statement in order to reject the Benson/Madison constitutional claim.

Both sides have claimed Thomas Hartley, but he is perhaps the most clarifying congressionalist speaker on June 22, because he was announcing his view—and perhaps coordinating the bloc of congressionalists to express their views—by voting yes/no/yes. Explaining his "no" vote on the second motion to strike the clear statement, he said he "[w]as against striking out, and so would every gentleman be, he trusted, who was not fully convinced that the

²¹¹ *Id.* ("Now, to strike out after such mature deliberation, argued a fickleness which he hoped never to see affect this honorable body. No new arguments have now been urged.")

²¹² One other member of the yes/no/yes swing bloc, Pennsylvania's Thomas Fitzsimons, suggested his support for presidentialism, but only vaguely, and he did not speak on the House floor. See Letter from Thomas Fitzsimons to Benjamin Rush (June 20, 1789) (suggesting that the right answer was to retain the "removable by the president" clause), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 30, at 819-20; Letter from Thomas Fitzsimons to Samuel Meredith (Aug. 24, 1789) (describing the clause as reflecting "[c]onstitutional power"), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 30, at 1389-90. Another significant vote was by Lambert Cadwalader, who voted against both Madison/Benson proposals ("NNY"), and later complained about the lack of clarity that Madison and Benson had created, calling the proposal "scarcely declaratory" of a constitutional principle. Letter from Lambert Cadwalader to James Monroe (July 5, 1789), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 30, at 946. Prakash erroneously considered Cadwalader as a supporter of the "executive power theory" (i.e., presidentialist) among the "enigmatic bloc," based on his overreading of a letter that indicated no preference between the presidentialist or the congressionalist theories, only a rejection of the pro-Senate theory. See Prakash, *New Light*, *supra* note 7, at 1060-61. For further analysis of this overreading, see *infra* Section III.E-F; Appendix II, *supra* note 12, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359596 [<https://perma.cc/V6GA-NZJP>].

²¹³ See The Congressional Register (June 22, 19789) ("I find no words that fix this power precisely in any branch of the government. It must however by implication be in the legislature—or is no where, until the constitution is amended."), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 1034.

²¹⁴ *Id.* at 1035.

²¹⁵ See *id.* ("I would rather a law should pass vesting the power in improper hands, than that the constitution should be wrong construed.")

power of removal [was] vested by the constitution in the president.”²¹⁶ Hartley’s congressionalist statement on June 22 was clear.

Hartley was the last of the pivotal faction to speak. Two remaining members of the faction had been vocally and consistently pro-congressionalist earlier but did not speak on June 22: New York’s Peter Silvester²¹⁷ and Virginia’s Richard Bland Lee.²¹⁸ A final tally from the initial yes/no/yes voting bloc of thirteen is:²¹⁹ four clearly congressionalist, one moderate congressionalist (Laurance), one clearly presidentialist (Boudinot), one less clearly presidentialist (Fitzsimons), and six silent. It was always problematic to claim that the silent members would somehow share the strongest views of

²¹⁶ *Id.* at 1035. Hartley had previously offered mixed arguments, but he emphasized the Constitution’s silence on removal, arguing that the Constitution had “expressly given [the legislature] the power to make all laws necessary to carry the constitution into effect . . . [and] Congress had a right to supply the defect” in case of missing or ambiguous constitutional provisions. The Daily Advertiser (June 17, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 886. Hartley also emphasized Congress’s power under the “necessary and proper” clause several times and he rested on Congress’s “right to exercise their discretion,” given that there was no clause “which forbids this house interfering.” The Congressional Register (June 17, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 906-07. Prakash mistakenly counted Hartley as a presidentialist due to misreading his correspondence. Prakash’s reasons for counting Hartley as presidentialist based on later correspondence do not hold up. *See* Prakash, *New Light*, *supra* note 7, at 1054 (“Hartley’s comments suggest that while he clearly preferred the original language, he was not opposed to the executive-power theory Hartley’s subsequent writings suggest that while he might have preferred the original text, he nonetheless supported the executive-power theory.”). However, the letters that Prakash cited do not indicate support for the executive power theory. Remarkably, Prakash seems to assume the word “principle” could only refer to presidentialist principles, when in fact, the congressionalists had principles, too. *See* Letter from Thomas Hartley to Jasper Yeates (Aug. 1, 1789) (“[I]t would be better to [lose] the Bill than give up the Principle”), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 1209; Letter from Thomas Hartley to Tench Coxe (Aug. 9, 1789) (“I think no [maneuvering] will induce the [m]ajority in our House to give up the Principle.”), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 1261. *See also infra* Section III.E–F and Appendix II, *supra* note 12, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359596 [<https://perma.cc/V6GA-NZJP>].

²¹⁷ *See, e.g.*, Gazette of the United States (June 19, 1789) (“[Congress has] a right to delegate the exercise of [the removal power] to whom they please.”), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1009; *see also* 1 ANNALS OF CONG. 562 (1789) (Joseph Gales ed., 1834) (“Having then the power to create offices, and discharging from office, they have a right to delegate the exercise of it to whom they please.”).

²¹⁸ *See* The Congressional Register (June 18, 1789) (“[T]he constitution vests in congress power to make all laws necessary and proper Have not congress, therefore, the power of making what laws they think proper to carry into execution the powers vested by the constitution in the government of the United States.”), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 963. This long congressionalist speech emphasizing enumerated powers (the Necessary and Proper clause) is consistent with two sentences in his letter referring to “whether the President had, or ought to have, from a fair [c]onstruction of the constitution, a power of removing officers” Letter from Richard Bland Lee to Leven Powell (June 27, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 866-67.

²¹⁹ This tally includes Boudinot, even though he missed the first vote.

presidential power, rather than a moderate or flexible position. In light of these speeches and vote patterns, it was also vanishingly unlikely.

The final speaker before the key vote was John Vining of Delaware. Vining, a yes/yes/yes voter who leaned presidentialist, made an explicit reference to the change to the bill as a strategy for getting it passed in the Senate: “he thought it more likely to obtain the acquiescence of the [S]enate on a point of legislative construction on the constitution, than to a positive relinquishment of a power which they might otherwise think themselves in some degree [e]ntitled to.”²²⁰ The ostensibly permanent constitutional conclusion, designed to cut out the Senate, would also be more likely to win “the acquiescence” of the Senate due to “legislative construction.”²²¹

“Legislative construction” seems to be a hint that the House could impute one meaning, and perhaps the Senate could impute another, and thus “acquiesce” and move on. This was the strategic ambiguity for a skeptical Senate. If it were only “legislative construction,” it could be changed later, or the House and Senate could take such an open-ended clause and suggest different legislative constructions. Vining’s admission crystallizes or at least clarifies Benson’s more cryptic comment earlier that day. Recall Benson’s implausible claim that a vote designed to undo the resolution of the previous week and split the pro-removal majority might “succeed in reconciling both sides of the house in the decision, and quieting the minds of gentlemen.”²²² It seems likely that both Benson and Vining had in mind reconciling both sides of Congress in the decision, and quieting the minds of senators with a more subtle ambiguity. Senator Maclay’s diary is consistent with this interpretation.²²³

A focus on June 22, mixed with other evidence where appropriate, establishes that most of the pivotal faction opposed the presidential view, and thus, the House overall rejected presidentialism. This pivotal—or enigmatic—group of representatives was not as univocal and uniform as the other two factions, but it was still generally congressionalist. After

²²⁰ The Congressional Register (June 22, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 1035-36.

²²¹ *Id.* at 1036. Vining may have been trying out a pretextual point: senators might prefer not to enact a “positive” law statute relinquishing their power. But at least such a statute was reversible in a future Congress. It is not plausible that senators would be more amenable to a permanent surrendering of such powers than a reversible one. More plausibly, the listeners understood that “legislative construction” here was based on ambiguity and compromise. Prakash was confused on Vining, suggesting that his mixed views were indicative of how the “enigmatic” members were sympathetic to presidentialism. See Prakash, *New Light*, *supra* note 7, at 1059-60. However, Vining was a yes/yes/yes voter, so Prakash’s observation should have cut in the opposite direction: some members whom Prakash counted as presidentialist may actually have been more ambivalent or mixed. See *infra* Section III.E.

²²² The Congressional Register (June 22, 1789) reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 1028.

²²³ See *infra* Part IV.

emphasizing the final clarifying round of debate, here is a more accurate categorization of the House factions, organized by the final vote on the bill on June 24:²²⁴ only 15 of 51 votes can be counted plausibly as “presidentialist,” and as explained above and below, there is still reason to think that many of those 15 votes may have been motivated more by a strategy of ambiguity simply to win passage in the Senate, regardless of which theory the members adhered to. There were at least 28 votes against presidentialism, and likely more.

Table 2: Categorization of House Factions after June 22 Debate by the final 29–22 vote on June 24

In favor of Foreign Affairs Bill:		Opposed to Foreign Affairs Bill:	
Presidentialist or Strategic	15	Senatorial ²²⁵	16
Congressionalist	6	Impeachment only	3
Silent pragmatic or congressionalist	6	Unclear final “no” votes	2
Unclear final “yes” votes	2	Congressional (Tucker)	1
Total “yes” votes:	29	Total “no” votes:	22

D. *“A little clause hid in the body of a bill can be called a declaratory act?”: The Founders and the First Congress Often Used Declarations and Explanatory Clauses, but Not Here*

1. The Founding’s Explanatory Drafting Practices: Constitutional Texts

If the theory is that the pivotal group voted “no” to keep the explicit removal language precisely because they preferred clarity, why didn’t the presidentialists simply propose even clearer language, perhaps with a prefatory clause or a preamble, explaining the presidentialist purpose or constitutional interpretation? Prakash admits that “in hindsight,” Benson (or, presumably Madison) should have offered a Congressional resolution announcing the constitutional vesting interpretation, leaving “no doubt.”²²⁶ But this was not a matter of hindsight. It is much more likely that Benson and Madison could foresee that they did not have the votes for such a

²²⁴ For table providing specific members in each camp and vote patterns, see *infra* Appendix I, Table C.

²²⁵ This count does not include Bland, who missed this vote, but is included in Table C as “senatorial” for his express position. See *infra* Appendix I, Table C.

²²⁶ Prakash, *New Light*, *supra* note 7, at 1061 n.262.

resolution in either the House or the Senate. Resolutions in the form of a preamble or an explanatory clause were otherwise a relatively common practice in this era, so it is not merely hindsight bias or Monday-morning-quarterbacking to suggest the form of a purposive clarification.

The Founding generation and the First Congress frequently offered explanatory clauses both in statutes and in constitutional provisions to clarify purposes and meanings. Indeed, the First Congress tended strongly towards the more explicit in constitutional drafting and fixing.²²⁷ Madison helped edit the Declaration of Rights, a long explanatory section of Virginia's 1776 Constitution.²²⁸ Then he drafted explanatory clauses May through June 1789. Madison's own "first amendment" in his draft was a long purposive preamble,²²⁹ and he added explanations to what would become the First Amendment, Second Amendment, and Seventh Amendment.²³⁰

When it came to the formal separation of powers, Madison and the House acknowledged that the implicit was insufficient and passed an explicit amendment borrowing from many state constitutions. Several state ratifying conventions had formally proposed such an amendment in 1788, also displeased with the merely implicit separation of powers from the federal constitution's structure and the three ambiguous vesting clauses.²³¹ On June 8, Madison proposed the explicit amendment:

The powers delegated by this Constitution are appropriated to the departments to which they are respectively distributed: so that the Legislative Department shall never exercise the powers vested in the Executive or Judicial, nor the Executive exercise the powers vested in the Legislative or Judicial, nor the Judicial exercise the powers vested in the Legislative or Executive Departments.²³²

²²⁷ See GIENAPP, *THE SECOND CREATION*, *supra* note 3, at 164-201 (discussing the drafting of an explicit Bill of Rights, rather than reliance on implicit limited powers); *id.* at 225-32 (discussing the rising emphasis on the Constitution as a "complete and static text" in the bank debates as opposed to an "incomplete, dynamic system").

²²⁸ See Madison's Amendments to the Declaration of Rights, in 1 *PAPERS OF JAMES MADISON* 174-75 (William T. Hutchinson & William M. E. Rachal eds., 1962) (detailing Madison's proposed edits concerning religion).

²²⁹ 1 *ANNALS OF CONG.* 431, 433-34 (1789) (Joseph Gales ed., 1834).

²³⁰ *Id.* at 433-36.

²³¹ See, e.g., Amendments Proposed by the Virginia Convention (June 27, 1788), in *CREATING THE BILL OF RIGHTS* 17 (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., 1991) [hereinafter *CREATING THE BILL OF RIGHTS*] (describing an amendment proposed at the Virginia Convention that explicitly described the separation of powers between the three branches).

²³² 1 *ANNALS OF CONG.* 435-36 (1789) (Joseph Gales ed., 1834).

On July 28, the committee reported it out as a proposed Seventeenth Amendment.²³³ Thus, in early June, Madison was drafting explicit constitutional language for the separation of powers, and he could have plugged an explanatory clause into the Foreign Affairs bill as construction of Article II. And yet, Madison did the opposite in late June. The entire narrative of the Madison switch simply does not make sense in light of the drafting practices of the First Congress, especially in the middle of June 1789.

There are three more eye-opening twists in the story of this failed separation-of-powers amendment. First, the Senate rejected it on September 7, which provides more evidence that the Senate was in conflict with the House and was unsympathetic to such formal separation of powers.²³⁴

Second, only two arguments against this amendment were recorded in the House during the August debate. Representative Sherman (a senatorial) declared it was “unnecessary” because he thought the Constitution already implied separation.²³⁵ Apparently, most of his House colleagues believed the implicit approach was insufficient, which—as noted above—raises questions about Madison’s odd explanation. Likely more reflective of the Senate’s opposition, Representative Livermore (another senatorial) objected to the clause, altogether believing that it was “subversive of the Constitution.”²³⁶ Presumably, Livermore thought this amendment would contradict the more general structure of the Constitution’s mixing of powers, such as the presidential veto over legislation, the Vice President’s vote in the Senate, and the Senate having traditionally executive powers over confirmation, treaty, and war powers. One can imagine that senators rejected this amendment because senators were also troubled by the potential mischief and loss of senatorial powers. Examining this vote deepens concerns about whether the Senate had actually endorsed a formal and permanent separation of powers in its Foreign Affairs vote. This vote also helps explain Madison’s strategy of more ambiguity in June: the Senate showed in September that it was in no mood to support more explicit separation of powers language.

Third, and perhaps most remarkably, the proposal’s most vocal supporters in the House were not only the presidentialists-in-chief Madison and Benson, but also the opponents of presidential removal power. Only about seven representatives spoke, but of those, two supporters were ardent senatorials (Sherman and Gerry) and one was an outspoken congressionalist

²³³ House Committee Report (July 28, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 233, at 29, 33.

²³⁴ *See id.* at 41 (documenting the senate’s rejection).

²³⁵ 1 *ANNALS OF CONG.* 760 (1789) (Joseph Gales ed., 1834).

²³⁶ *Id.* at 760-61.

(Sedgwick).²³⁷ If they opposed presidential removal (whether on constitutional grounds or on policy grounds), it seems unlikely that they would support this new amendment if they thought the June debates had already established that removal was a core executive power. Their support for the proposal is additional evidence that members of Congress did not perceive any presidentialist “Decision” emerging from the June votes. In fact, their comfort with such an amendment is some evidence that they may have thought the presidentialist interpretation of removal had failed in June, and thus they were comfortable with more explicit separation of powers language, because it did not have a public meaning of assigning removal powers to the President.

2. The First Congress’s Explanatory Statutory Clauses

Even before the Madison/Benson switch on Monday, June 22, Representative Elbridge Gerry (a senatorial) criticized the original bill’s more explicit clause as useless and too vague, veiled, and invalid to establish broader meaning, remarking that if the presidentialists say “[removal power] is delegated by the constitution, then there is no use for the clause.”²³⁸ But if the congressionalists thought the clause delegated this power, Representative Gerry would ask “whether this is the proper way to do it? [W]hether a little clause hid in the body of a bill can be called a declaratory act? I think it cannot.”²³⁹ Gerry concluded, “[i]t looks as if we were afraid of avowing our intentions: [i]f we are determined upon making a declaratory act, let us do it in such a manner as to indicate our intention.”²⁴⁰

Gerry criticized both the congressionalists and presidentialists for avoiding specificity, likely knowing that an apparent pro-removal majority concealed a sharp split. He conceded, “[b]ut perhaps gentlemen may think we have no authority to make declaratory acts.”²⁴¹ In particular, he doubted that the judges are bound by congressional decisions in such declaratory acts.²⁴² Nevertheless, he was challenging the presidentialists and congressionalists to propose statutory language that was clearer.

²³⁷ See *Gazette of the United States* (Aug. 22, 1789) (recording the agreement of Sedgwick, Benson, and Gerry on the proposed amendment), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 1296.

²³⁸ *The Congressional Register* (June 18, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 976.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*; see also *Debates in the House of Representatives* (June 18, 1789) (Gerry raising questions about validity of declaratory acts), reprinted in 22 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789–3 MARCH 1791, at 1685 (Charlene Bangs Bickford, Kenneth R. Bowling, Helen E. Veit & William Charles DiGiacomantonio eds., 2017) [hereinafter 22 DOCUMENTARY HISTORY].

Yet, four days later Madison conspicuously retreated even further from avowing presidentialism, avoiding Gerry's call for a declaratory act or an explanatory clause, but still trying to assert a theory with a "little clause hid in the body of a bill" even more cryptically.²⁴³

Gerry was right to doubt the practice of fully declaratory acts, but the First Congress added declaratory or purposive clauses to more operative legislative bills.²⁴⁴ Some of the statutes passed and treaties ratified in the First Congress had an explanatory preface or purposes, sometimes with "whereas" clauses to offer explanations.²⁴⁵ The First Congress also added such resolutions, in the form of explanatory clauses, "whereas" clauses, or purposive preambles, in some of their first statutes and also some of their most important statutes, such as the Impost Act (or Duty Act),²⁴⁶ the Northwest Territory Act of 1789,²⁴⁷ the Coasting Act,²⁴⁸ and in 1790, the Sinking Fund Act that addressed the massive debt problem and also rejected presidential removal powers.²⁴⁹

One of the first statutes, the Impost Act (or Duty Act), introduced on May 5 and signed July 4, 1789, had the following Section 1: "[w]hereas it is necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures, that duties be laid on goods, wares and merchandises imported."²⁵⁰ This same statute included another "whereas" clause to explain its special treatment of Rhode Island and North Carolina: "[a]nd whereas, The States of Rhode Island and Providence Plantations, and North Carolina, have not as yet ratified the

²⁴³ The Congressional Register (June 18, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 976.

²⁴⁴ See Alexander Zhang, Legislative Statutory Interpretation 41-44 (Dec. 21, 2022) (unpublished manuscript) (on file with author).

²⁴⁵ See, e.g., North Carolina Cession Act [S-7] (Apr. 2, 1790) (providing an example of a statute with a whereas clause), reprinted in 6 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789-3 MARCH 1791, at 1544 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) [hereinafter 6 DOCUMENTARY HISTORY]; Treaty of Peace and Friendship, Morocco-U.S. (Jul. 15, 1786) (demonstrating a federal treaty with a whereas clause), reprinted in 9 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE U.S. 1776-1949, at 1278-79 (Charles I. Bevans, ed. 1972).

²⁴⁶ Duty Act, § 1, 1 Stat. 24 (1789); *id.* § 38.

²⁴⁷ Northwest Territory Act [HR-14] (Aug. 7, 1789), reprinted in 6 DOCUMENTARY HISTORY, *supra* note 245, at 1559.

²⁴⁸ Coasting Act [HR-16] (Sept. 1, 1789), reprinted in 4 DOCUMENTARY HISTORY, *supra* note 136, at 233.

²⁴⁹ Sinking Fund Act [HR-101] (Aug. 12, 1790), reprinted in 6 DOCUMENTARY HISTORY, *supra* note 245, at 1890; see also Christine Kexel Chabot, *Is the Federal Reserve Unconstitutional?*, *supra* note 11, at 39-40 (describing the legislative intent of the Sinking Fund Act and how some members of the Sinking Fund Commission were not removable by the President).

²⁵⁰ The Duty Act, § 1, 1 Stat. 24 (1789).

present Constitution of the United States, by reason whereof this act doth not extend to the collecting of duties within either of the said two States.”²⁵¹

Another major statute drafted around the same time included constitutionally-based explanations. Congress drafted the Northwest Territory Act of 1789 to modify the Northwest Ordinance of 1787 to comport with the new Constitution. In a statement of constitutional purpose, the act began with a preamble: “[w]hereas . . . for the government of the territory north-west of the river Ohio, may continue to have full effect, it is requisite that certain provisions should be made, so as to adapt the same to the present Constitution of the United States.”²⁵² Another major statute, the Coasting Act (introduced in early July and passed in August) also included a “whereas” explanatory clause.²⁵³ A “whereas” explanatory clause was unnecessary when the purpose of the act itself was declaratory. The Navigation Acts of 1790 and 1791 were either declaratory acts or functioned like declaratory acts: “[t]hat the consent of Congress be, and is hereby declared”;²⁵⁴ and the prior act “is hereby declared to be in full force.”²⁵⁵

Both the Sinking Fund Act of 1790 and the follow-up Sinking Fund Act of 1791 (passed in the third session of the First Congress) contained explanatory purposive clauses. The first Sinking Fund Act also was a concrete rejection of unitary theory. Hamilton had proposed a Sinking Fund commission the previous year, and Congress delegated executive power to a commission with seats for the vice president and chief justice, whom the President cannot appoint nor remove.²⁵⁶ Congress opened this statute with a preamble starting “[it] being desirable . . .” followed by a list of purposes, sounding like an explanation of its constitutional basis from Article I’s “Necessary and Proper” clause:

[It] being desirable by all just and proper means, to effect a reduction of the amount of the public debt, and as the application of such surplus of the revenue as may remain after satisfying the purposes for which appropriations shall have been made by law, will not only contribute to that desirable end, but will be

²⁵¹ *Id.* § 38.

²⁵² Northwest Territory Act [HR-14] (Aug. 7, 1789), *reprinted in* 6 DOCUMENTARY HISTORY, *supra* note 245, at 1559.

²⁵³ Coasting Act [HR-16] (Sept. 1, 1789), *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 136, at 233.

²⁵⁴ Navigation Act [HR-93] (Aug. 11, 1790), *reprinted in* 6 DOCUMENTARY HISTORY, *supra* note 245, at 1523.

²⁵⁵ Navigation Act [HR-103] (Jan. 10, 1791), *reprinted in* 6 DOCUMENTARY HISTORY, *supra* note 245, at 1527.

²⁵⁶ *See* Sinking Fund Act [HR-101] (Aug. 12, 1790) (creating this commission), *reprinted in* 6 DOCUMENTARY HISTORY, *supra* note 245, at 1890; *see also* Chabot, *Is the Federal Reserve Unconstitutional?*, *supra* note 11, at 6 (describing the incapability of the President to remove certain members of the Sinking Fund Commission).

beneficial to the creditors of the United States, by raising the price of their stock, and be productive of considerable saving to the United States.²⁵⁷

A second Sinking Fund Act (passed on March 3, 1791, during the third session of the First Congress) briefly updated the first statute to resolve a controversy about whether a Dutch loan had been consistent with the 1790 statute.²⁵⁸ The 1791 Act opened with three explanatory “whereas” clauses for this commission emphasizing the importance of resolving “doubt” about debt: “[a]nd whereas it is expedient that the said doubt be removed.”²⁵⁹

By contrast, when there were ongoing doubts about the Foreign Affairs Act’s meaning, Madison did not think it was expedient to remove doubt about removal with an explanatory clause, nor in a follow-up declaratory act like the 1791 Sinking Fund Act. Perhaps it was inexpedient if he knew he did not have the votes. As Occam’s Razor suggests, the simplest explanation for Madison’s obscurantist approach is that he knew he only had the votes in the Senate for ambiguity.

E. *The Summer of ‘89: The “Enigmatic,” “Pragmatic,” and “Ambiguity” Blocs*

Pragmatism and exhaustion are better explanations than quiet presidentialism for the voting patterns of the silent members of the pivotal bloc. The vocally congressional members of the pivotal bloc decided not to vote against the entire statute after losing the middle vote because the ambiguous removal language was not worth any further delay. Perhaps if Madison had tried to insert explicit presidentialist language, the congressionalists and senatorials could have teamed up, fought to the end and blocked the bill—which helps explain why Madison avoided the explicit. He was strategically ambiguous because he expected the anti-presidential majority to be pragmatic and accept ambiguity.

The best-case scenario for unitary proponents is classifying sixteen members of the House as “presidential”, and that number depends on an assumption that none voted for the purpose of strategic ambiguity or pragmatic expedience, or voted out of confusion and merely followed the vocal leader Madison. In fact, only seven members explicitly endorsed a presidentialist interpretation on the House floor, arguing that the Constitution resolved the question in favor of presidential power: Madison,

²⁵⁷ Sinking Fund Act [HR-101] (Aug. 12, 1790), reprinted in 6 DOCUMENTARY HISTORY, *supra* note 245, at 1890.

²⁵⁸ Sinking Fund Act [HR-136] (Mar. 3, 1791), reprinted in 6 DOCUMENTARY HISTORY, *supra* note 245, at 1896.

²⁵⁹ *Id.*

Ames, Benson, Boudinot, Clymer,²⁶⁰ Moore,²⁶¹ and Vining.²⁶² Even some of those ostensibly committed presidentialists were some combination of ambivalent, strategic, or inconsistent on the constitutional issue: Vining,²⁶³ Madison,²⁶⁴ and Ames.²⁶⁵ If these leaders of the presidential bloc were ambivalent or strategic, then it seems likely that some of their followers were, too. A seventh member, Goodhue, did not explain his vote on the House floor, but in a letter describing his lobbying of reluctant Senator Dalton for the Foreign Affairs bill, he indicated an interpretation of “the Executive part of the Constitution.”²⁶⁶ An eighth, Fitzsimons, briefly described the debate in two letters, and while he seemed to endorse a presidentialist view, the short passages are neither clear nor reflect close consideration.²⁶⁷

²⁶⁰ See The Congressional Register (May 19, 1789) (“[T]he power of removal was an executive power, and as such belonged to the President alone, by the express words of the constitution . . .”), reprinted in 10 DOCUMENTARY HISTORY, *supra* note 111, at 738.

²⁶¹ See The Congressional Register (June 22, 1789) (“[H]e would not have it thought that the legislature possess a right to confer powers not vested in them by the constitution.”), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 1033.

²⁶² For a refresher on the arguments made by the presidentialists, see Section III.A–C; see also The Congressional Register (June 17, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 915 (recording Clymer’s argument that he was “totally indifferent whether the words were struck out or not; because I am clear that the executive has the power of removal as incident to his department, and if the constitution had been silent with respect to the appointment he would have had that power also[.]”).

²⁶³ Vining was vocally presidentialist but also recognized alternative arguments. See The Congressional Register (June 22, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 1035 (“[H]e thought it more likely to obtain the acquiescence of the senate on a point of legislative construction on the constitution . . .”).

²⁶⁴ Madison generally rejected presidentialism, beginning with the Convention (June 1 and Aug 20 vote). See *supra* Part II. He continued to reject presidentialism at the time of ratification. See THE FEDERALIST NO. 39, at 194 (Ian Shapiro ed., 2009) (“The tenure of the ministerial officers generally will be a subject of legal regulation.”). Further, he rejected presidentialism in May 1789. See The Congressional Register (May 17, 1789) (expressing that tenure conditions are at “the discretion of the legislature”), reprinted in 10 DOCUMENTARY HISTORY, *supra* note 106, at 730. About a week after the pivotal Foreign Affairs motions, he rejected the unitary model in proposing an independent Comptroller. See *infra* Part VI.

²⁶⁵ See Letter from Fisher Ames to George R. Minot (June 23, 1789) (“This is in fact a great question, and I feel perfectly satisfied with the President’s right to exercise the power, *either by the Constitution or the authority of an act*. The arguments in favor of the former fall short of full proof, but in my mind they greatly preponderate.” (emphasis added)), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 30, at 841.

²⁶⁶ Letter from Benjamin Goodhue to Cotton Tufts (July 20, 1789), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 30, at 1085; see also Letter from Benjamin Goodhue to Samuel Phillips, Jr. (June 21, 1789) (writing that “the Constitution contemplates” presidential removal), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 30, at 826.

²⁶⁷ See Letter from Thomas Fitzsimons to Benjamin Rush (June 20, 1789) (indicating an oversimplification of the debate by construing the argument as two-sided rather than three; dubiously mentioning the “vesting” argument in a manner that could be considered shorthand, and yet providing support of presidentialists Madison and Ames), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 30, at 819–20. An August 24, 1789 letter makes only an oblique reference to

Of the remaining seven yes/yes/yes members who may (or may not) have been presidentialists: three have no recorded views on the House floor or in their letters;²⁶⁸ two spoke but offered only a mix of policy arguments (about the kind of powers a President should have) and unclear constitutional interpretations;²⁶⁹ one (Peter Muhlenberg) did not speak on the House floor and wrote a single ambiguous and noncommittal letter on the constitutional question;²⁷⁰ and one (Burke) was silent during the Foreign Affairs debate, then spoke and made motions on the Treasury bill in ways inconsistent with sole presidential control over removal.²⁷¹ Only a few expressed that the President had a constitutional power to remove “at pleasure.”²⁷²

If one can question if some of the yes/no/yes votes were an “enigmatic” bloc rather than congressionalist, it is equally fair to question if some of the yes/yes/yes votes were a “strategic ambiguity” bloc rather than presidentialists. As such, it is plausible that the other eight or nine yes/yes/yes members were a “strategic ambiguity” voting bloc seeking to replace the clear text with an unclear text precisely *because* it was unclear, not because it signaled a constitutional theory. This explanation is simply the other side of the coin of the “enigmatic bloc” theory that the members who preferred to keep the original text were voting for a clear statement of some form of

“the Constitutional power of the president to remove” two months after the vote. Letter from Thomas Fitzsimons to Samuel Meredith (Aug. 24, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 1389.

²⁶⁸ The three members with no recorded views are Brown, Griffin, and Sinnickson.

²⁶⁹ Baldwin and Scott. It is possible that Baldwin was saying Congress should interpret the Constitution or that Congress should delegate the power. *See* Gazette of the United States (July 1, 1789) (“The main objection to the clause is, that we shall violate the Constitution, by giving this power to the President . . . but in my opinion, gentlemen should alter their mode of expression, and say, that their *constructions* of the Constitution will be violated It rests with us to decide The Judiciary is the constitutional judge of our laws, and they will decide upon this, and I think they will consider themselves obliged by our decision.”), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 995-96; *see also* The Congressional Register (May 20, 1789) (reporting Baldwin’s discussion of the establishment of a board of treasury without turning to the constitutional question), *reprinted in* 10 DOCUMENTARY HISTORY, *supra* note 111, at 754-55; The Daily Advertiser (June 23, 1789) (providing Scott’s reflections), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 950; The Congressional Register (June 18, 1789) (noting Scott’s argument that “no man in the United States has their concurrent voice but [The President]” and for that reason he should control the power to remove), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 973. In sum, Baldwin and Scott mixed arguments and did not offer clear presidential interpretations of Article II.

²⁷⁰ *See* Letter from Peter Muhlenberg to Benjamin Rush (June 25, 1789) (summarizing the congressional factions without expressing his own opinion), *in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 856.

²⁷¹ *See* The Congressional Register (June 29, 1789) (showing Burke’s position against “at pleasure” tenure in the Treasury debate wherein he proposed specific restraints on officers’ engagement in commerce, indicating the officers were not completely removed from congressional oversight and did not solely serve at the pleasure of the President), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1080.

²⁷² *See infra* Part VII for a discussion of the lack of consensus regarding “at pleasure” tenure.

removal power, rather than an ambiguous text. If one wants to claim those votes are enigmatic and not necessarily “congressionalist,” so too the silent yes/yes/yes members are also enigmatic and not necessarily “presidentialist.” In this instance, the unitary theorists want it both ways: count all the yes/yes/yes votes as presidentialist, regardless if they spoke or if they were ambivalent, but count yes/no/yes votes as congressionalist only if they spoke unambiguously for the congressionalist view. This argument has all the burdens backward.

The half-dozen silent members who voted yes/no/yes were more likely pragmatic and perhaps even agnostic on the theoretical constitutional questions. They were just as likely a “move on, move forward” faction, eager to get to more urgent and concrete business. In fact, during another impasse on removal in the Treasury bill, members explicitly complained later about these long debates and fights preventing the House from finishing its business: “[w]e already know [our constituents’] sentiments: [t]his business must absolutely be attended to, and completed previous to a recess.”²⁷³

In June, the quieter members likely did not speak because they tired of the long debate about constitutional interpretation when the practical rule furthered the same result: presidents get to remove Foreign Affairs officials, whether the power was granted by the Constitution itself or by Congress. The better conclusion is that they were flexible moderates on the question (and congressionalism was the more moderate and flexible position between fixed presidentialism and fixed senatorialism).

Indeed, many of these pragmatic moderates were likely tired of this debate that seemed over on Friday but re-opened on Monday. Sedgwick said they had fought over the explicit clause for four days, and felt it was unnecessary and even a risk to delete a clause that brought together the two factions, in order to take up a clause that divided them.²⁷⁴ That deletion and new debate could have ended with neither clause, a defeat for both factions. A French minister observed of Congress, “[y]ou would think after more than three months of existence this Congress, of which wonders are expected, [Congress] would already have been able to let the American people taste the fruits of a revolution in government that is supposed to produce remedies for all the ills the people complained of.”²⁷⁵ The French minister noted that Congress’s agenda was “too numerous and intricate to be discussed in a

²⁷³ *Gazette of the United States* (Aug. 26, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 1327.

²⁷⁴ See *The Congressional Register* (June 22, 1789) (“I wish the honorable mover of the amendment had been content with the decision of yesterday; because I apprehend the discussion of the question which he has agitated, will take up some time, without any possible advantage.”), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 1029.

²⁷⁵ GIENAPP, *THE SECOND CREATION*, *supra* note 3, at 126 (2018).

moment” but Congress “attend[s] too minutely to the detail of business.”²⁷⁶ On the one hand, the minister observed how seriously some members of the House took this debate, that the dozen or so speakers were committed enough to the “intricate” constitutional principles to delay the urgent practical tasks.²⁷⁷ But the French minister also noted that the House had gotten bogged down on these details.²⁷⁸ He reflected a growing sense that it was time for the United States Congress to move on to concrete governing matters, and urgently so. If this French minister was writing about such impatience, some of the silent House members surely thought that a dozen of their colleagues had gone too far down a rabbit hole of constitutional minutiae. As much as they took the question seriously, at a certain point, they could not keep delaying the urgent tasks of creating a government, and thus they may have resolved not to decide the constitutional question.

Ambiguity was a practical compromise: presidentialists could interpret it their way, congressionalists could interpret it their way, senatorials could claim both of those sides had actually retreated, and all could move on. By late June, the 1789 session was almost half over, and only one bill, the short and simple Oath Act, had been signed into law.²⁷⁹ The tariff bill was in trouble in mid-June, due to an already brewing power struggle between the House and Senate.²⁸⁰ Madison had recently proposed constitutional amendments which would take up much of the summer.²⁸¹ Time was running out to deal with revenue, spending, debt, creating the three departments and a judiciary system.

²⁷⁶ *Id.* Many commented on Congress’s considerable agenda at the time. See Letter from Rev. Madison to James Madison (Mar. 1, 1789), in 11 THE PAPERS OF JAMES MADISON 454 (Robert A. Rutland, Charles F. Hobson, William M.E. Rachal & Jeanne K. Sisson eds., 1977) (“[T]he Prosperity of the federal [government] will depend in great [m]easure upon the [w]isdom of the [l]aws & [a]rrangements first proposed.”); Letter from Abraham Baldwin to Joel Barlow (June 14, 1789) (indicating the legislature is extremely busy and is mired at least in part by politics), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 30, at 774-75.

²⁷⁷ GIENAPP, *supra* note 272, at 125-26 (describing the First Congress’s lack of progress in the fact of “a mountain of responsibilities and challenges”).

²⁷⁸ See *supra* note 276 and accompanying text.

²⁷⁹ Oath Act [HR-1] (June 1, 1789) (regulating oaths given by public officials), reprinted in 6 DOCUMENTARY HISTORY, *supra* note 243, at 1608. The next statute to become law was the Impost Act, sometimes known as the Duty Act. Duty Act, 1 Stat. 24 (1789). For list of house bills and their passage dates, see 4 DOCUMENTARY HISTORY, *supra* note 136, at lvii-lxxii. The first Senate bill to pass was the Judiciary Act on September 24, 1789. *Id.* at lxxiii; Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789).

²⁸⁰ See *supra* Section III.B.

²⁸¹ Amendments to the Constitution (Sept. 28, 1789) (listing the various motions proposed by Madison from May through September of 1789), in 4 DOCUMENTARY HISTORY, *supra* note 136, at 3-9.

F. The “Decision of 1789” Misreadings

In his *Seila Law* concurrence, Justice Thomas relied on Prakash’s *New Light on the Decision of 1789*,²⁸² and other judges and academics cite it to support the unitary theory that a majority of both houses of Congress endorsed the executive-power interpretation of the Constitution.²⁸³ Prakash contends:

The best explanation for the seemingly inconsistent votes of the fifteen members of the enigmatic faction is that most, if not all, of them did not cast inconsistent votes. All the while, members of the enigmatic faction favored, with varying intensity, the executive-power theory and merely differed with other executive-power partisans about tactics.²⁸⁴

The problem here starts with math: There were only fourteen members (including Baldwin) who voted yes/yes/yes, fully supporting Benson and Madison, out of fifty-three who voted in their proposals (or just 26%). There were a dozen who voted yes/no/yes, opposing their proposal to delete the clear language. Prakash attempted to address their argument by claiming this “no” vote was over “tactics” and language, and not “principles.”²⁸⁵ Prakash’s math would depend on counting almost all these members, plus a small number more, as “presidential.” Prakash never acknowledged this math problem, nor did he attempt a head count to establish a presidentialist majority.

Only six of the yes/no/yes voters were silent (Carroll, Contee, Gilman, Hiester, Seney, and Trumbull). Even assuming all six of them were “presidentialist,” the total would still be only twenty-two out of fifty-three voting members. The math is clear: neither Madison nor Taft nor Roberts nor Prakash had the votes.²⁸⁶

Instead of counting votes, Prakash argues more impressionistically that this bloc was “enigmatic,” rather than congressional, and that many of these voters either were or *could have been* presidentialist.²⁸⁷ However, it would be odd to rely on silence and enigma to establish clear original public meaning.

Hartley announced to his colleagues on the floor what he thought a yes/no vote on the Monday motions signified: congressionalism. He was “against

²⁸² *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2213 n.1 (2020) (Thomas, J., concurring).

²⁸³ See Prakash, *New Light*, *supra* note 7, at 1026, 1051 n.194, 1058 n. 245, 1062-63, 1072 (asserting that the executive-power theory enjoyed majority support).

²⁸⁴ *Id.* at 1047; see also *id.* at 1060 (reiterating that members of the enigmatic faction “believed that it more clearly expressed the House’s position that the President had a constitutional removal power”).

²⁸⁵ *Id.* at 1047 (explaining the inconsistent votes of fifteen members by reference to differences in “tactics” rather than “theory”).

²⁸⁶ See *infra* Appendix I, Table B.

²⁸⁷ *Id.* at 1047-66 (arguing throughout that support for the executive-power theory prompted the votes of all enigmatic legislators).

striking out,” and so would every gentleman be, he trusted, who was not fully convinced that the power of removal vested by the constitution in the President.²⁸⁸ Only one member, Boudinot, had clarified that he had different meaning for such a “no” vote.²⁸⁹ If others had disagreed with Hartley, one can imagine that they may have said so. At a minimum, it is a stretch to assume their silence would have signified support of the boldest and least flexible position—presidentialism. It seems more likely that if they said nothing, they either held the more flexible position (congressional discretion) or did not have a strong view either way.

Another fundamental problem is that the “enigma” argument wants to have it both ways: Prakash claims that Madison’s new text was clear enough to be a clear presidentialist statement,²⁹⁰ but also ambiguous enough to explain that the ostensibly “enigmatic” faction were voting against ambiguity when they voted “no” in the second step of Madison’s plan.²⁹¹ This argument is self-contradictory: the clause must be both clear and unclear. Ironically, his unitary interpretation of the “Decision of 1789” depends on the key statute being *indecisive*.

A separate Appendix II goes into more detail about the misinterpretation or miscategorization of nine congressmen and of the letters from Senator Richard Henry Lee, Vice President Adams, and Samuel Adams.²⁹²

²⁸⁸ Hartley had been explicitly congressionalist. See *The Daily Advertiser* (June 19, 1789) (showing where Hartley “advocated” for a congressionalist view), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 886; *The Congressional Register* (June 19, 1789) (providing Hartley’s explanation for his congressionalist view), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 904-07; see also Appendix II, *supra* note 12, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359596 [<https://perma.cc/V6GA-NZJP>].

²⁸⁹ See *supra* notes 210–212 and accompanying text.

²⁹⁰ See Prakash, *New Light*, *supra* note 7, at 1046 (“First, the language of the bills most naturally reads as if it assumed the President had a removal power.”); see also PRAKASH, IMPERIAL FROM THE BEGINNING, *supra* note 61, at 196 (asserting that the text of the House bill made “clear the authors’ view that the president had a constitutional power to remove”).

²⁹¹ As Prakash attempted to explain:

First, some executive-power proponents voted against Benson’s second amendment because they regarded the original bill language as a useful congressional ‘declaration’ about the Constitution. Despite the arguments of Benson and Madison, some members clearly thought that the original text was a more open and unequivocal affirmation of the executive-power theory, especially as compared to the bill that would result from the passage of Benson’s second amendment. Second, some supporters likely voted against Benson’s second amendment because they were surprised by it and were not sure what to make of it.

Prakash, *New Light*, *supra* note 7, at 1047-48 (internal footnotes omitted).

²⁹² Prakash claims as “enigmatic” three congressmen who should be counted more accurately as explicitly congressional: Thomas Hartley, John Laurance, and Lambert Cadwalader. See Appendix II, *supra* note 12, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359596 [<https://perma.cc/V6GA-NZJP>], for further discussion of these miscategorizations. Laurance’s views were complicated, so this Article counts him as “less clearly” congressionalist. See *infra* Appendix I, Table C. Compare Prakash, *New Light*, *supra* note 7, at 1053, 1056, 1061 (arguing that

In the end, only two yes/no/yes representatives fit Prakash's explanation (Boudinot and Fitzsimons). Five sided with congressionalism in their floor speeches. Once Prakash's "enigmatic faction" is no longer enigmatic, not much is left of the unitary claim. Considering how many documents cited by the unitary side actually lend more support for the congressional view, it suggests that there is little real evidence for the unitary side. These errors raise broader questions about both the unitary theory and about the practice of originalism.

The next Part moves on to the Senate debate and then summarizes the Foreign Affairs debate as either an "Indecision of 1789" or a decision against presidentialism by forcing this retreat to ambiguity.

IV. JULY 14–18: SENATOR MACLAY'S DIARY AND SENATE CONFUSION

The Senate debated the bill in mid-July. Pennsylvania Senator William Maclay's diary notes that Vice President John Adams broke a tie on the bill in favor of presidential removal on July 16 (a 10–10 tie) and again on July 18 (a 9–9 tie, as senators started eagerly leaving Manhattan at the height of summer).²⁹³ (Note the irony of the Vice President, an executive official, casting legislative votes for strict separation of powers and exclusivity). According to Maclay's diary and Adams's rough notes, the senators debated the constitutional basis for a presidential removal power.²⁹⁴ As noted previously, there is a good reason to find Maclay's diary credible; many judges and scholars have relied on other parts of his diary; and unitary scholars cite Maclay's senator-by-senator tally for their 10–10 tie.²⁹⁵ Maclay's notes indicate that an initial tally was likely eight in favor, and twelve opposed—until two senators made surprise switches.²⁹⁶

As they approached the tight final vote, senators remained confused about the meaning of the bill's removal clause, and according to Maclay, the bill's supporters confusingly offered to delete the key provisions when they worried

Laurance endorsed the executive-power theory, and that the reason he sought to retain the language of the original bill was to avoid Congressional abuses that would abridge the constitutional power of the president to remove officers), with Appendix II, *supra* note 12, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359596 [<https://perma.cc/V6GA-NZJP>] (suggesting that Laurance was a congressionalist of sorts, although with more complicated views).

²⁹³ See The Diary of William Maclay (July 16, 1789) (recording the vote on July 16), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 115; *id.* at 117 (recording the vote on July 18).

²⁹⁴ See *id.* at 117–18 (stating that there was "much curious conversation" about the Foreign Affairs Bill, including removal); 3 THE WORKS OF JOHN ADAMS 409, 412 (Charles Francis Adams ed., 1851) (reproducing debate about presidential removal).

²⁹⁵ See *supra* notes 138–139 (listing sources that have cited Maclay's diary for these reasons).

²⁹⁶ See The Diary of William Maclay (July 16, 1789) (recording that Senators Dalton and Basset recanted their initial positions on the vote and listing the members of the two voting blocs), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 114–15.

it was too ambiguous and vulnerable to abuse.²⁹⁷ The strange ambiguity of the clause and the strategy of implied powers also opened up more questions: did the clause hint at presidential removal? Or was it really implying other presidential powers to empower inferior officers to take over departments? The Madison/Benson strategic ambiguity was too ambiguous, backfiring by leaving too much for others to infer, and too much to the political imagination. On July 18, the Senate sponsors retreated, dismissed the relevance of the House authors' intent, and even suggested deleting the clause.²⁹⁸ But instead of the Senate presidentialists resolving this confusion, many senators were ready to leave New York, and they left the clause unclear.²⁹⁹

The Senate vote provides one of Prakash's strongest pieces of evidence: anti-presidentialist Senator Paine Wingate conceded that "the question turned on . . . whether the President had a constitutional right to remove; [and] not on the expediency of it," a statement against his own interest.³⁰⁰ On the other hand, he was describing the Senate vote, which may have been perceived as a win for presidentialism after a 10–10 tie was broken by the vocally presidential Adams. He was not describing the more divided House vote. Moreover, Wingate's "notes" from the First Congress fill one single page on the removal debate, and they suggest he had a relatively simplistic understanding of these issues or had limited attention for them.³⁰¹ Other evidence Prakash cited to support such a "vindication of the executive-power position" in the Senate does not hold up to scrutiny.³⁰² Fortunately, Maclay, Adams, Johnson, and Paterson provided notes on the Senate debate that are more reliable than Senator Wingate's passing reference in a letter and short passages in a handful of other letters.³⁰³

As noted above, the House and Senate had been increasingly split over the past month. On June 17, the Senate rejected Madison's anti-English, pro-French tariff proposal, coinciding with the Foreign Affairs department

²⁹⁷ See *id.* at 117–19 (noting that after Senator Paterson stated his support for striking the provision, Senators Morris and Ellsworth rose to concur).

²⁹⁸ See The Diary of William Maclay (July 18, 1789) (noting the support of several senators to strike the clause), reprinted in 9 DOCUMENTARY HISTORY, *supra* note 39, at 118.

²⁹⁹ *Id.* at 118–19.

³⁰⁰ Letter from Paine Wingate to Nathaniel P. Sargeant (July 18, 1789), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 30, at 1069; see also Prakash, *New Light*, *supra* note 7, at 1065–66, 1066 n. 293.

³⁰¹ See Debate on the Foreign Affairs Act [HR-8] (July 16, 1789) (indicating Wingate's loose and general impression of the Senate debate), reprinted in 9 DOCUMENTARY HISTORY, *supra* note 39, at 499.

³⁰² See Prakash, *New Light*, *supra* note 7, at 1065–66, 1066 n. 293. See Appendix II, *supra* note 12, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359596 [<https://perma.cc/V6GA-NZJP>], for a discussion of the various letters that Prakash cites in support of his view.

³⁰³ See Introduction, in 9 DOCUMENTARY HISTORY, *supra* note 39, at xi (praising Maclay's notes and referencing the notes of Adams, Johnson, and Paterson).

debate.³⁰⁴ On the tariffs, the House had rejected compromise, and then on June 19, the Senate dug in for a fight.³⁰⁵ Maclay expected a stalemate: “we nearly insisted on all our amendments, and I suppose they will adhere to [their] original bill.”³⁰⁶ Maclay also noted his walk and conversations that weekend with members of the House.³⁰⁷ Three days later, Madison suddenly abandoned the explicit presidential “removable” language.³⁰⁸

When the Senate debated the bill in July, Maclay’s diary reveals that the senators who sponsored the bill began with clear statements of presidentialism, but gradually retreated to the strategy of ambiguity. Maclay recorded in his diary that he spoke first, arguing against the bill because the clause disempowered the Senate. He cited the “maxim” that “it requires the same power to repeal as to enact[, thus] the depriving power should then be the same as the appoint[ing] power.”³⁰⁹ After Maclay moved to strike out the whole clause, Maclay and William Paterson both recorded that John Langdon of New Hampshire moved to strike just the words “by the president of the U.S.”³¹⁰ Oliver Ellsworth, a future Supreme Court Justice, defended the clause that “removal remained to [the president] intire.”³¹¹ In closing, he “either shed tears or affected to do so.”³¹² Senator Pierce Butler of South Carolina followed by saying he had initially supported the clause, but Ellsworth, “in endeavouring to support the [c]lause, convinced him in the clearest [m]anner, that the clause was highly improper and he would vote against it.”³¹³ Butler was possibly ridiculing Ellsworth, but it is also possible that the clause was so vague that Butler did not understand that it might have a presidentialist meaning until Ellsworth’s speech.

Senator William Johnson recorded notes from his own speech mocking the bill for its illegibility. He opened with a facetious apology for not having formed an opinion of this bill yet, because he “believ[ed] the Sen[at]e [would]

304 Journal of the First Session of the Senate (June 17, 1789) (recording the senate’s rejection), reprinted in 1 DOCUMENTARY HISTORY, *supra* note 150, at 68-69.

305 The Diary of William Maclay (June 19, 1789), reprinted in 9 DOCUMENTARY HISTORY, *supra* note 39, at 83.

306 *Id.*

307 *Id.*

308 See *infra* Section III.C (discussing the debate that occurred on June 22, 1789).

309 The Diary of William Maclay (July 14, 1789), reprinted in 9 DOCUMENTARY HISTORY, *supra* note 39, at 110.

310 See *id.* at 110 (describing that Langdon hoped the [w]hole would not be [s]truck out”); Notes of William Paterson (July 14, 1789), reprinted in 9 DOCUMENTARY HISTORY, *supra* note 39, at 483.

311 The Diary of William Maclay (July 14, 1789), reprinted in 9 DOCUMENTARY HISTORY, *supra* note 39, at 111.

312 *Id.* at 112.

313 See *id.* (describing how Butler “came into the House in the most perfect [s]tate of [i]ndifference, [and] rather disposed to give the power in question to the President” before Ellsworth prompted him to change his position).

inst[ant]ly reject it coming in so Quest[ionabl]e a shape.”³¹⁴ Johnson mocked the incompleteness of the “whenever . . . removed” clause. But he says he listened to the bill’s proponents (calling their explanations “[a]rtful [a]rgum[en]t”), but the more he heard, the more he was “satisf[ie]d [they] are wrong,” and suggested their constitutional arguments were disingenuous: they first “[f]orm their plan, then seek for [t]exts of [scripture] to supp[or]t it.”³¹⁵ He showed that the debate indeed focused on the main constitutional arguments. He said the proponents contended that the Vesting Clause was no support, and that vesting has a meaning for “[l]and” and “[m]oney,” but this context is different.³¹⁶ He concluded, “[w]hat I chiefly regret is the Decept[io]n we are putting upon the People.”³¹⁷

For the rest of the first day, Maclay recorded more speeches against the clause (Butler and Izard of South Carolina, Johnson of Connecticut, Lee of Virginia, and himself, against the clause; only Ellsworth and a “confused” Strong in favor).³¹⁸ Over the next two days, the Senate was closely divided, with many silent members. Then there was a shift in the debate, from the general constitutional question about removal to a more specific focus on the bill’s unclear language. Adams’s notes record some fragments of Senator Grayson’s speech: “[t]he President is not above the [l]aw . . . a [m]onarchy by a [s]idewind . . . come forward like [m]en, and reason openly, and the People will hear more quickly than if you attempt side [w]inds.”³¹⁹ His challenge to the bill’s supporters to “come forward like [m]en, and reason openly” was similar to Representative Smith’s accusations that the bill’s authors were not “candid” or “manly” and that the new language as a “side blow,” as retreat and evasiveness.³²⁰

The next day, Grayson repeated his criticism, asking, “if [presidential removal] is in the Constitution, why insert it, in the [l]aw? [It is] brought in by a [s]idewind, inferentially.”³²¹ He seems to be combining a constitutional

³¹⁴ Notes of William Samuel Johnson (July 14, 1789), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 465.

³¹⁵ *Id.*

³¹⁶ *Id.*; see also Shugerman, *Vesting*, *supra* note 11, at 1551 (showing that, in the eighteenth century, the word “vest” was associated with real property and did not have a clear meaning with respect to powers).

³¹⁷ Notes of William Samuel Johnson (July 14, 1789), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 466.

³¹⁸ The Diary of William Maclay (July 15, 1789), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 112.

³¹⁹ Notes of John Adams (July 15 or 16, 1789), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 446.

³²⁰ See The Congressional Register (June 22, 1789) (recording Representative Smith’s and Representative Page’s jeers), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1029.

³²¹ The Notes of John Adams (July 16, 1789), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 448.

argument with a statutory critique: given that there is already a problem that the Constitution is silent on removal, it cannot be made constitutional by statute, and even if one could “insert” it by statute, it is weak and suspicious to resolve silence with mere indirection and inference.

More senators had spoken against the clause than for it,³²² and it seemed like the bill was in trouble. But then it seems lobbying by a pro-administration “court party” turned the tide. On Wednesday, July 15, Maclay noticed “more caballing and meeting of the [m]embers in knots this day, than I ever observed before.”³²³ Paterson’s notes suggest that another senator, likely Senator Johnson, made a similar remark about “caballing [s]pirit.”³²⁴ Maclay observed “a [g]eneral hunt and [b]ustle . . . it seems as if a Court party was forming.”³²⁵ He observed Ellsworth and Robert Morris standing “in a knot” apparently with Representative Fisher Ames, Madison’s young presidentialist ally in the House.³²⁶ Maclay then saw four senators speaking—two who had favored the bill (Ellsworth and Strong), and two whose views were unknown but would soon announce their support (Carrol and Paterson).³²⁷

The next day, July 16, Maclay was surprised to hear Paterson, after a long wavering warm-up, eventually endorse presidential removal.³²⁸ Then two other senators—Tristram Dalton of Massachusetts and Richard Bassett of Delaware—“recanted” their opposition to the clause.³²⁹ Dalton spoke hesitatingly in an “embarrassed [m]anner” as “his recantation had just now altered his mind” after Paterson’s arguments.³³⁰ Senator Izard “jumped up” to say it was “impossible” that anyone could have been convinced by Paterson.³³¹ A red-faced Robert Morris “rose hastily” and “threw [c]ensure on Mr. Izard.”³³²

“[N]ow Recantation was in fashion,” Maclay observed, “Mr. Bassett, recanted, too,” announcing that he had also switched in favor of the bill.³³³

322 There were seven and then eight votes explicitly against, and only Strong, Ellsworth, and likely Read and Morris in favor. In addition to Maclay, Grayson, Johnson, Izard, Langdon, Butler, and Lee, Senator Paine Wingate added his opposition on July 16. *See* Notes of Paine Wingate (July 16, 1789) (“A long train of arguments has been adduced to prove that the [constitution] vests this power in the President.”), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 499.

323 The Diary of William Maclay (July 15, 1789), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 113.

324 Notes of William Paterson (July 16, 1789), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 489.

325 The Diary of William Maclay (July 15, 1789), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 113.

326 *Id.*

327 *Id.*

328 *Id.* at 114.

329 *Id.*

330 *Id.*

331 *Id.*

332 *Id.*

333 *Id.*

Maclay wrote, “[w]e now saw how it would go. [A]nd I could not help admiring the frugality of the Court party in procuring [r]ecantations or [v]otes, which you please.”³³⁴ He expressed particular disappointment in Paterson, whom he thought had “betrayed [u]s.”³³⁵ Maclay reflected: “I know not that there is such a thing as buying Members, but if there is[,] he is certainly sold.”³³⁶

It seems these switches flipped the vote from at least twelve senators against the clause to a tie vote of 10–10, broken by Adams.³³⁷ Maclay’s account suggests only reluctant support for the bill, regardless of whether the theory was presidentialist or congressionalist. We have no record of the interpretive views of two “yes” votes, so it is unclear if ten senators endorsed the unitary theory.

After the vote, Maclay suggested that his side engaged in “the openest [m]anner,” in contrast to the pro-administration side.³³⁸ Then he recorded a short, angry speech by Grayson: “[t]he [m]atter predicted by Mr. [Patrick] Henry, is now coming to pass, consolidation is the object of the [n]ew [g]overnment, and the first attempt will be to destroy the Senate, as they are the Representatives of the State legislatures.”³³⁹

On the one hand, it is remarkable that the Senate was surrendering its own institutional power, so one might assume that this rare sacrifice may have been driven by principle. On the other hand, Maclay’s observations and other notes suspect a party spirit perhaps overcoming institutional power (an early Levinson-Pildes “separation of parties, not powers” dynamic familiar today).³⁴⁰ Historians identify an emerging pro-administration “court party” in Congress, which included Madison, Hamilton, Ellsworth, and Morris, at least through 1789, and opposed by Maclay and many of the senatorial side.³⁴¹ Members of the House observed this dynamic: William Smith identified Hamilton “chang[ing] his opinion” from his *Federalist* No. 77 as a reflection of Hamilton seeking Washington’s appointment as Treasury Secretary.³⁴² The

³³⁴ *Id.*

³³⁵ *Id.* at 115.

³³⁶ *Id.*

³³⁷ *Id.*; Foreign Affairs Bill [HR-8] (June 24, 1789), reprinted in 4 DOCUMENTARY HISTORY, *supra* note 136, at 697 n.4.

³³⁸ The Diary of William Maclay (July 16, 1789), reprinted in 9 DOCUMENTARY HISTORY, *supra* note 39, at 114.

³³⁹ *Id.* at 114–15.

³⁴⁰ Daryl J. Levison & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2315 (2006) (“[T]he degree and kind of competition between the legislative and executive branches vary significantly, and may all but disappear, depending on whether the House, Senate, and presidency are divided or unified by political party.”).

³⁴¹ See KENNETH C. MARTIS, THE HISTORICAL ATLAS OF POLITICAL PARTIES IN THE UNITED STATES CONGRESS 1789–1989 (1989); John H. Aldrich & Ruth W. Grant, *The Antifederalists, the First Congress, and the First Parties*, 55 J. POLS. 295, 312 (1993) (identifying clusters in the Continental Congress: antifederalists, and “anti- and pro- administration Federalists”).

³⁴² See *supra* notes 131–132 and accompanying text.

Senate votes for the bill fell along roughly proto-partisan lines, and the pro-administration side's lobbying make it more likely that the vote reflected horse-trading more than a "decision." Later that summer, a majority of the Senate would fight back on the Treasury bill.³⁴³

The Senate scheduled a final vote on the bill on Saturday, July 18, but senators were getting eager to adjourn, Ellsworth was sick, and Bassett "had sta[yed] over the time he expected, [and] was likewise going out of [t]own."³⁴⁴ Butler's absence caused some procedural confusion and complaining.³⁴⁵ The senators were eager to move on, though many still had questions after four days of debate. On the day of the final vote, Maclay recorded a puzzling turn. The final speakers were still trying to understand the strange language on the clerk: the clause was unnecessary because of course a clerk would be in charge of the department head's papers if something happened to him, because that was the nature of being a clerk.³⁴⁶ Before engaging Maclay's diary on the opposition's argument, it helps to review the Madison/Benson clause in the bill, with a different part italicized as the operative implied power:

[T]here shall be . . . 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.*³⁴⁷

The message from the Senate sponsors was that this section of the bill signaled or hinted at broader powers. They identified the hint as presidential removal power, but it was reasonable to ask if it hinted at other powers. On the last day of debate, the opposition took a second look at this ambiguity, wondering what else was implied or signaled, or wondering if there was a more insidious plan that the presidentialists had hidden in the text. They understandably were confused by any need for a clause to explain that a clerk would "have the charge and custody" of departmental records. What was the point of this clause? If the presidentialists were saying that the text should not be taken literally, but taken as a hint of broader powers, was it not plausible to read this clause as empowering an inferior officer to "have the charge" of the department beyond the obvious duties of a clerk?

³⁴³ See *infra* Section IV.B.

³⁴⁴ The Diary of William Maclay (July 18, 1789), reprinted in 9 DOCUMENTARY HISTORY, *supra* note 39, at 117.

³⁴⁵ *Id.* ("Bassett did not like it . . . all this was occasioned by the [a]bsence of Butler.")

³⁴⁶ *Id.* at 118 ("What is the [u]se of the [c]lause here? . . . the Secretary appoints his Clerk of [c]ourse, and the Clerk of [c]ourse will take care of the [o]ffice records book and papers, even if the Principal should be removed.")

³⁴⁷ Foreign Affairs Act, ch. 4, § 2, 1 Stat. 28, 29 (1789) (emphasis added).

Maclay described Senator Johnson and then himself still seeking clarification of the clause's impact on the Senate.³⁴⁸ He observed that this clause seemed unnecessary, because it was obviously the chief clerk's duty to take care of the department's papers in case of vacancy, noting that clerks "are to be under [o]ath or affirmation, faithfully to execute the trust committed to them, [and] it is not to be presumed that they will abandon the papers to the [w]inds."³⁴⁹ Maclay answered his own question: "clearly to put it into the power of a President, if so minded, to exercise this office without the advice or consent of the Senate as to the [o]fficer. [T]he consent of the President at . . . the [e]nd of the [c]lause points out this [c]learly."³⁵⁰ Maclay concluded with suspicion: "[t]he objects ostensibly held out by the bill are nugatory, [and] the design is but illy concealed."³⁵¹ John Adams recorded Grayson adding the same objections to the bill's confusing "[s]idewind" and unclear "inference[e]."³⁵² Grayson's, Maclay's, and Johnson's comments suggest that they were still figuring out the meaning and were more suspicious and questioning law-by-hinted-powers. These notes make sense only if the supporters of the bill were obfuscating. The bill's supporters reacted defensively:

[Paterson] got up [and] said the later part of the [c]lause, perhaps was exceptionable and he would have no objection to strike it out. Mr. Morris rose and said something to the same import, but as Doctor Johnson had glanced something at the [c]onduct of the other House. [A]nd as [w]hat I said leaned the same way. Mr. Morris said [w]hatever the particular [v]iew might be of the Member who brought in this clause. [H]e acquitted the House in general of any design against the Senate. Mr. Elsworth[] rose and said such much more on the same [s]ubject.³⁵³

This response is confusing. Paterson and Morris could have been agreeing that they would strike out just the part of the clause on the clerk "having the charge and custody" of the papers. If so, the clause would be just a sentence fragment. Perhaps they were offering to cut the entire clause, if "later part" referred to the "whenever . . . removed by the president" language.³⁵⁴ Either way, the bill's supporters suddenly offered to change the bill to delete the

³⁴⁸ *Id.* at 117-18.

³⁴⁹ *Id.* at 118.

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² The Notes of John Adams (July 16, 1789), reprinted in 9 DOCUMENTARY HISTORY, *supra* note 39, at 448.

³⁵³ The Diary of William Maclay (July 18, 1789), reprinted in 9 DOCUMENTARY HISTORY, *supra* note 39, at 118.

³⁵⁴ *Id.*

hints, indicating that there was still confusion and chaos about the bill leading up to the final vote.

When Morris “acquitted the House in general of any design against the Senate,” it is possible that he was denying that the bill had an effect on creating an acting head in circumvention of the Senate’s confirmation powers, or an effect on removal, or more generally denying there was a deeper plot in the House against the Senate.³⁵⁵ Either way, these exchanges reflect ongoing uncertainty about the clause, and that its supporters were taking advantage of strategic ambiguity as Paterson, Morris, and Ellsworth shifted explanations and made the terms less clear. Even after shifting explanations, Maclay’s diary records the supporters of the bill retreating and offering to delete, but not clarify, a presidentialist meaning.³⁵⁶ Maybe the senators were bluffing, but they appeared willing to sacrifice or further muddle the removal provision to save the rest of the bill. Just before the Senate’s final vote, Maclay then recounted his final speech alleging deception and cloaking:

The House of Representatives had debated 4 days, on a direct [c]lause for vesting the President with this power[,,] and after having carried it with an open face[,] they dropped and threw out the [c]lause and here produced the same thing cloaked and modif[ied] in a different [m]anner by a side [w]ind. I liked for my part plain dealing[,] and there was something that bore a very different aspect in this business.³⁵⁷

Maclay was reminding the Senate that the House had debated for four days a “direct” and explicit removal clause but ultimately abandoned that language. Maclay may have been arguing that the statute, in light of this retreat, should be interpreted as not establishing presidential removal. He accused the bill’s advocates of being dishonest and hiding the same power in “cloaked” language.³⁵⁸ Just as the House’s skeptics denounced Madison’s move as a “side blow,”³⁵⁹ Maclay and Grayson called it a “side [w]ind,” which was the opposite of “plain dealing.”³⁶⁰

The allegation of the House’s “side [w]ind” has a valid basis: Congressman Vining confessed that the House’s strategy was to use the new language to

³⁵⁵ *Id.*

³⁵⁶ *Id.* (“[Paterson] . . . said the later part of the Clause perhaps was exceptionable and he would have no objection to strike it out. Mr. Morris rose and said something to the same import . . . Mr. Elsworth rose and said much more on the same [s]ubject.”).

³⁵⁷ *Id.* at 118-19.

³⁵⁸ *Id.* at 119.

³⁵⁹ The Congressional Register (June 22, 1789) (recording Smith’s comments), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1029.

³⁶⁰ The Diary of William Maclay (July 18, 1789), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 118-19; The Notes of John Adams (July 15 or 16, 1789), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 446.

“obtain the acquiescence” of the Senate.³⁶¹ Thus, in both Houses, the strategy was to delete and obscure, not to add and clarify.

The First Congress was running out of time. On that Saturday, after days of debate during a long summer in New York, Butler was gone while senators Ellsworth, Bassett, and Grayson complained that they had to leave town.³⁶² Accordingly, they seemed willing to jettison language to move on.³⁶³ Three Senators who had been identified earlier as opponents of the removal clause but then voted for the Foreign Affairs bill (Dalton, Bassett, and Elmer),³⁶⁴ and perhaps others, may have been compromising and pragmatically moving on, likely similar to the silent members of the House who voted “yes/no/yes.” Perhaps what Maclay suspected as corruption was simply logrolling by an emerging “Court party” of pro-administration proto-Federalists. Whether pragmatic or impatient, silence should not be interpreted as an endorsement of a permanent constitutional interpretation.

The bottom line is that the Foreign Affairs debate indicates that Congress rejected presidentialism. Thus, unitary scholars cannot claim the silent members as part of a presidentialist decision. Here is a final tally of the House and Senate, with more specific names and categories in Appendix I:

Table 3: House Positions

Presidentialist (or strategically ambiguous)	Silent or unclear	Opposed to presidentialism
7 explicit Y/Y/Y	6 silent Y/N/Y (likely	17 senatorial
7 silent Y/Y/Y	congressional or	7 explicitly congressionalist
2 Y/N/Y	pragmatic/agnostic)	3 impeachment only
	2 unclear (likely	3 unclear (against the bill)
	pragmatic)	
16	8	30

³⁶¹ The Congressional Register (June 22, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1035-36.

³⁶² The Diary of William Maclay (July 18, 1789) (showing their agreement with striking out the clause), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 117.

³⁶³ *Id.*

³⁶⁴ See Letter from William Smith (S.C.) to Edward Rutledge (July 5, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 960.

Table 4: Senate Positions

Presidentialist	Silent, unclear, or ambivalent	“No” votes (Congressionalist or Senatorial)
7	3 (Dalton, Elmer, and Bassett) ³⁶⁵	10

V. LEGAL SOURCES VS. TEXTUAL INFERENCES

The substance of the summer debate should be a major problem for both unitary and originalist theorists. The evidence of original public meaning and original methods circa 1787–88 presented in the First Congress was solidly against the presidentialist theory. Opponents to presidential removal cited legal maxims and the *Federalist Papers*. The presidentialists did not respond with counterevidence from historical sources, but instead made textual inferences, structural inferences, and policy arguments. In the initial House debate in May, Madison had endorsed the congressionalist position, consistent with his position in *Federalist* No. 39.³⁶⁶ In the June debates, Madison acknowledged that he had earlier favored the senatorial position,³⁶⁷ as did Hamilton, who conceded that he had initially supported the senatorial position in *Federalist* No. 77 but had since “*changed his opinion*.”³⁶⁸ In other words, presidentialists’ new position based on text, structure, and policy trumped original understandings. Moreover, if there was a time to cite any historical source, a claim of royal tradition, or a background understanding at the Convention, May and June 1789 would have been the moment. The lack of such evidence is a dog that did not bark.

However, the congressional debate had a different feature that suggests that removal was not entirely new ground: the senatorial side frequently cited traditional legal understandings, while the presidentialists offered textual

³⁶⁵ Records indicate that Dalton, Bassett, and Elmer were initially opposed but ultimately became late-breaking votes for the bill. See *supra* text accompanying notes 328–337; Letter from William Smith (S.C.) to Edward Rutledge (July 5, 1789), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 30, at 960. Fragmentary notes indicate Dalton gave a short ambiguous statement that opposed the senatorial argument and only arguably hinted at a presidential argument. See Notes of William Paterson (July 16, 1789) (“[Dalton] [t]hinks the removeability belongs to the Executive— [t]he Senate ought not to participate.”), reprinted in 9 DOCUMENTARY HISTORY, *supra* note 39, at 488. There are no records of Bassett or Elmer speaking on the bill.

³⁶⁶ The Congressional Register (May 19, 1789), (“[I]t is in the discretion of the legislature to say upon what terms the office shall be held, either during good behaviour, or during pleasure.”), reprinted in 10 DOCUMENTARY HISTORY, *supra* note 111, at 730.

³⁶⁷ Madison said his “original impression” was that “the same power which appointed officers should have the right of displacing them,” i.e., the Senate. The Daily Advertiser (June 18, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 846.

³⁶⁸ See *supra* note 132 and accompanying text (emphasis in original).

inferences and assertions about “necessity,” but no traditional sources. The senatorial bloc cited parallelism, backed by traditions enshrined in Latin: “[u]numquoque dissolvitur, eodem modo, quo ligatur,”³⁶⁹ and “[c]ujus est instituere ejus abrogate,”³⁷⁰ meaning roughly “[e]very obligation is dissolved by the same method with which it is created,”³⁷¹ and “whose right it is to institute, his right it is to abrogate,” respectively.³⁷² The more common formulation “[q]uodque dissolvitur eodem modo quo ligatur” or closely related phrases are in many eighteenth-century legal sources,³⁷³ and carried on in legal sources over the next two centuries. The “*cujus est instituere*” formulation is in dozens of eighteenth-century treatises, including works by the famous republican Algernon Sidney.³⁷⁴ Another traditional formulation from Roman law is “*eodem modo quo oritur, eodem modo dissolvitur*,” which translates to, “[i]n the manner in which . . . a thing is constituted, is it dissolved,” as recorded in many traditional law dictionaries³⁷⁵ and carried on in American case law.³⁷⁶ In these debates, senatorials applied the principle that if the President and Senate together appointed, then both were necessary to remove.

Senator Paterson (a presidentialist) summarized the senatorial argument: “if the Senate has the [p]ower of rem[oval] jointly with the Presid[ent,] it arises from [i]mplic[ation]—from the assumed Principle, that they who appoint must displace—and which [i]mplic[ation] is the most natural.”³⁷⁷ Paterson was being somewhat dismissive calling it “the assumed Principle,” because his senatorial opponents were citing an established legal principle, even if he did not agree with this application of it.

369 Notes of John Adams (July 16, 1789) (quoting Sen. Johnson), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 448.

370 *Id.* at 449 (quoting Sen. Izard).

371 *Id.* at 448 n.6; *see also* Debates in the House of Representatives (June 18, 1789) (showing Sedgwick attributing to the other side the claim “[t]hat the power which gives, is the only power to take away”), *reprinted in* 22 DOCUMENTARY HISTORY, *supra* note 242, at 1681.

372 The Notes of John Adams (July 16, 1789), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 449 n.7.

373 *See, e.g.*, THOMAS BRANCH, PRINCIPIA LEGIS & ÆQUITATIS: BEING AN ALPHABETICAL COLLECTION OF MAXIMS, PRINCIPLES OR RULES, DEFINITIONS AND MEMORABLE SAYINGS IN LAW AND EQUITY 94 (1753); JEAN LE PAIGE, NOUVEAU COMMENTAIRE SUR LA COUTUME DE BAR-LE-DUC 383 (1711).

374 ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 15, 315 (3d ed. 1751).

375 *See, e.g.*, *Eodem modo quo quid constituitur, dissolvitur*, BLACK’S LAW DICTIONARY (6th ed. 1990); *Eodem modo quo oritur, eodem modo dissolvitur*, BALLENTINE’S LAW DICTIONARY (3d ed. 1969).

376 *See, e.g.*, Reynolds v. Swain, 13 La. 193, 198 (La. 1839) (“The repeal spoken of in the [Louisiana] code . . . cannot extend beyond the laws which the legislature itself had enacted; for it is this alone which it may repeal; *eodem modo quiquit constituitur, eodem modo dissolvitur.*”); Murphy v. Webster, 2 Mass. (1 Tyng) 482, 488 (1881) (“Unless otherwise provided by constitution or statute, the power of removal is incident to the power of appointment. *Cujus est instituere, ejus est abrogare.*”).

377 Notes of William Patterson (July 16, 1789), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 489.

Many members of Congress in the removal debates echoed this interpretation without the Latin: “the same power which created, should remove officers”;³⁷⁸ “an established principle, that the appointing power should have the right to remove,”³⁷⁹ and similar formulations.³⁸⁰ It was also described as “doctrine.”³⁸¹ Smith’s reference to “Publius” (Hamilton) and *The Federalist* No. 77 was further originalist evidence in favor of the Senate’s role consistent with that doctrine.³⁸²

Madison acknowledged the “principle” on the senatorial side that “the power to make appointments implies in its own nature a power of removal as incidental to it.”³⁸³ Madison’s only rebuttal was textual inference from the Executive Vesting and Take Care Clauses.³⁸⁴ This pattern emerged over the four days of debate. The senatorial side relied heavily on their “established principle,” while the advocates for presidential removal offered no similar legal authority or historical evidence for their interpretations of Article II. Presidentialists instead relied on textual inferences from Article II,³⁸⁵ structural inferences, assertions about the “nature” of executive power,³⁸⁶ and

378 *The Daily Advertiser* (May 20, 1789), reprinted in 10 DOCUMENTARY HISTORY, *supra* note 111, at 719.

379 *The Daily Advertiser* (June 20, 1789) (remarks by Sherman), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 892.

380 *See, e.g.*, *The Congressional Register* (May 19, 1789) (remarks by Bland), reprinted in 10 DOCUMENTARY HISTORY, *supra* note 111, at 729; *id.* at 733-34 (remarks by Silvester); *The Daily Advertiser* (June 18, 1789) (remarks by White), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 848; *The Congressional Register* (June 18, 1789) (remarks by Livermore), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 984.

381 *The Daily Advertiser* (June 22, 1789) (remarks by White), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 943.

382 *The Congressional Register* (June 16, 1789) (remarks by Smith), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 861; *The Congressional Register* (June 17, 1789) (remarks by Smith), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 935 (“Publius [shows] clearly the superior advantage of having the president and senate combined in the exercise of [the removal] power.”).

383 *The Daily Advertiser* (June 22, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 896.

384 *Id.* (“[T]here is another part of the constitution as explicit as that on which the gentlemen found their doctrine: [i]t is that which declares that the executive power shall be vested in the President of the United States.”).

385 *See, e.g.*, *The Congressional Register* (June 16, 1789) (reporting arguments by Madison based on Vesting Clause textual inferences), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 868-69.

386 *The Daily Advertiser* (June 18, 1789) (remarks by Madison), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 846.

claims of “necessity”³⁸⁷ and “convenience,”³⁸⁸ whether it was Madison,³⁸⁹ Ames,³⁹⁰ or Boudinot.³⁹¹ They made pragmatic claims, arguing that the American presidency is uniquely protected from corruption or despotic leaders,³⁹² and that the American President was more democratically a representative of “THE PEOPLE,” the entire nation, and would be better entrusted than the Senate.³⁹³ These pragmatic claims were policy arguments, not evidence of original public meaning of Article II.³⁹⁴ Importantly, speakers on each side of the debate were explicitly and implicitly rejecting European monarchies, including the English Crown, as models of the presidency because monarchs were inherently more dangerous than the presidency was designed to be.³⁹⁵

387 The Congressional Register (May 19, 1789) (remarks by Benson), *reprinted in* 10 DOCUMENTARY HISTORY, *supra* note 111, at 728.

388 The Congressional Register (June 17, 1789) (remarks by Vining), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 938.

389 The Daily Advertiser (June 18, 1789) (remarks by Madison), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 846.

390 The Daily Advertiser (June 18, 1789) (remarks by Ames, pointing to the “dangers” that would result from “lodging the power of removal in the senate”), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 851, 859.

391 The Congressional Register (May 19, 1789) (remarks by Boudinot that impeachment as the sole means of removing an officer would be a “deplorable situation indeed”), *reprinted in* 10 DOCUMENTARY HISTORY, *supra* note 111, at 730-31.

392 The Congressional Register (June 16, 1789) (remarks by Madison that “instances will be very rare” in which an “unworthy” person will be elected president), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 867.

393 The Daily Advertiser (June 23, 1789) (“[T]he President . . . may justly and truly be denominated THE MAN OF THE PEOPLE, whereas the senate are the mere representatives of the sovereignties of the several states composing the Union . . . and which representatives have (officially) little or nothing to do with the people or their interests.”), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 950.

394 Some policy arguments were very weak, like Boudinot’s concern that if the Senate declined to remove, the Senate would be compromised or biased in a hearing or subsequent impeachment. The Daily Advertiser (June 18, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 849.

395 *See, e.g.*, The Congressional Register (May 23, 1789) (remarks by Boudinot that unilateral presidential power to remove officers resulted in a “monarchical system”), *reprinted in* 10 DOCUMENTARY HISTORY, *supra* note 111, at 721-22; The Daily Advertiser (June 18, 1789) (remarks by Madison), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 852; The Daily Advertiser (June 20, 1789) (remarks by Jackson regarding the “deadly influence of the crown in England, where offices were held during the pleasure of the king”), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 890; *id.* at 891-92 (remarks by Page that at-will removal of officials by the president “contained in it the seeds of royal prerogative”); *id.* at 894 (remarks by Stone, contrasting (a) a “hereditary monarch” with a “personal property [interest] in the government and administration” who “necessarily” would possess the power to choose and control who “manage[d] his property,” with (b) a president who would have “no species of property in the government”); The Congressional Register (June 18, 1789) (remarks by Sherman contrasting the removal powers of the “crown of Great Britain” with the removal powers of the president), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 977.

For almost all of the House debate in May and June, the presidential side included both the “unitary” Article II presidentialists and the “necessary and proper” congressionalists, because both endorsed an explicit statute on presidential removal. Thus, policy arguments were appropriate for those who thought removal was a matter of congressional choice, but it is striking that the leading “unitary” Article II presidentialists like Madison, Ames, and Boudinot felt comfortable making policy arguments for their constitutional interpretation. Even on June 22, once the Madison/Benson proposal split the congressionalists off from the unitary presidentialists, the presidentialists still did not offer more originalist evidence in their squared-off debate against the congressionalists.

Representative White, a senatorial member, made such an observation about the presidentialists’ assertions and lack of evidence: the presidentialist side cannot infer an answer “from any particular clause. It is sought from another source, the general nature of executive power.”³⁹⁶ Then White pointed out that the state constitutions contradicted this assumption, and that the presidentialists had no other evidence to support their claims.³⁹⁷ When presidentialists Boudinot, Ames, Madison, and Vining rose to speak after White’s criticism of their thin case, they did not rise to the challenge to offer evidence in support, but merely repeated the same thin textualist, structural, and pragmatic assertions.³⁹⁸ Their lack of an answer to this challenge was telling.

The presidentialists avoided reliance on the English Crown, royalist practice, or claims of royal prerogative power. This reticence about royal prerogatives undermines the assertions from modern unitary theorists that the removal power was understood to be drawn from the royal prerogative.³⁹⁹

³⁹⁶ The Daily Advertiser (June 22, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 940.

³⁹⁷ *Id.* at 940-41.

³⁹⁸ The Congressional Register (June 18, 1789) (argument by Boudinot relying on “the true interest of the United States,” the “general principles of the constitution,” and ultimately whether it is “impossible” for the president to carry out his duties without removal powers), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 966-968; *id.* at 978-83 (argument by Ames that presidential “authority” is effectively “strip[ped]” without removal powers); *id.* at 986-988 (argument by Madison discarding opposing views that place “the legislature at the head of the executive branch of the government”). Vining made only pragmatic or policy arguments. Gazette of the United States (July 1, 1789) (remarks by Vining on June 19, 1789, relating to features of the presidential office that make it less prone to “abuse of power”), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 998-99, 1017-21. Scott was not clearly presidentialist or congressionalist, but either way, he also did not meet White’s challenge and instead repeated the claim that the president is more fully representative of the people. See The Congressional Register (June 18, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 971-73.

³⁹⁹ See MCCONNELL, *supra* note 17, at 30, 39, 95, 99, 161-63 (“The king had the prerogative power to remove most officers at will” and so while “the framers might have assumed that Congress would have the power to determine removal. . . in every other instance where the [Framers] intended to allocate a royal prerogative power to the legislative branch—and there were many—[they] did so explicitly.”). For further discussion on unitary theorists’ undue reliance on royal

At the same time, several members conceded that the English tradition recognized property in offices or writs for challenging removals in the office-as-property tradition.⁴⁰⁰

From the debates in 1789 to the modern unitary theory, there has been a consistent pattern and a consistent problem: presidentialists made (and continue to make) thin assertions from textual inferences, without citing historical evidence, legal authorities, or even legalistic maxims. The senatorial side did not cite treatises or historical examples, but they had an established maxim—in both Latin and English translation—that had a foundation in legal authorities before and after this era. The congressionalists had their own inference, which did not need much historical support: constitutional silence leads to congressional discretion. But we will see below that they cited an English writ system as a legal tradition of removal for cause, not at pleasure.⁴⁰¹ These congressional debates are their own time capsule containing the available sources for public meaning: the senatorial and congressional sides had a mix of traditional legal evidence, while the presidentialists did not, which helps explain why they also did not have the votes.

VI. LATE JUNE–SEPTEMBER: THE TREASURY COMPROMISES

A. *Madison's Independent Comptroller and Persistent Doubts*

Prominent scholars have turned to the Treasury Act to raise questions about unitary assumptions,⁴⁰² but unitary scholars parried most of these

prerogatives, see Shugerman, *Vénalité*, *supra* note 11 (manuscript at 7-15), and Shugerman, *Originalism and the Seila Law Brief*, *supra* note 89.

⁴⁰⁰ See, e.g., *The Daily Advertiser* (June 19, 1789) (remark by Hartley on June 17, 1789, that “every man had a property in his office”), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 886. Several speeches discuss the use of the writ of mandamus by an officer to restore his office in the case of improper removal. See *The Congressional Register* (June 16, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 864, 866; *The Congressional Register* (June 19, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1008; see also *infra* Section VII.A.

⁴⁰¹ See *infra* Section VII.A.

⁴⁰² See, e.g., JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* 40-42 (2012) (“The initial Treasury statute thus appears to make the Secretary of the Treasury responsible primarily to Congress rather than to the President.”); CURRIE, *THE CONSTITUTION IN CONGRESS*, *supra* note 26, at 41-42 (arguing that the Treasury was not expressly an “executive” department and that the Secretary had legislative duties); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 26-27 (1994) (“[T]he first Congress conceived of the proper organizational structure for different executive departments differently. This conception . . . argues against the belief in a strong unitary executive.”); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 239-42 (1989) (discussing the differences between the organization of the executive departments, concluding that “Congress stressed coordination rather than separation as it seemed constitutionally appropriate”); Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 71-73

questions.⁴⁰³ Together with outstanding recent historical work,⁴⁰⁴ this Part revives these questions and shows that the answers were anti-unitary.

During the Foreign Affairs debate, supporters of presidential removal via congressional delegation worried that the Madison/Benson amendment was so unclear, with “weak” and “decrepit” explanations, that it would backfire on both of their camps: “the president may not easily understand [this statute.] For if he supposes the constitution totally silent, he can hardly draw authority from your law.”⁴⁰⁵ Indeed, there was so much confusion that opponents celebrated, and supporters worried they lost. One opponent wrote to Elbridge Gerry, a senatorial, a few days after the votes: “I rejoice with joy unspeakable and full of security, that the point is carried [against] giving the President the power contended for.”⁴⁰⁶ A few days after that, Fisher Ames, one of the leading supporters of executive power, doubted the presidentialists’ gambit, and wondered if they had “blundered” by not keeping the clear language.⁴⁰⁷

On the day of the House vote on the final Foreign Affairs bill, Madison himself acknowledged to insider Edmund Randolph a continuing dissensus conveyed in the newspapers, but he dismissed such reports as the result of “misconception” and arguments “mutilated” or “often misapprehended”—in other words, he was blaming the press for being confused, not admitting that the debate itself grew more confusing due in part to a more ambiguous

(1983) (discussing the significance of the differences between the executive departments, including the “special relationship of the Treasury Department to Congress and the President”).

403 See, e.g., PRAKASH, *IMPERIAL FROM THE BEGINNING*, *supra* note 61, at 200-02 (arguing that Congress’s decision to not label the Treasury Department as “executive” was simply a “missed adjective” and ultimately “immaterial” considering other evidence); Calabresi & Prakash, *The President’s Power to Execute the Laws*, *supra* note 61, at 650-51 (suggesting that the decision to not classify the Treasury Department as executive “was without significance”).

404 See Manners & Menand, *supra* note 11, at 5-8 (describing the history of removal permissions to refute the conclusion that the President may remove the head of an independent agency for failure to follow the President’s policy agenda); Chabot, *Is the Federal Reserve Constitutional?*, *supra* note 11, at 53-54 (providing the Sinking Fund Commission as support for independent agencies with limited presidential control).

405 The Congressional Register (June 22, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1033.

406 Letter from James Sullivan to Elbridge Gerry (June 28, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 878. Prakash concedes this. See Prakash, *New Light*, *supra* note 7, at 1060 n.258 (“Indeed, there is evidence that opponents of presidential removal regarded the deletion of the original removal language as a victory of sorts.”).

407 Letter from Fisher Ames to George R. Minot (July 9, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 985. Prakash admits that “in hindsight,” Benson should have offered a standalone resolution announcing the constitutional vesting interpretation, leaving “no doubt.” Prakash, *New Light*, *supra* note 7, at 1061 n.262. But Prakash assumes away this problem. See *id.* (“In the face of evidence that Congress endorsed the executive-grant theory, however, Benson’s failure to propose such an amendment seems rather insignificant.”).

clause.⁴⁰⁸ Madison had several opportunities to address those misconceptions with a clear explanatory clause. Instead, on the House floor a few days later, Madison and colleagues would offer an even stronger message of doubt they had made any general decision in the comptroller debate.⁴⁰⁹

Other scholars and I have recently discussed Madison's widely misunderstood comptroller proposal elsewhere.⁴¹⁰ This Article explains the topic in more depth and highlights how the House debate illustrated a consensus that Congress could limit removal of principal officers and a lack of consensus about whether the earlier "Decision" debate had resolved removal questions.

Just one day after the House passed the Foreign Affairs bill 29–22 on June 24,⁴¹¹ the House turned to the Treasury bill.⁴¹² Representative John Page moved to strike the language in the Treasury bill that the head would "be removable at the pleasure of the President."⁴¹³ Page's motion "carried without debate."⁴¹⁴ Page was the opponent of presidential removal power in the Foreign Affairs debate who had called out Benson and Madison for "evacuat[ing] untenable ground,"⁴¹⁵ and called presidential removal "such a prerogative . . . [that] is incompatible with the principles of a free government" and "a disposition towards monarchy."⁴¹⁶

In the Treasury debates, many representatives focused on the dangers of presidential corruption and abuse of the removal power. Representative Jackson of Georgia continued,

If [a president] wants to establish an arbitrary authority, and finds the secretary of finance not inclined to second his endeavors, he has nothing more to do than to remove him, and get one appointed of principles more congenial

⁴⁰⁸ Letter from James Madison to Edmund Randolph (June 24, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 853.

⁴⁰⁹ *See* The Congressional Register (June 29, 1789) (reporting that the committee "had gone through the bill without making any provision respecting the tenure by which the comptroller is to hold his office" and offering more observations on the matter), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1079–83.

⁴¹⁰ *See* Manners & Menand, *supra* note 11, at 21–23; Shugerman, *Presidential Removal: The Marbury Problem*, *supra* note 135, at 2090.

⁴¹¹ *See* Journal of the First Session of the House of Representatives (June 24, 1789), *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 108, at 94–95.

⁴¹² *Id.* at 97.

⁴¹³ The Daily Advertiser (June 25, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1045.

⁴¹⁴ *Id.* at 1045.

⁴¹⁵ The Congressional Register (June 22, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1030.

⁴¹⁶ *Id.* at 1031.

with his own. Then, says he, I have got the army, let me have but the money, and I will establish my throne upon the ruins of your visionary republic.⁴¹⁷

Others feared that the clause would be akin to “giving birth to a . . . monster.”⁴¹⁸ They feared the idea of the President becoming a despot of “the purse,” and thought that if he had removal power, he would have “command of the public chest . . . [and] would always be able to secure his election perpetual.”⁴¹⁹

Madison himself proposed an independent comptroller just four days later on June 29, 1789.⁴²⁰ This proposal failed, but it clarified not only Madison’s more congressional view as the debate shifted from Foreign Affairs to Treasury matters, but it also revealed that he and his colleagues understood that there was no consensus in favor of a tenure during “during pleasure” default.⁴²¹ Madison explained that this executive office also had a “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 the government.”⁴²²

First, Madison entertained and then explicitly rejected “at pleasure” tenure for this office, because he was against “any interference in the settling and adjusting [of] the legal claims of individuals against the United States.”⁴²³ Second, while Madison acknowledged the comptroller’s mixed role, he emphasized that the comptroller was “in the greatest degree” executive rather than judicial.⁴²⁴ Moreover, Madison observed, “[w]hatever, [M]r. [C]hairman, may be my opinion with respect to the tenure by which an executive officer may hold his office according to the meaning of the constitution, I am very well satisfied, that a modification by the legislature

⁴¹⁷ The Congressional Register (June 17, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 913.

⁴¹⁸ The Congressional Register (June 16, 1789) (remarks of Livermore), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 884.

⁴¹⁹ The Daily Advertiser (June 23, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 949.

⁴²⁰ The Congressional Register (June 29, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1080-81; *see also* Shugerman, *Presidential Removal: The Marbury Problem*, *supra* note 135, at 2095 (explaining Madison’s proposal).

⁴²¹ *See* Letter from James Madison to Thomas Jefferson (June 30, 1789) (describing the “very long debates” and noting that “[w]hat the decision of the Senate will be cannot yet be even conjectured”), *in* 12 PAPERS OF JAMES MADISON 271-72 (Charles F. Hobson, Robert A. Rutland & William M. E. Rachal eds., 1979). Burke also introduced a proposal earlier on the same day as Madison’s comptroller proposal. *See* The Congressional Register (June 29, 1789) (giving notice that he wanted to add a clause that would make executive officials who were concerned in commerce “guilty of a high crime or misdemeanor”), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1080. This proposal became law in the Treasury Act, §8, 1 Stat. 65, 67 (1789).

⁴²² The Congressional Register (June 29, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1080.

⁴²³ *Id.* at 1083.

⁴²⁴ *Id.* at 1080.

may take place.”⁴²⁵ This demonstrates that Madison returned to his original congressionalism, clearly in favor of defeasibility.

Madison then proposed his language for the bill: “the comptroller should hold his office during ___ years, unless sooner removed by the president.”⁴²⁶ Modern judges and scholars have been confused by this exchange. In his recent 2020 book, Michael McConnell repeated the unitary conventional wisdom: “Madison’s solution was not to give the comptroller tenure of office for a lengthy term, but rather to shorten his term and make the office subject to greater congressional as well as presidential oversight.”⁴²⁷ Recent unitary scholars make the same assertions, assuming a modern law of offices and default rules.⁴²⁸ Chief Justice Roberts, Justice Kavanaugh, and scholars on both sides of the unitary debate have similarly misunderstood Madison’s comptroller proposal for a long time. Then-Judge Kavanaugh on the D.C. Circuit offered a remarkably wrong upshot: “[i]n *Free Enterprise Fund*, the Supreme Court definitively explained that the original Comptroller of the Treasury was removable at will by the President.”⁴²⁹ Kavanaugh was relying on Chief Justice Roberts’s erroneous interpretation in *Free Enterprise Fund*, which was repeated in *Seila Law*.⁴³⁰ On the other side, Justice Breyer and scholars in favor of independent agencies have quoted Madison’s general explanations, but did not explain why his proposal would have limited presidential removal nor address the counterarguments to their position.⁴³¹

The problem is these modern readers assume that the tenure default rule was merely “at pleasure,” so they likely assumed Madison’s reference to

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ MCCONNELL, *supra* note 17, at 166-67. See also Calabresi & Prakash, *The President’s Power to Execute the Laws*, *supra* note 61, at 652 (describing the response to Madison’s proposal as “incredulity”); Prakash, *New Light*, *supra* note 7, at 1070 (saying Madison’s colleagues were “baffled” by his proposal). To his credit, Prakash recognized that Madison was protecting the comptroller, but misses the broader significance of the debate in that several “presidentialists” rejected the unitary theory of indefeasibility. See *id.* at 1070-72.

⁴²⁸ See, e.g., Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 142 n.205 (2020) (misunderstanding the findings by Jane Manners and Lev Menand on the nature of the default rule that an office held for a “term of years” would be protected from removal if it did not have additional language explicitly delegating a presidential removal power).

⁴²⁹ PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 177 n.4 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

⁴³⁰ See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2205 n.10 (2020) (relying on *Free Enterprise Fund* for the proposition that the comptroller was removable by the President and was also dependent on the Senate for reappointment).

⁴³¹ See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 530-31 (2010) (Breyer, J., dissenting) (quoting Madison’s suggestion that an executive officer with duties of a “judicial character” should be independent); *Humphrey’s Executor v. United States*, 295 U.S. 602, 630-31 (1935); *PHH Corp.*, 881 F.3d at 91; Lessig & Sunstein, *supra* note 402, at 17 & n.70; PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 194 (2014).

presidential removal must have also meant removal “at pleasure.” Instead, recall an early modern approach to offices-as-property. The Crown often created offices for life and even inheritable offices.⁴³² Jane Manners and Lev Menand have revealed the historical “inviolab[ility]” of offices held for a “term of years.”⁴³³ For example, Blackstone’s *Commentaries* discussed offices as property: an “estate . . . either to him and his heirs, or for life, or for a term of years, *or* during pleasure only.”⁴³⁴ From England through the Founding, including the fight over Marbury’s Justice of the Peace office, “a term of years,” unless specified otherwise by statute or constitutional text, meant that the office was protected from executive removal.⁴³⁵

Madison’s colleagues confirmed this interpretation of “term of years.” John Laurance explained, “[t]he constitution declares that the judges shall hold their offices during good behaviour. This implies that other officers shall hold their offices during a limited time, *or* according to the will of some person.”⁴³⁶ Livermore similarly linked offices held for a term of years as protected from removal: “I conceive all officers to be appointed during pleasure, except where the [C]onstitution stipulates for a different tenure, unless indeed the law should create the office, *or* officer, for a term of years.”⁴³⁷ In this excerpt,

⁴³² See Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 182 (2020) (contrasting royal offices that were held “pursuant to life or hereditary tenure” with those created by Parliament that generally had a fixed tenure and removal procedures). *But see* Wurman, *supra* note 428, at 142 n.205 (raising valid concerns that Birk focused on many offices that were too early, too late, too obscure, or too quasi-judicial to be probative of eighteenth-century American public meaning on executive offices).

⁴³³ Manners & Menand, *supra* note 11, at 5. The major English case *Harcourt v. Fox* turned on the notion of office-as-property, and *Marbury v. Madison*’s dicta also famously engaged this same rule. See *Harcourt v. Fox*, 88 ENG. REP. 1152, 1153 (discussing a statute that gave the plaintiff the property of the office for life); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803) (elaborating upon the property rights conferred when one is appointed to an office). Relatedly, Representative Thomas Hartley criticized England’s office-as-property tradition. See 1 ANNALS OF CONG. 480 (1789) (Joseph Gales ed. 1834) (“I hope this doctrine will never be admitted in this country.”).

⁴³⁴ 2 WILLIAM BLACKSTONE, COMMENTARIES *36 (emphasis added). See also Birk, *supra* note 432, at 207 n.196 (explaining how Bailiffs’ and Sheriffs’ offices were inheritable).

⁴³⁵ Birk, *supra* note 432, at 204-05 (explaining how the property rights conferred in an office made it so even the Crown lacked the legal power to remove an officer).

⁴³⁶ The Congressional Register (June 17, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 907 (emphasis added). On May 19, Laurance spoke about congressional discretion to create offices and different kinds of job security, and the structure of his list grouped together similar levels of protections and tenure. See The Congressional Register (May 19, 1789), *reprinted in* 10 DOCUMENTARY HISTORY, *supra* note 111, at 733. For example, Laurance linked tenure for a term of years (“three years”) “or during good behaviour,” and then immediately stated “we may declare unfitness and incapacity, causes of removal and make the president alone judge of the case” (a “good cause” grouping), and concluded by granting the president a power to “remove . . . for any cause he thinks proper.” *Id.* Note that Laurance did not put the three-year term alongside the “any cause” part of this spectrum, but next to “good behaviour.” *Id.*

⁴³⁷ The Congressional Register (June 18, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 984 (emphasis added).

Livermore is suggesting two exceptions to “during pleasure” as a default: first, a constitutional office with a different tenure (“good behaviour” or perhaps until “high crimes and misdemeanors”), or second, a statutory office for a term of years.⁴³⁸ These were broad and common exceptions.

Next, Stone said:

[I do] not know whether the office should be held *during good behaviour, as the gentleman [Madison] proposed*, for if it was intended to be held *during a term of years*, and then the officer to be re-appointed, if he had not been convicted on impeachment, it would be tantamount to holding it during all the time he behaved well.⁴³⁹

Madison had not explicitly stated “good behaviour,” but in his answers, Madison did not object to this understanding.⁴⁴⁰ Stone’s inference from a term of years is consistent with the earlier comments by Laurance and Livermore⁴⁴¹ implying that a “term of years” meant protection beyond removal at pleasure.

The following speakers shared the same understanding. Sedgwick rose to suggest “some doubts,” because he was concerned that Madison’s proposal meant too much job security—namely that the comptroller of the Treasury “would hold his office by the firm tenure of good behaviour in as much as he was to be re-appointed at the expiration of the first term, and so on.”⁴⁴² Madison rose to clarify immediately, but only on a narrow side-issue to clarify “re-appointable,” not automatically “re-appointed.”⁴⁴³ Madison did not correct the “good behaviour” interpretation, confirming that his proposal was for a protection against removal. From the context and Madison’s use of “term of years” (an established limit on removal), his colleagues rightly inferred that Madison was proposing a comptroller with some form of good-cause protection. They seem to have used the term “good behaviour” as an imprecise shorthand. Presumably, Madison’s reference to removal by the President would be the President initiating a removal process by showing cause, roughly consistent with the writ tradition described by some members

438 *Id.* at 984–85; see also The Congressional Register (June 16, 1789) (explaining the differences between “good behaviour” and statutory offices), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 884–85; Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 92 (2005) (discussing “good behaviour” as a means for removal).

439 The Congressional Register (June 29, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 1081 (emphasis added).

440 *Id.* at 1083 (“I do not say the office is either executive or judicial; I think it rather distinct from both, tho[ugh] it partakes of each, and therefore some modification accommodated to those circumstances ought to take place; I would therefore make the officer responsible to every part of government.”).

441 See *supra* notes 436–437 and accompanying text.

442 The Congressional Register (June 29, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 1082.

443 *Id.*

and the process of officers initiating good behavior removals based on a showing of misbehavior and good cause.⁴⁴⁴ Madison's approach confirmed his earlier congressionalism in the Foreign Affairs debate in May: "because Congress may establish offices by law . . . it is in the discretion of the [l]egislature to say upon what terms the office shall be held, either during good behaviour or during pleasure."⁴⁴⁵

Sedgwick raised a concern "that a majority of the house had decided, that all officers concerned in executive business, should depend upon the will of the president."⁴⁴⁶ Recall that Sedgwick was vocally a congressionalist, not a presidentialist, and he had mocked the Madison/Benson proposals.⁴⁴⁷ His intervention here was consistent with congressionalism, as he seemed to assume that Congress implicitly had legislated "at will" employment. Sedgwick argued that the comptroller was fundamentally executive—and "ought, he thought, to be depend[e]nt upon the president!"⁴⁴⁸ Thus, Sedgwick also understood Madison to be proposing limits on presidential removal. Sedgwick then retreated to more tentative ground, perhaps acknowledging a lack of clarity about what had been decided so far: "[h]e did not mean by what he said, to give a decided opinion, but merely to suggest for consideration, some doubts which had arisen in his mind since the subject was introduced."⁴⁴⁹

Benson, one of the most vocal supporters for presidential power and one of the few who endorsed "at pleasure" tenure, rejected Madison's proposal for an executive officer that would have the ability to serve during "good behaviour," stating: "[t]he judges hold theirs during good behaviour, as established by the constitution, all others, during pleasure."⁴⁵⁰

⁴⁴⁴ See *infra* Section VII.C (discussing House members' references to the writs of *scire facias* and *mandamus*); Prakash & Smith, *How to Remove a Federal Judge*, *supra* note 438, at 92-105 (discussing the Anglo-American process of officers initiating removals from offices held good behavior with judicial process).

⁴⁴⁵ 1 ANNALS OF CONG. 374-75 (1789) (Joseph Gales ed., 1834).

⁴⁴⁶ The Congressional Register (June 29, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1082.

⁴⁴⁷ See The Congressional Register (June 18, 1789) ("He had undertaken to say that the legislature were at liberty to determine that an officer should be removable by the president, or whom they pleased; that he was absolutely the creature of the law, and subject to legislative discretion."), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 983; The Congressional Register (June 22, 1789) ("I wish the honorable mover of the amendment had been content with the decision of yesterday; because I apprehend the discussion of the question which he has agitated, will take up some time, without any possible advantage."), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1029.

⁴⁴⁸ The Congressional Register (June 29, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1082.

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

Madison returned to the floor to defend his proposal. He acknowledged that some members believed “the executive magistrate had constitutionally a right to remove subordinate officers at pleasure” and thought that officers “were merely to assist him.”⁴⁵¹ Nevertheless, Madison revealed he had a different constitutional vision, not this unitary model: “[s]urely the legislature, have the right to limit the salary of any officer; if they have this, and the power of establishing officers at discretion, it can never be said, that by limiting the tenure of an office, we devise schemes for the overthrow of the executive department.”⁴⁵²

Tellingly, among the presidentialists from the Foreign Affairs debate, only Benson rose to defend such an “at pleasure” rule.⁴⁵³ Sedgwick’s intervention was from a congressionalist perspective, and then he turned tentative and doubted any consensus.

Other legal commentators and judges have confirmed that Congress could use *limited duration* (“a term of years”) to prevent the President’s removal power, including Justice Joseph Story’s *Commentaries*,⁴⁵⁴ legal commentator Matthew Bacon,⁴⁵⁵ and Chief Justice Marshall in *Marbury v. Madison*.⁴⁵⁶ This context provides an additional explanation for why Congress added an “at pleasure” clause to the marshal and deputy marshal offices in the Judiciary

⁴⁵¹ *Id.* at 1083.

⁴⁵² *Id.*

⁴⁵³ *Id.* at 1082.

⁴⁵⁴ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 388-90 (“[A]ll others [besides judges] must hold their offices during pleasure, unless [C]ongress shall have given some other duration to their office.”). Story cites the 1789 debates for this conclusion. *Id.* at 388 n.2.

⁴⁵⁵ Manners & Menand, *supra* note 11, at 19 (explaining that Bacon perceived positions granted “for [y]ears or a limited [t]ime” as undesirable for particularly important positions because, in the event of an officer’s death, these positions—as the property of the officer—would go to an heir of the officer).

⁴⁵⁶ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803) (explaining that once an executive has appointed an officer, that executive no longer has power over the officer “where, by law, the officer is not removeable by him”); see also *Myers v. United States*, 272 U.S. 52, 242, 242 n.4 (1926) (Brandeis, J., dissenting) (“In *Marbury* . . . it was assumed, as the basis of decision, that the President, acting alone, is powerless to remove an inferior civil officer appointed for a fixed term with the consent of the Senate; and that case was long regarded as so deciding.”); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 311 n.1 (O.W. Holmes, Jr. ed., 12th ed. 1873) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 167, 168, 172 (1803)) (implying, in part on the basis of Chief Justice Marshall’s reasoning in *Marbury*, that the Tenure of Office Act of March 2, 1861, blocked the president’s removal power by requiring that a successor be appointed by the Senate prior to the removal of the then-current appointee); Manners & Menand, *supra* note 11, at 25 (“At the time of the Founding and for at least several decades thereafter, Marshall’s understanding—that absent statutory or constitutional language to the contrary, a term-of-years office foreclosed executive removal—was uncontroversial and widely accepted.”); Shugerman, *Presidential Removal*, *supra* note 135, at 2109 (arguing that *Marbury* follows the English tradition of creating “a limit on executive discretion, while empowering the legislature over the executive”); Birk, *supra* note 432, at 187 n.68 (citing *Marbury*, 5 U.S. (1 Cranch) at 162) (noting that in *Marbury*, Chief Justice Marshall “endorsed” the view that where Senate consent was required for appointment it was also required for removal).

Act.⁴⁵⁷ Both offices were limited to a specific term of years: four years for the marshal and deputy marshal⁴⁵⁸ and a blank to be filled in for Madison's comptroller.⁴⁵⁹ This is notable, especially in light of the fact that early modern England and founding-era America had default rules about offices that were obvious to them but are obscure to modern readers.⁴⁶⁰ In the eighteenth century, a limited term-of-years tenure meant the office would be unremovable by the executive unless the legislature imposed such conditions, or through extraordinary measures such as impeachment.⁴⁶¹

In the domain of treasury, finance, and debt, some modern scholars have recently interpreted the First Congress's actions as establishing government commissions with concrete barriers to presidential removal and control. Christine Kexel Chabot, for instance, explained how the Sinking Fund Commission, proposed by Alexander Hamilton and enacted in 1790, contradicted the unitary model.⁴⁶² This commission was composed of "the President of the Senate, the Chief Justice, the Secretary of State, the Secretary of the Treasury, and the Attorney General."⁴⁶³ The Chief Justice and the President of the Senate (i.e., the Vice President) could not be removed by the President.⁴⁶⁴ Before the ratification of the Twelfth Amendment, the Vice President did not yet run on a ticket with the President, meaning he could have been a rival or an opponent of the President.⁴⁶⁵ Similarly, the Chief Justice, who is not a member of the

457 Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87 (1789).

458 *Id.* (specifying a term of four years for the marshal and deputy marshal).

459 The Congressional Register (June 29, 1789) ("[T]he comptroller should hold his office during ___ years, unless sooner removed by the president: he will always be dependant upon the legislature . . ."), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 1080.

460 *See, e.g.*, Manners & Menand, *supra* note 11, at 25 (explaining that the view that "a term-of-years office foreclosed executive removal" was widely accepted at the time of the founding).

461 *Id.* at 18-19.

462 *See* Chabot, *Is the Federal Reserve Constitutional?*, *supra* note 11, at 3-4, 29 ("The evidence establishes that the Sinking Fund Commission possessed much more independence than unitary executives have recognized. Historical practice provides compelling evidence that the Constitution allows Congress to limit the President's control over officials who execute statutes effectuating enumerated powers under Article I, Section 8."). Note that Hamilton's proposal of an independent executive commission reflects a reversal from his endorsement of presidential removal during the Foreign Affairs debate. *See supra* note 132 and accompanying text.

463 Sinking Fund Act [HR-101] (Aug. 12, 1790), reprinted in 6 DOCUMENTARY HISTORY, *supra* note 245, at 1890.

464 Chabot, *Is the Federal Reserve Unconstitutional?*, *supra* note 11, at 6.

465 *See* BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS 204-05 (2005) (explaining that before the ratification of the Twelfth Amendment, the runner-up in the presidential election became Vice President). President Adams and Vice President Jefferson, and then President Jefferson and Vice President Burr, could attest to this unique relationship. *See id.* at 19-20, 213 (mentioning that President Adams and then-Vice President Jefferson were of two different parties, and when Jefferson became president, he distrusted Vice President Aaron Burr in part because they were elected to their respective positions after a prolonged fight for the presidency).

executive branch, could not be removed by the President, nor could he be assumed to share policy views with the President.⁴⁶⁶ Thus, the creation of the Sinking Fund Commission was a “decision” of 1790 that further undercuts the claim of a unitary Decision of 1789. In fact, the contradictions preceded the creation of the Sinking Fund Commission. They began in 1789, during the departmental debates and with the Treasury Act of 1789.

B. *The Compromise of August 1789*

If there had been a decision in the Foreign Affairs debate, Congress had a strange way of showing it over the rest of the summer. The two Houses continued to fight over the “removal” language in the next two departmental debates from late June to August, but these debates did not clarify a constitutional interpretation. Instead of confirming a “Decision,” the Senate’s resistance throughout July and August confirms why Madison and Benson had reason to retreat to strategic ambiguity in June and illustrates how the strategy played out throughout the First Congress.

On the same day the House passed the final version of the Foreign Affairs bill, Benson offered an amendment to the War Department bill “with respect to the secretary’s being removable by the President, a similar amendment to that which had been obtained in the bill establishing the department of foreign affairs.”⁴⁶⁷ But this time, it barely passed with a 24–22 vote, a drop from the 29–22 vote on the Foreign Affairs bill.⁴⁶⁸ There was no roll call recorded, but five members seemed to have abstained during the vote on the War Department bill.

Over the next two months, the opposition in the Senate dug in, leading to voting in the House which revealed their deliberate strategy of ambiguity. On August 3, after enough senators returned from their July break, the Senate took up the War Department bill.⁴⁶⁹ But the senatorial bloc was missing their tenth vote for the tie: after the Foreign Affairs vote, Maclay had asked for a three-week leave of absence to stay in Philadelphia to recuperate from a

⁴⁶⁶ The only method for removal of the Chief Justice, or any federal judge for that matter, is impeachment. See U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.”). Therefore, the President cannot remove the Chief Justice nor ensure shared policy views.

⁴⁶⁷ The Congressional Register (June 24, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 1044.

⁴⁶⁸ Compare *id.* (providing the vote totals on the War Department bill), with Foreign Affairs Act [HR-8] (July 27, 1789) (providing the vote totals for the Foreign Affairs bill), reprinted in 4 DOCUMENTARY HISTORY, *supra* note 136, at 692.

⁴⁶⁹ See War Department Act [HR-7] (Aug. 7, 1789) (providing a calendar of legislative events), reprinted in 6 DOCUMENTARY HISTORY, *supra* note 245, at 2031.

lingering illness.⁴⁷⁰ The senatorial bloc tried to strike out the ambiguous clause but lost 10–9,⁴⁷¹ with the same breakdown as the Foreign Affairs vote on July 16, minus Maclay.⁴⁷² President Washington signed the War Department bill into law three days later.⁴⁷³

However, when the Treasury bill came up in early August, the Senate vote flipped to a majority in opposition to the ambiguous removal clause.⁴⁷⁴ Maclay was still away until mid-August, so there is no record of who switched against the clause. But letters soon would reveal why this switch occurred. When the bill returned to the House on August 4, “the old question was again brought up and considerable debate took place,” and with no recorded debate or vote, the House rejected the Senate’s version, insisting on restoring the same ambiguous vacancy clause.⁴⁷⁵ The next day, the Senate majority dug in for the deletion, and then each chamber appointed members to a conference committee: the House appointed three presidentialists (Madison, Boudinot, and Fitzsimons, “on a motion by Vining,” another presidentialist), and the Senate appointed two senatorials (Johnson and Lee) plus Strong, who had been a presidentialist vote in July for the Foreign Affairs Bill.⁴⁷⁶ Strong was unlikely a switch to senatorial; the more likely candidates were the ones earlier mentioned as likely votes against the Foreign Affairs bill: Dalton, Bassett, or Elmer.⁴⁷⁷

On August 10, William Smith, the Maryland senatorial member of the House, wrote, “the Senate [s]truck out the Clause giving the President the power of [removal],” indicating opposition to a removal power regardless of

⁴⁷⁰ Diary of William Maclay: First Session (July 20, 1789), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 119.

⁴⁷¹ Journal of the First Session of the Senate (Aug. 4, 1789), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 145, at 104–05.

⁴⁷² See Diary of William Maclay: First Session (July 16, 1789) (providing the voting breakdown for the Foreign Affairs bill, a 10–10 tie, which includes Maclay voting for striking the ambiguous clause), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 38, at 115.

⁴⁷³ War Department Act [HR-7] (Aug. 7, 1789), *reprinted in* 6 DOCUMENTARY HISTORY, *supra* note 245, at 2031.

⁴⁷⁴ Treasury Bill [HR-9] (July 2, 1789), *reprinted in* 6 DOCUMENTARY HISTORY, *supra* note 245, at 1985 n.9.

⁴⁷⁵ The Daily Advertiser (Aug. 5, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1174.

⁴⁷⁶ Treasury Act [HR-9] (Sept. 2, 1789), *reprinted in* 6 DOCUMENTARY HISTORY, *supra* note 224, at 1979.

⁴⁷⁷ See Letter from William Smith (S.C.) to Edward Rutledge (July 5, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 960. Maclay had described Strong as “confused,” see *supra* note 316 and accompanying text, but Strong’s strong support for the bill was confirmed in a letter by Benjamin Goodhue. Goodhue described “convert[ing]” Dalton as the necessary vote for passage and hinted at his own presidentialist leanings; it seems fair to assume Strong shared the same interpretation. See Letter from Benjamin Goodhue to Cotton Tufts (July 20, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 1085.

theory.⁴⁷⁸ He noted uncertainly, “how it will terminate I [cannot] [s]ay.”⁴⁷⁹ Apparently inspired by these events on the same day, the other William Smith, the South Carolina “impeachment only” member, repeated a thorny problem for the presidentialists: “It is very certain that had the power been agitated in [the] Convention [and] there understood to be in the [President] alone, we [should] have been told it in the debate.”⁴⁸⁰ And the Senate made it clear that these debates had not yet ended without a new prolonged fight. On August 14, Senator Johnson “reported inability of conference committee to reach agreement.”⁴⁸¹ The House notes in an August 22 report that they still could not reach an agreement after more than two weeks, and Madison spoke against compromise: “it would not be right for the [H]ouse to recede from their disagreement.”⁴⁸² In the context of his June 22 gambit, he had already receded and retreated to the ambiguous clause back then, so he was really speaking against any further retreat.

A letter from a key congressionalist offers some insight that strategic ambiguity had been the plan, and how a compromise seems to have unfolded. On August 16, Representative Thomas Hartley wrote a letter to a Pennsylvania lawyer about the deadlock: “[o]ur Contest with the Senate is not yet decided—we have told them we adhere to the Clause of Removal by the President—and that they must restore it in the bill—or by an authentic act give up the Principle—we expect to obtain one or other.”⁴⁸³

First, the pronouns and possessives are revealing: “[o]ur [c]ontest” and “we have told them we adhere.”⁴⁸⁴ Hartley was a vocal congressionalist who voted yes/no/yes and proclaimed that such a vote would indicate a congressionalist interpretation back on “Decision Day”—Monday, June 22.⁴⁸⁵ The final “yes” of the yes/no/yes had always been a decision by the congressionalists to accept the final bill with the Madison/Benson vacancy

478 Letter from William Smith (Md.) to Otho H. Williams (Aug. 10, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 1281.

479 *Id.*

480 Letter from William Smith (S.C.) to Edward Rutledge (Aug. 10, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 1281-82.

481 Treasury Act [HR-9] (Sept. 2, 1789), *reprinted in* 6 DOCUMENTARY HISTORY, *supra* note 224, at 1979.

482 The Congressional Register (Aug. 22, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1324.

483 Letter from Thomas Hartley to Jasper Yeates (Aug. 16, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 1332; Letter from Thomas Hartley to William Irvine (Aug. 17, 1789) (“The Senate has not yet passed the Treasury bill—they are called upon by our Committee to restore the Clause in which they struck out, or by an explicit Resolution acknowledge of the power of removal in the President and in the mode contended for in the House of Representatives.”), *reprinted in* 16 DOCUMENTARY HISTORY, *supra*, at 1337.

484 *Id.* (emphasis added).

485 *See supra* note 216 and accompanying text.

clause as a compromise, even as they disagreed with Madison's and Benson's claims about what the vacancy clause symbolized.⁴⁸⁶ Their first choice was to clearly delegate the removal power, but they preferred departmental bills with at least some hint of the delegation of the removal power, rather than no bill or no hint at all. Hartley as a congressionalist showed that he had fully adopted that compromise in calling for the Senate opposition to accept that same compromise. Hartley's letter says nothing about a constitutional theory. It does not indicate that a congressionalist like Hartley had accepted the presidentialist theory, only that he embraced the practical goal of keeping "Removal by the President." The pronouns and possessives Hartley used in his letter demonstrate that he was not alone in this approach.

A second letter from Hartley on this impasse, written the next day, refers to "our Committee[,] asking the Senate to "restore the Clause" or "by an explicit Resolution acknowledge the [p]ower of removal in the President in the [m]ode contended for in the House of Representatives."⁴⁸⁷ This second letter's reference to "acknowledge the [p]ower of removal in the President" sounds more like the presidential theory, and Hartley does refer to it as the view "in" the House—but "in" the House does not mean the view "of" the House. Hartley did not endorse the presidential theory in either letter. Given his clear congressional arguments in June, it is more likely that Hartley had joined the strategy of ambiguity and compromise: the ambiguous language was better than nothing for a congressionalist who wanted some plausible basis for delegating a removal power. Congressionalists had agreed to this committee, and it would make sense that they were pursuing a mix of the two approaches: the presidentialists still considering (or empty threatening) an "explicit Resolution," while pushing the back-up ambiguous language as a more likely compromise.

Second, the letters confirm that Congress explicitly considered an "explicit Resolution" (or an "authentic act") instead of ambiguity, and it again retreated. Such a separate act would have been the explicit declaratory act that Representative Gerry, a senatorial opposed to removal based on either theory, had dared them to try back in June,⁴⁸⁸ instead of the "little clause hid in the body" or the "side wind" the senatorials had dismissed.⁴⁸⁹ In this letter, Hartley was acknowledging that such a declaratory act (or even an

⁴⁸⁶ See *supra* note 180 and accompanying text.

⁴⁸⁷ Letter from Thomas Hartley to William Irvine (Aug. 17, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 1337.

⁴⁸⁸ See The Daily Advertiser (June 22, 1789) ("It looks as if we were afraid of avowing our intentions: [i]f we are determined upon making a declaratory act, let us do it in such a manner as to indicate our intention."), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 976.

⁴⁸⁹ *Id.*; The Notes of John Adams (July 15 or 16, 1789), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 38, at 446.

explanatory clause) had been an option all along. This exchange indicates that when the Senate resisted the ambiguous compromise, the House put the explicit declaratory act on the table as the alternative that they knew the Senate would not accept, and that such an unacceptable choice would leave the ambiguous clause as the more tolerable compromise. By implication, the ambiguous clause was not really “authentic” as a statement or a “decision.” It was a compromise *forged* because of a lack of consensus.

Third, the Senate’s rejection of the “authentic act” and the initial rejection of the ambiguous clause confirm that the Senate really did have the votes against presidential removal and also had the will to slow down Congress over the issue. Reluctant Senators (likely Bassett, Dalton, and/or Elmer) had been willing to cooperate or compromise on the Foreign Affairs and War department bills, but it seems the Treasury bill may have been a bridge too far. The fact that the House leadership openly put both options as an either/or deal—and that the House congressionalists and at least a small number of the Senate’s senatorials first resisted but then agreed to the ambiguous clause—is additional evidence that strategic ambiguity was the plan from the time Madison and Benson introduced it.

A day later, Moore (a Y/Y/Y member) worried, “[t]he Senate insist on their Amendments—[p]robably the [T]reasury Bill [w]ill be lost for the [p]resent.”⁴⁹⁰ Many members clamored to adjourn in the next month, and Congress was desperately trying to conclude the constitutional amendments and the Judiciary Bill.⁴⁹¹ On August 23, Hartley wrote two letters describing an escalating stand-off and defeatism: “[I]f the Senate will not recede let them answer for the [c]onsequences[,]”⁴⁹² and “if we stand firm the [b]ill will be lost.”⁴⁹³ Yet again, he did not identify any theory of removal, just the House fighting for a general power.

On August 25, after an impasse for most of the month, the Senate voted again, back to a familiar 10–10 tie, again broken by Vice President Adams.⁴⁹⁴

⁴⁹⁰ Letter from Andrew Moore to Archibald Stuart (Aug. 18, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 1347.

⁴⁹¹ See, e.g., Letter from James Madison to Edmund Randolph (Aug. 21, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 1364.

⁴⁹² Letter from Thomas Hartley to Tench Coxe (Aug. 23, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 1379.

⁴⁹³ Letter from Thomas Hartley to Jasper Yeates (Aug. 23, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 1380.

⁴⁹⁴ Treasury Act [HR-9] (Sept. 2, 1789), *reprinted in* 6 DOCUMENTARY HISTORY, *supra* note 243, at 1979–80. The presidentialist Fitzsimons described the Senate vote as a removal power “fully established,” but did not say clearly that it conveyed a constitutional interpretation of Article II. See Letter from Thomas Fitzsimons to Benjamin Rush (Aug. 27, 1789), *reprinted in* 22 DOCUMENTARY HISTORY, *supra* note 242, at 1730 (“The Senate have passed the trea[sury] bill which has lain so long with them and by which the [r]emovability from office by the [President] is fully established. . .”).

The notes from the House that week reflect rising tensions over the amount of work left and the need to make plans for fall adjournment and recess. After other members complained, Vining listed the remaining bills urgently on the agenda: “[w]e already know [our constituents’] sentiments: [t]his business must absolutely be attended to, and completed previous to a recess.”⁴⁹⁵ Nothing focuses the mind like a deadline and facing constituents. Besides the Treasury Act, throughout the summer Congress was deep in debates over the Judiciary Act, Indian tribal treaties, revenue and salaries for officers, and the constitutional amendments and the Bill of Rights—the wide range of bills covered in the proceedings is staggering.⁴⁹⁶ The vote on the Treasury bill was not likely a compromise with any reflection on constitutional interpretation. It was more likely a compromise out of necessity and exhaustion.

So, this is where we find Congress at the end of the summer of 1789: the Senate had held up the Treasury bill for a precious month. An “authentic” explanatory clause was used as a threat, but it was an abandoned threat, and likely an empty threat. The rejection of the explicit in favor of the ambiguous left some senatorial sympathizers, like James Sullivan, “rejoic[ing]” the presidentialists’ retreat;⁴⁹⁷ left presidentialists like Ames worrying that they had “blundered” by deleting the clear clause;⁴⁹⁸ and left everyone confused by Madison’s comptroller proposal.⁴⁹⁹ Maclay did not record any major changes once he returned to the Senate in mid-August, just when this

⁴⁹⁵ *Id.* at 1327.

⁴⁹⁶ See Journal of the First Session of the House of Representatives (July 1789) (documenting July House proceedings on Treasury, duties, tonnage, salaries, the territories, navigation, state debt, and the amendments and Bill of Rights), *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 108, at 102-29; Journal of the First Session of the House of Representatives (Aug. 3, 1789) (documenting August House proceedings on navigation/coasting, salaries, militias, Indian tribe treaties, the Judiciary Act, amendments/Bill of Rights, patent/copyright, land offices and territorial governments, and back to tonnage and duties), *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 108, at 130-77; Judiciary Act [S-1] (Sept. 24, 1789) (documenting July Senate proceedings on the Judiciary Act), *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 148, at 1167-68; Journal of the First Session of the Senate (July 1789) (documenting July Senate proceedings on the Judiciary Act, Foreign Affairs, duties and tonnage, navigation, state debt, criminal statute, and the Treasury Act), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 150, at 77-103; Journal of the First Session of the Senate (Aug. 1789) (documenting August Senate proceedings on territorial government, state debt, the Treasury Act, the War Department Act, salaries, navigation, criminal statutes, Indian tribal treaties, choosing the site for the federal seat of government, and amendments/Bill of Rights), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 150, at 104-47.

⁴⁹⁷ See Letter from James Sullivan to Elbridge Gerry (June 28, 1789) (“I rejoice with joy unspeakable and full of security, that the point is carried [against] giving the President the power contended for.”), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 878.

⁴⁹⁸ See Letter from Fisher Ames to George R. Minot (July 9, 1789) (“I thought the manner of opposing the President’s power of removal was artful, two or three days ago, but I now think that the very best method of trying their strength was blundered upon, and finally not perceived to be the best.”), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 985.

⁴⁹⁹ See *supra* Section VI.A.

compromise was getting worked out. If there had been significant debate on the constitutional meaning of this compromise either way, Maclay would have been eager to complain about further “[r]ecantations,”⁵⁰⁰ corruption, and betrayals on the one hand, or new victories for his side and defeats for those he held in contempt, especially John Adams. Maclay’s silence suggests that the compromise was more whimper than bang. The senatorials’ stopping the Treasury bill revived a statement against removal, and they clarified that the presidentialists did not have a vote for their own clear statement. The presidentialists had to keep relying on Easter egg hints, the congressionalists could plausibly claim the hint was mere delegation or ambiguity about the source of the power, and senatorials could plausibly claim this ambiguity reflected uncertainty about the power. Instead of going back to clarify the presidentialist interpretation, it seems Madison, Benson, Ames, Vining, and the presidentialists mostly gave up on pursuing the theory by August, and they were more interested in compromise and moving on. There was no presidential “Decision of 1789.” The three-way split in the First Congress led to a Compromise of 1789.

VII. “AT PLEASURE” AND GOOD-CAUSE WRITS

In addition to the Treasury debate’s rejection of a clause for tenure “at pleasure,” the Judiciary Act suggests that “at pleasure” was no default rule. Chief Justice Taft and then-Judge Kavanaugh mistakenly asserted that the “Decision of 1789” had “established” or “given . . . this construction” of removal “at pleasure” or “at will.”⁵⁰¹

Even when it came to the War and Foreign Affairs Departments—the most executive of powers of war and peace—a majority of Congress still rejected Article II presidentialist removal powers. Moreover, the members’ references to writs for a process of removing or opposing removal indicate an understanding of legal protections for officeholders against removals-at-pleasure. Then the First Congress enacted a series of removal-by-judiciary

⁵⁰⁰ Diary of William Maclay (July 16, 1789), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 38, at 114.

⁵⁰¹ *Myers v. United States*, 272 U.S. 52, 147 (1926) (quoting *Parsons v. United States*, 167 U.S. 324, 339 (1897)) (referring to “the construction of the Constitution in this regard as given by the Congress of 1789” which included “removal from office at pleasure”); *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 168 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) (“In 1789, the First Congress confirmed that Presidents may remove executive officers at will.”); *see also* *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 692 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (“[T]he constitutional text and the original understanding, including the Decision of 1789, established that the President possesses the power under Article II to remove officers of the Executive Branch at will.”); *supra* Part VI.

clauses, demonstrating that presidential removal was nonexclusive and unnecessary and/or insufficient.

A. *No Consensus on “At Pleasure” or “At Will”*

The real Decision of 1789 was against indefeasible presidential powers, as demonstrated not only in a debate about a failed comptroller proposal, but also in the votes and statutory texts from the First Congress. Prakash conceded that the First Congress did not resolve the conditions Congress could place on presidential removal.⁵⁰² The evidence from the House debates goes even further: if presidentialists rejected “indefeasibility” so clearly, the House had an overwhelming majority who were either anti-presidentialist or pro-defeasibility/congressional conditions.

Few members went on record endorsing “at will” or “during pleasure” tenure, either as a constitutional matter under Article II or as a policy matter for Congress. The holdings in *Free Enterprise* and *Seila Law* assume a constitutional rule of removal at will.⁵⁰³ However, the First Congress never came close to adopting or even implicitly endorsing such a rule. Their 1789 debates are more consistent with Chief Justice Rehnquist’s commonsense majority opinion in *Morrison v. Olson*: Presidents could still take care that the laws were faithfully executed even if removal was limited by a “good cause” requirement.⁵⁰⁴ Neither service “at the pleasure of the President” nor removal “at will” were necessary.⁵⁰⁵

⁵⁰² Prakash, *New Light*, *supra* note 7, at 1072 (“Because the question of a default removal power was never squarely addressed, it is difficult to conclude that a majority of the House implicitly opposed the idea.”).

⁵⁰³ *Free Enterprise* and *Seila Law* invalidate for-cause limits on a presidential power to remove, in order to protect a president’s power to remove at will. See *Free Enter. Fund*, 561 U.S. at 510 (“[T]he power to remove officer at will and without cause is a powerful tool for control of an inferior . . . [T]he Commission is properly viewed, under the Constitution, as possessing the power to remove Board members at will.” (internal quotation marks omitted)); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2207, 2209 (2020) (“If the Director were removable at will by the President, the constitutional violation would disappear.”); see also *Myers*, 272 U.S. at 147 (quoting *Parsons*, 167 U.S. at 339) (“[T]he President . . . was then regarded as being clothed with such power [to remove at pleasure] in any event. Considering the construction of the Constitution in this regard as given by the Congress of 1789 . . . we think the provision that the officials were removable from office at pleasure was but a recognition of the construction thus almost universally adhered to and acquiesced in as to the power of the President to remove.”) Even in dissent, Justice McReynolds erred in this assumption. *Id.* at 194 (McReynolds, J., dissenting) (“The record fairly indicates that nine, including Mr. Madison, thought the President would have the right to remove an officer serving at will under direct constitutional grant.”). See also *PHH Corp.*, 881 F.3d at 168 (Kavanaugh, J., dissenting); *Free Enter. Fund*, 537 F.3d at 692 (Kavanaugh, J., dissenting).

⁵⁰⁴ *Morrison v. Olson*, 487 U.S. 654, 692 (1988).

⁵⁰⁵ *Id.* at 690 n.29.

The Convention records suggest little support for “during pleasure” tenure. In one particularly notable example, Gouverneur Morris, seconded by Pinckney, proposed an executive council of five department heads serving “during pleasure,” but the proposal was ignored and then died in committee.⁵⁰⁶ In his recent book, Michael McConnell tried to use Morris’s proposal to show that presidential removal at will was “raised” and “brought . . . to the attention” of the Convention,⁵⁰⁷ but he did not note that the Convention ignored it.⁵⁰⁸ To that end, a century ago, a pro-presidentialist scholar regarded this failed proposal as a decisive dismissal of “at pleasure” cabinet governance as a matter of law.⁵⁰⁹

McConnell compounded this error when he wrongly asserted that in the “Decision of 1789,” “Congress made all the officers of the three departments, as well as the district attorneys, removable by the President at will—and the Removal Power is the principal battleground over presidential control.”⁵¹⁰ There is no footnote or source for this claim. And for good reason: it is not correct.

The First Congress was generally silent about tenure conditions, almost never specifying “at will” or “at pleasure.” In fact, the 1789 statutes designated only two sets of officers to serve “at pleasure”: the relatively lowly marshals and deputy marshals, and only the marshal was removable by the President.⁵¹¹ This silence seems to indicate that the First Congress was continuing the indecisions of Philadelphia on removal, leaving this question open, or if not, deliberately leaving room to infer “good cause.”

After the Convention ignored Morris’s proposal of a Council of State serving mostly “at pleasure,” the First Congress generally rejected “at pleasure” removal, adopting such language only for the low-level marshals.⁵¹² The 1789 statutes, however, are silent on the tenure of principal officers. As noted above, Representative Page was able to delete “at pleasure” language from the Treasury Bill without needing debate.⁵¹³ Further, the comptroller

⁵⁰⁶ See THACH, *supra* note 15, at 121 (outlining Morris’s proposal); JAMES MADISON, *Debates in the Federal Convention of 1787*, in 3 THE PAPERS OF JAMES MADISON 1366-67 (1840) (recounting on August 20, 1787 that the proposals were “referred to the Committee of Detail, without debate or consideration of them by the House”).

⁵⁰⁷ MCCONNELL, *supra* note 17, at 162.

⁵⁰⁸ See 2 FARRAND, *supra* note 97, at 342-50 (showing that the committee ignored Morris’s proposal).

⁵⁰⁹ See THACH, *supra* note 15, at 125 (“Its failure marks the final elimination of the separate council idea, and *pro tanto* an abandonment of the English scheme of executive organization.”).

⁵¹⁰ MCCONNELL, *supra* note 17, at 338.

⁵¹¹ See *supra* Part VI.

⁵¹² Judiciary Act of 1789, § 27, 1 Stat. 73, 87 (providing that the marshal “shall be removable from office at pleasure”); see also *infra* Section VI.A.

⁵¹³ The Daily Advertiser (June 26, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 1045.

debate confirmed a lack of support for “at pleasure” tenure, as Madison confirmed his opposition to a general “at pleasure” rule.⁵¹⁴ Ultimately, between nine and eleven members (out of the fifty-three members who voted on these bills) explicitly endorsed a general tenure “during pleasure” rule.⁵¹⁵ Of those eleven, three were senatorial (Livermore, Stone, and White) plus a fourth who also voted against the Foreign Affairs bill (Thatcher).⁵¹⁶ Instead of a higher substantive standard, they embraced a more concrete institutional veto by the Senate on presidential power, so they meant “at the pleasure of the Senate plus President.” Another member, the congressionalist Laurance, put more emphasis on “the will of the legislature,” and otherwise endorsed conditions and terms, so long as they did not use “good behaviour” tenure as an excessive limit on the President.⁵¹⁷ Among the remaining five members, Hartley and Sedgwick were congressionalist; there were only three presidentialists who explicitly and consistently endorsed a rule of tenure “during pleasure”: Ames, Benson, and Boudinot.⁵¹⁸

Meanwhile, other members attacked “tenure during pleasure.” Elbridge Gerry, for example, attributed “removal at pleasure” to a “monarchy,” not a republic.⁵¹⁹ Representative John Page similarly warned that removal power “would run instantly headlong into a monarchy,” and “la[y] the foundation of tyranny,” whereas an independent officer would report corruption and stop it.⁵²⁰ However, such critics did not seem to think that there was only one other option, namely tenure during “good behaviour.” A spectrum of terms and conditions had emerged over time, as reflected in these debates.

⁵¹⁴ See The Congressional Register (June 29, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1083 (noting Madison’s rejection of an “at pleasure” clause).

⁵¹⁵ See The Daily Advertiser (June 18, 1789) (Ames), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 850; The Congressional Register (June 22, 1789) (Benson), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1029-30; *id.* at 1034 (Boudinot); The Daily Advertiser (June 19, 1789) (Hartley), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 886; The Congressional Register (June 18, 1789) (Sedgwick), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 960, 1033; The Daily Advertiser (June 20, 1789) (Stone), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 893; The Congressional Register (May 19, 1789) (Thatcher), *reprinted in* 10 DOCUMENTARY HISTORY, *supra* note 111, at 731; *id.* (White).

⁵¹⁶ Samuel Livermore’s record is mixed, with an arguably implicit exception to at-will default if the law “should create . . . a term of years.” The Congressional Register (June 18, 1789) *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 984. Stone and White endorsed the Senate having a role in removal. *Id.* at 852, 860, 918, 940.

⁵¹⁷ See *id.* at 888-89 (describing Laurance’s view that an incoming President should be able to appoint new executive members but that Laurance “begged gentlemen to consider that the President was liable to impeachment, for having displaced a good man who enjoyed the confidence of his people”); The Congressional Register (May 19, 1789) (endorsing conditions on removal) *reprinted in* 10 DOCUMENTARY HISTORY, *supra* note 111, at 733.

⁵¹⁸ See *supra* Section III.C; see also *infra* Appendix I, Table C.

⁵¹⁹ The Congressional Register (June 19, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1023.

⁵²⁰ *Id.* at 989-91.

Unitary theorists claim that the Founding decided that presidential powers under Article II were “indefeasible.”⁵²¹ It is worth noting that the members of the First Congress sometimes used this word, but never in the context of presidential power. Madison’s draft bill of rights, submitted on June 8, included in its first explanatory amendment (or preamble): “[t]hat the people have an *indubitable, unalienable, and indefeasible* right to reform or change their government.”⁵²² Later in the bill of rights debates, Roger Sherman similarly referred to the people’s “indefeasible” right to exercise their “natural and inherent privilege[s].”⁵²³ Accordingly, it seems that the First Congress limited the scope of “indefeasibility” to natural rights of “the people,” which preceded official powers. The founders thus seemed to have thought that rights were “indefeasible,” not powers.⁵²⁴

B. *The Confederation Era and the Judiciary Act: Expressio Unius?*

The practices before and after the Foreign Affairs debate—especially the Judiciary Act drafted in the summer of 1789—raise further doubts about the assumption of a “during pleasure” default or decision. Section 27 of the Act created the office of the marshal and deputy marshal.⁵²⁵ Congress gave them a term of years, but made sure to be explicit about the terms of removal: “a marshal shall be appointed in and for each district for the term of four years, *but shall be removable from office at pleasure.*”⁵²⁶ The marshal was appointed by the President and confirmed by the Senate,⁵²⁷ and Congress made sure to specify for this lower and more narrowly executive official that he serve “at pleasure.” The deputies also served at pleasure—and were removable by

⁵²¹ See, e.g., MCCONNELL, *supra* note 17, at 31 (“Under the United States Constitution executive prerogatives are set forth in Article II, and are impervious to statutory abridgement . . . [t]hey are indefeasible.”); Prakash, *The Essential Meaning of Executive Power*, *supra* note 94, at 817 (“As everyone understood at the founding, the Constitution indefeasibly vested the power to execute the laws in the president.”); Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 257 (2005) (reviewing HAROLD J. KRENT, *PRESIDENTIAL POWERS* (2005) and arguing that the president’s powers are “indefeasibly his”). Cf. Harold J. Krent, *Essay, The Lamentable Notion of Indefeasible Presidential Powers: A Reply to Professor Prakash*, 91 CORNELL L. REV. 1383, 1386–87 (2006) (criticizing Prakash’s claims on indefeasibility).

⁵²² Madison Resolution (June 8, 1789), *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 136, at 9–10; see also Shugerman, *Vesting*, *supra* note 11, at 36 (discussing the founders’ use of “indefeasibility” in the context of individual rights).

⁵²³ The Congressional Register (Aug. 14, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1242.

⁵²⁴ See *id.* (reflecting Sherman’s comments about the people’s “indefeasible” rights).

⁵²⁵ Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87.

⁵²⁶ *Id.* (emphasis added).

⁵²⁷ James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the “Court of Law” Requirement*, 107 NW. U. L. REV. 1125, 1153 (2013).

judges, not the President.⁵²⁸ These two offices were the only times the First Congress declared any office would be held “at pleasure.” As Manners and Menand explain, “Congress’s choice to start the removability phrase with the conjunction ‘but’—a formulation Congress would repeat—underscores the contrast between the ordinary understanding of a term of years and the tacked-on removal permission.”⁵²⁹ This language, with the word “but,” appeared in the Senate bill passed on July 17,⁵³⁰ so presidentialists in the House had two months to see this language and incorporate these terms in the War and Treasury bills still being debated—but tellingly, they did not.

Before 1787, early Americans sometimes specified “during pleasure” tenure in constitutions and statutes. The New York Constitution of 1777 designated that executive officers served “during the pleasure of the council of appointment,” not the governor.⁵³¹ Hamilton and Benson, of course, were familiar with New York’s constitution and its explicit statement on “at pleasure” removal.⁵³² The Confederation Congress had used “during the pleasure of Congress” for the original Secretary of Foreign Affairs, and “at pleasure” for officers serving under the Secretary of War in a 1785 ordinance.⁵³³ It often referred to tenure “during pleasure” in specific contexts,

⁵²⁸ Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87 (“[D]eputies . . . shall be removable from office by the judge of the district court, or the circuit court sitting within the district, at the pleasure of either . . .”).

⁵²⁹ Manners & Menand, *supra* note 11, at 23.

⁵³⁰ See Judiciary Bill [S-1] (July 17, 1789) (“That a Marshall shall be appointed in and for each district, for the term of [f]our years; *but* shall be removable from office at pleasure . . .” (emphasis added)), reprinted in 5 DOCUMENTARY HISTORY, *supra* note 148, at 1207.

⁵³¹ N.Y. CONST. of 1777, art. XXVIII.

⁵³² Both were prominent New York lawyers. Hamilton frequently referred to the New York constitution in the Federalist Papers. See, e.g. THE FEDERALIST NO. 26, at 130–31 (Alexander Hamilton) (Ian Shapiro ed., 2009) (praising the New York Constitution’s lack of a “without the consent of the legislature” limitation upon the power to maintain a standing army); THE FEDERALIST NO. 66, at 336 (Alexander Hamilton) (Ian Shapiro ed., 2009) (countering objections to permitting the Senate to hold impeachment trials with reference to a similar provision in the New York Constitution); THE FEDERALIST NO. 69, at 349–50 (Alexander Hamilton) (Ian Shapiro ed., 2009) (“The governor of New York, on the other hand, is by the constitution of the State vested only with the command of its militia and navy.”). Benson was an active member of the New York State Assembly from 1777 to 1781, among other major political roles in New York. Benson, Egbert, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguide.congress.gov/search/bio/B000388> [<https://perma.cc/CRB4-395Y>].

⁵³³ Gaillard Hunt, *The History of the Department of State*, 1 AM. J. INT’L L. 867, 869 (1907) (noting that Secretary to the United States of America for the Department of Foreign Affairs “shall hold his office during the pleasure of Congress”). The statute is reprinted in the standard federal statute compendium as a note to the 1789 War Department statute entitled “An Ordinance for ascertaining the Powers and Duties of the Secretary at War.” See 1 Stat. 49 note b. (“He shall appoint and remove at pleasure all persons employed under him, and shall be responsible for their conduct in office . . .”).

like setting up territorial governments or other military offices.⁵³⁴ Later in the 1790s, Congress again referred to tenure “during” or “at” pleasure for other lower level offices, mostly in military contexts, but also for tax collectors.⁵³⁵

The classic textual canon of *expressio unius est exclusio alterius* would apply here: the explicit mention of “during pleasure” in one place implies its intentional exclusion elsewhere. One should apply the *expressio unius* canon carefully, given the speed and size of the First Congress’s legislative agenda. Nevertheless, it is worth asking whether the Judiciary Act’s specific use of “at pleasure” for two low-level offices of law enforcement signals stronger protections for other officers in the Judiciary Act or the departmental bills. Again, the Treasury bill bolsters such an implication.

C. Good-Cause Writs and Justiciability

The English system had primarily relied on “at pleasure” and “good behaviour,” with life terms, inheritable offices, and “term of years” requiring special reasons to remove.⁵³⁶ The English also applied other conditions similar to good cause. English and colonial statutes required officials to take oaths of faithful execution, faithful discharge, or faithful performance, guaranteed by monetary “sureties” or bonds.⁵³⁷ Officers who violated their duties—by “neglect of duty” or “malfeasance in office”—were removed by legal process and lost these sureties or faced other financial penalties.⁵³⁸

⁵³⁴ See, e.g., 19 JOURNAL OF THE CONTINENTAL CONGRESS 1774-1789, at 75 (Gaillard Hunt ed. 1912) [hereinafter JCC] (Jan. 23, 1781) (procurator appointed “during the pleasure of Congress”); *id.* at 290 (March 21, 1781) (superintendent of finance “is hereby empowered to appoint and remove at his pleasure, his assistants”); 31 JCC, *supra*, at 672 (Sept. 19, 1786) (territorial General Assembly to “continue in Office during pleasure”); 32 JCC, *supra*, at 283 (May 10, 1787) (same); 25 JCC, *supra*, at 572 (Sept. 16, 1783) (all persons employed under the Secretary of the Marine Department shall be “appoint[ed] and remove[d] at pleasure”); 24 JCC, *supra*, at 377 (June 2, 1783) (commercial agent appointed “during our pleasure”); 20 JCC, *supra*, at 735 (July 10, 1781) (commission as vice consult to France “during the pleasure of Congress”).

⁵³⁵ See, e.g., An Act To Provide For The Valuation Of Lands And Dwelling-Houses, ch. 70, § 5, 1 Stat 580, 584 (1798) (permitting direct tax commissioners to appoint their own clerk, who would serve “at the pleasure” of the commissioner); An Act For The Relief Of Sick And Disabled Seamen, ch.77, § 5, 1 Stat 605, 606 (1798) (“[T]he said directors [of a marine hospital] shall hold their offices during the pleasure of the President . . .”); An Act Further To Protect The Commerce Of The United States, ch.68, § 2, 1 Stat. 578, 589 (“And the commissions [for armed private vessels] which shall be granted, as aforesaid, shall be revocable at the pleasure of the President of the United States.”).

⁵³⁶ See discussion *supra* notes 418–421 and accompanying text (discussing English practice regarding removal from royal offices).

⁵³⁷ See Kent, Leib & Shugerman, *supra* note 11, at 2165–68 (describing oaths, bonds, and sureties in colonial Rhode Island, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia).

⁵³⁸ See *id.* at 2070–71 (describing civil and criminal actions against public officials for neglect of duty or criminal activity); see also Manners & Menand, *supra* note 11, at 43 (“Virginia . . . require[ed]

Faithful execution was a forerunner of a more modern language of “neglect of duty,” “inability, or for other just [c]ause,” and good cause, as seen in recent historical work.⁵³⁹ “Good cause” was a common legal term for removal in the mid-eighteenth century, and was the default rule for removal in English corporate law (a quasi-public law in that era).⁵⁴⁰

The First Congress’s debates also had members offering conditions similar to good cause that would be justiciable in the English writ tradition.⁵⁴¹ To that end, on May 19, John Laurance’s menu of legislative options included “hold[ing] for three years” (as property protected from removal by English law); “good behaviour” (similar); by legislative declarations of “unfitness and incapacity”; “causes of removal”; and “mak[ing] the president alone judge of this case[,]” the latter of which seemed to be presidential good cause without judicial review.⁵⁴² Laurance’s long list of legislative options provides more context for his congressionalism on June 22, which contradicts Prakash’s characterization of Laurance as a presidentialist and undercuts his claim that Congress did not address conditions limiting removal.⁵⁴³

Further, Thomas Sedgwick recognized judicial process for removal and good cause: “I believe some difficulty will result from determining this

that the warehouses’ superintendents . . . [were] by law liable . . . for the misfeasance, non feissance and malfeasance in office.” (internal quotations omitted).

⁵³⁹ See Manners & Menand, *supra* note 11, at 6 (“When Congress first used the now-talismanic [inability, neglect, or malfeasance] phrase in 1887, it defined these circumstances using terms that were already well-known. ‘Neglect of duty’ and ‘malfeasance in office’ were old common law concepts employed by courts and legislators to connote an officer’s failure to faithfully execute statutory duties.”); Birk, *supra* note 432, at 224 n.304 (citing an English statute which permitted city officials in Westminster to appoint constables to one-year terms, dischargeable for “[i]nability, or for other just [c]ause”).

⁵⁴⁰ See e.g., James Bagg’s Case, 77 Eng. Rep. 1271, 1271-72 (1615) (prohibiting corporate disenfranchisement of an employee without legal cause); Lord Bruce’s Case, 93 Eng. Rep. 870, 870 (1729) (“[I]f it is an actual forfeiture, he is out, and you may chuse another . . . if not, it is but a misdemeanour, and a quo warranto will not lie.”); Rex v. Richardson, 96 Eng. Rep. 1115, 1116 (1758) (“It is expressly laid down in Bagg’s case . . . that one cannot be removed from his franchise, without charter, or prescription, but by due conviction, per judicium parium.”); 1 WILLIAM BLACKSTONE, COMMENTARIES *484 (citing Bagg’s Case for the proposition that corporations could disenfranchise their employees only for a violation of the law); Manners & Menand, *supra* note 11, at 30-33 (discussing Bagg’s Case, Lord Bruce’s Case, and Rex v. Richardson); Shugerman, Despotism Displacement, *supra* note 11 (manuscript at 34-35) (same). Hamilton’s Bank of New York charter draft of 1784 emphasized “neglect of duty” twice, and Jefferson’s charter of the College of William & Mary in 1779 mentioned “good cause.” See Shugerman, Despotism Displacement, *supra* note 11 (manuscript at 28 n.154).

⁵⁴¹ The Congressional Register (June 16, 1789) (featuring Sedgwick’s remarks noting the availability of the writ of mandamus to reverse removals if contrary to law and endorsing removal conditions for “incapacity”), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 866.

⁵⁴² The Congressional Register (May 19, 1789), *reprinted in* 10 DOCUMENTARY HISTORY, *supra* note 111, at 733.

⁵⁴³ See Prakash, *New Light*, *supra* note 7, at 1053-54, 1054 n. 218 (“Laurance arguably voted for the final bill for the same reason Boudinot did: because it endorsed the executive-power theory.”). If Prakash claims Laurance as part of any “presidential” bloc, then that bloc included those who clearly rejected indefeasibility, like Laurance and Madison.

question by mandamus. A mandamus is used to re-place an officer who has been removed contrary to law.”⁵⁴⁴ Sedgwick added, “this officer being the creature of the law, we may declare that he shall be removed for incapacity, and if so declared, the removal will be according to law.”⁵⁴⁵ Sedgwick may have meant that mandamus would not protect this officer, because a declaration of incapacity might be sufficient “according to law.” However, Sedgwick was still acknowledging an English writ tradition that limited removal, which could apply in other statutory conditions. This formulation “according to law” with writs to enforce the law indicate a range of legal limits against removal.

Sedgwick understood that mandamus was an important part of the legal background to protect offices from removal “according to law.” Sedgwick does not specify what default standard would apply under mandamus, but he assumed that Congress had the power to specify the terms of removal by “declaring” a rule of removal for incapacity. His comment suggests that Congress may choose a protection against removal, which would govern the mandamus proceeding on any removal from office. Sedgwick reflects an understanding that mandamus provided a process and a remedy against a wrongful executive removal decision, and that the executive generally did not have a discretionary removal power.⁵⁴⁶

In the same removal debate, William Loughton Smith also referred to mandamus to challenge removals. As he grew frustrated that his impeachment interpretation did not persuade his colleagues, Smith told them officers would be going to the courts anyway: “the [removed] officer will have a right to a *mandamus* to be restored to his office, and the judges would determine whether the president exercised a constitutional authority or not.”⁵⁴⁷ Smith and Sedgwick were describing widely-understood English common law of removal: some writs were legal processes that offered a path for removing an officer who held his position under good behavior tenure, but only where there was evidence of misbehavior by the officer, who has given a chance to rebut his claim.⁵⁴⁸ Judges could remove officers for misbehavior, but misbehavior was a high standard to prove.⁵⁴⁹ Most relevant

⁵⁴⁴ The Congressional Register (June 16, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 866.

⁵⁴⁵ *Id.*

⁵⁴⁶ For more on mandamus, see JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL DEPARTMENT OF THE UNITED STATES 25-31, 60-65 (2009).

⁵⁴⁷ *Id.* at 864.

⁵⁴⁸ Prakash & Smith, *How to Remove a Federal Judge*, *supra* note 438, at 92-94, 102, 111.

⁵⁴⁹ *See id.* at 92-94 (arguing that historical evidence from England, the colonies, and independent America shows that “a judicial finding of misbehavior would terminate good-behavior tenure”); *see also* Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1847 (2006) (suggesting English and early American courts lacked inherent authority to remove inferior judicial

here, kings often could not remove officers at pleasure if their tenure was held under good behavior, so they had use the writ of *scire facias* (“to make known”) or *quo warranto* (“by what authority”) to allege misbehavior and remove officers.⁵⁵⁰ Notably, on June 12, 1789, the Senate had already drafted and presented the All Writs Act as a section of the Judiciary Act of 1789, which enacted the writ of *scire facias*, mandamus, and “all other writs not specially provided for by [s]tatute.”⁵⁵¹ *Scire facias* is “a rough equivalent to the modern-day ‘order to show cause.’”⁵⁵² The king used *scire facias* as a plaintiff to remove officers for cause,⁵⁵³ and it could also be used by the king against the king’s officers.⁵⁵⁴ In 1686, Massachusetts colonists similarly used a writ of *scire facias*

officers, such as clerks, and instead relied on express statutory or constitutional grants of removal authority). *But see* James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227, 1228 (2007) (arguing that Prakash and Smith’s historical evidence regarding the availability of non-impeachment means for removing judges is unpersuasive); Martin H. Redish, Response, *Good Behaviour, Judicial Independence and the Foundations of American Constitutionalism*, 116 YALE L.J. 139, 141 (2006) (“Prakash and Smith fail to meet their burden of historical proof to show that those who drafted and ratified the Constitution intended . . . to incorporate wholesale the preconstitutional historical practice.”).

⁵⁵⁰ For instance, in *Reynel’s Case*, the court made clear that the king had to use *scire facias* to remove officers in specific circumstances. *See Reynel’s Case*, 77 Eng. Rep. 871, 871-74 (1612); *see also* Prakash & Smith, *How to Remove a Federal Judge*, *supra* note 438, at 92-102 (detailing historical evidence regarding the use of *scire facias* in England).

⁵⁵¹ Judiciary Bill [S-1] (June 12, 1789), *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 148, at 1181; Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

⁵⁵² Mark Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 VA. L. REV. 1673, 1683 & n.38 (2013) (citing BLACK’S LAW DICTIONARY 1464 (9th ed. 2009)).

⁵⁵³ *See, e.g., Reynel’s Case*, 77 Eng. Rep. at 871-74 (clarifying circumstances under which the king must use *scire facias*); RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 128-129 (1973) (citing two instances in which, though the king ordered a judge to be removed from office, the judge successfully asserted that removal required a “*scire facias* proceeding”); Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870, 882-83 (1930) (“Judges and other officers, holding ‘during good behavior’ by patent from the King, were removable on *scire facias* in the King’s Bench. Persons in lower official positions, not holding by patent from the King, were subject to ouster by a proceeding in the nature of *quo warranto* The causes of forfeiture were . . . misconduct and neglect of duty.”); Prakash & Smith, *How to Remove a Federal Judge*, *supra* note 438, at 77 n.13 (discussing the Crown’s use of the writ of *scire facias*).

⁵⁵⁴ *See generally* THOMAS CAMPBELL FOSTER, *A TREATISE ON THE WRIT OF SCIRE FACIAS* (1851) (describing the writ of *scire facias* and its history); JOSEPH CHITTY, JR., *A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN; AND THE RELATIVE DUTIES AND RIGHTS OF THE SUBJECT* 330-31 (1820) (listing *scire facias* as a “prerogative process” by which the king may repeal a grant of office, and noting that in such a proceeding the officer has the opportunity to offer a defense or demur); James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269, 1303-04 & n.193 (2020) (describing the use of *scire facias* as one of “the prerogative or common law writs that took hold in eighteenth-century England” and observing that it “resembled other public actions, in which individuals were entitled to pursue relief in the form of a judicial order that quashed or invalidated official action and could redound to the benefit of the public as a whole”). For the continuing and robust role of *scire facias* for official action on patents and the English influence on US patent law, see Christopher Beauchamp, *Repealing Patents*, 72 VAND. L. REV. 647, 655-57 (2019).

to demand the Massachusetts Bay Company to “shew cause unto the Court why its charter shouldn’t be vacated,” which effectively led to the replacement of the colonial government.⁵⁵⁵ Thus, the understanding of *scire facias* appears to be that it related to the removal of officers, but only for cause.

A follow-up Article on the European tradition of “venality” (the sale of offices) and the Constitution’s “offices of profit” will show how the First Congress carried on a tradition of offices as freehold property protected from removal by judicial process.⁵⁵⁶ The First Congress and other early Congresses passed many statutes that created a process of civil removal by the judiciary—by judges and juries.⁵⁵⁷ The Treasury Act and its debates provide one major example.⁵⁵⁸ These removal clauses suggest that Congress needed to create a process to remove officers, likely as a continuation of the English tradition of offices-as-freehold property. Parallel to the English writ system, these clauses provided for a process of good cause or proving misbehavior to remove officers who were otherwise protected from removal-at-will. Thus, these clauses seem to reflect an understanding that presidential “pleasure” would not be sufficient to remove many officers. Alternatively, or additionally, these clauses may reflect an understanding that presidential removal was neither necessary nor exclusive; if presidents were unwilling or unable to supervise their officers, there would be an independent civil judicial process for removing officers for cause (e.g., misbehavior or “high misdemeanor[s]”).⁵⁵⁹

These early congressional debates indicate a set of background understandings about the justiciability of removals for cause. House members apparently were aware they were enabling courts to continue an English tradition of judges examining the reasons for official removal, which is further evidence for “good cause” tenure, against a default assumption of “at pleasure” tenure.

⁵⁵⁵ Nikolas Bowie, *Why the Constitution Was Written Down*, 71 STAN. L. REV. 1397, 1455-57 (2019).

⁵⁵⁶ See Shugerman, *Despotic Displacement*, *supra* note 11.

⁵⁵⁷ For a long list of such statutes, see Brief for Jed H. Shugerman as Amicus Curiae In Support of the Court-Appointed *Amicus Curiae* at 21-24, *Collins v. Yellen*, 141 S. Ct. 1761 (2021) (No. 19-422); see also Chabot, *Interring the Unitary Executive Theory*, *supra* note 108, at 176-84 (detailing statutes in which the First Congress “refused to leave faithful execution to the executive alone” and “supplemented the President’s removal power by subjecting misbehaving officers to judicially imposed penalties, including removal”).

⁵⁵⁸ An Act to Establish the Treasury Department, ch. 12, § 8, 1 Stat. 65, 67 (“[I]f any person shall offend against any of the prohibitions of this act, he shall be deemed guilty of a high misdemeanor . . . and shall upon conviction be removed from office, and forever thereafter incapable of holding any office under the United States”); The Congressional Register (June 29, 1789) (Rep. Burke explaining he intended this clause to prevent officials “from being directly or indirectly concerned in commerce, or in speculating in the public funds under a high penalty, and being deemed guilty of a high crime or misdemeanor”), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 1080; see also *supra* Section IV.A for an in-depth discussion of the Treasury debate.

⁵⁵⁹ See An Act to Establish the Treasury Department, ch. 12, § 8, 1 Stat. 65, 67.

VIII. "COURT PARTY" SPIN

Madison was a small man ironically nicknamed the "Big Knife"⁵⁶⁰ for his legislative skill cutting deals and cutting through opposition. In many ways, this revised account is a more interesting story of Madison outwitting his much more numerous opponents with a divide-and-conquer strategy. To paraphrase Justice Scalia, Madison tried to hide an unpopular elephant in an ambiguous mousehole.⁵⁶¹ To borrow another textualist metaphor, this long and shifting debate invited the advocates of presidential power to find their friends in a large party, a problem of selection bias and confirmation bias.⁵⁶² The ambiguity allowed Madison and the pro-administration presidentialists to spin a "Decision" after the votes. Insiders built up this myth over the next few years and decades, especially Chief Justice Marshall and later the Jacksonian supporters of presidential control over offices and patronage. Madison's strategy has succeeded two centuries later, as an unwitting Roberts Court and good-faith modern unitary theorists rely on Madison's propaganda.

Madison's perspective shifts back and forth from 1787 to 1789, from more openness to congressional power to more emphasis on presidential power in mid-June 1789—and back again. This shift should give pause to originalists who focus on original public meaning circa 1787, because Madison's arguments in 1789 and thereafter may reflect his changing political interests over time, rather than his recollecting a consensus from 1787 to 1788.⁵⁶³ In many constitutional questions, the original public understanding was often unstable, but in this case, James Madison's own understanding was unstable year-to-year—and even week-to-week in the spring of 1789. Or perhaps his own political standing was unstable year-to-year, and so he shifted his standing on his constitutional "understanding" back and forth over these years.

⁵⁶⁰ JOSEPH J. ELLIS, *FOUNDING BROTHERS* 70 (2002).

⁵⁶¹ See *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."); see also *NFIB v. OSHA*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) ("Congress does not usually 'hide elephants in mouseholes.'").

⁵⁶² See JUSTICE ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 36 (1997) ("In any major piece of legislation, the legislative history is extensive, and there is something for everybody. As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends."); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 *IOWA L. REV.* 195, 214 (1983) ("It sometimes seems that citing legislative history is still, as my late colleague Harold Leventhal once observed, akin to 'looking over a crowd and picking out your friends.'").

⁵⁶³ See, e.g., BILDER, *supra* note 135, at 239-40 (2015) (arguing Madison continuously "revis[ed] his understanding" of the Convention debates, and that his recollections "imposed his personality and preferences" as they were influenced by his hopes, failures, and interests).

Madison's prominence as a Federalist during ratification triggered the fierce opposition of Patrick Henry and Virginia's anti-Federalists—described as “animus” that was “entirely undisguised.”⁵⁶⁴ They first blocked him from both Senate seats, then tried to gerrymander (or “Henrymander”)⁵⁶⁵ him out of a seat by putting him in a more rural anti-Federalist district—where he would have to face James Monroe, who was both a war hero (unlike Madison) and more anti-Federalist.⁵⁶⁶ To garner support, Madison reversed himself on amending the Constitution and made “untrue”⁵⁶⁷ claims about his stances in the Convention. He prevailed in a close vote only after pledging to support amending the Constitution.⁵⁶⁸

Madison almost lost out on three different seats, due to being perceived as too much of a nationalist/Federalist, and due to being perceived as out of touch with Virginians and local politics. Even though he knew that he would have had a place in the administration if he had lost,⁵⁶⁹ he had ambitions in electoral politics and learned he needed the support of Virginia voters and Virginia elites.

As Madison's biographers observe, Madison's ally Fisher Ames “only slightly overstated the situation when he wrote that Madison was afraid of losing his popularity among Virginia state politicians. Madison depended greatly on the Virginia circle[,] . . . [w]hen he stood before Congress, he never forgot that he was a Virginian first.”⁵⁷⁰ This “Virginian-first” Madison of 1789 was different from the nationalist Madison in Philadelphia 1787. Because of the promises made and the localist lessons learned during this close contest, Congressman Madison of 1789 reversed Convention delegate Madison of 1787 on a Bill of Rights, and he led this effort out of allegiance “not only to his constituents but also to his closest friends and political allies” in Virginia.⁵⁷¹

Madison's split from Washington was so dramatic and consequential in the 1790s that it is easy to forget that Madison was Washington's closest political ally in the period from Ratification through the summer of 1789.

⁵⁶⁴ ANDREW BURSTEIN & NANCY ISENBERG, *MADISON AND JEFFERSON* 187 (2010).

⁵⁶⁵ LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 271 (1995).

⁵⁶⁶ NOAH FELDMAN, *THE THREE LIVES OF JAMES MADISON* 246-50 (2017).

⁵⁶⁷ *Id.* at 252-54.

⁵⁶⁸ RICHARD LABUNSKI, *JAMES MADISON AND THE STRUGGLE FOR A BILL OF RIGHTS* 159, 174 (2006); GIENAPP, *THE SECOND CREATION*, *supra* note 3, at 169-172.

⁵⁶⁹ See KEVIN R. C. GUTZMAN, *JAMES MADISON AND THE MAKING OF AMERICA*, 241 (2012) (noting Madison's political allies thought he would head an executive department if not elected); see also STUART LEIBIGER, *FOUNDING FRIENDSHIP: GEORGE WASHINGTON, JAMES MADISON, AND THE CREATION OF THE AMERICAN REPUBLIC* 99 (1999) (quoting letters from Madison's friends, who thought he would be appointed to a position in Washington's administration, and noting Madison's own later belief that this was true).

⁵⁷⁰ BURSTEIN & ISENBERG, *supra* note 564, at 199.

⁵⁷¹ *Id.*

Washington wanted Madison to run for Congress to assist him as an ally and legislative leader, but if Madison had lost, Washington had a place for him in his administration.⁵⁷² Washington asked Madison to draft his inaugural address, delivered on April 30, 1789; then Madison also wrote the congressional reply, and Washington had him write his reply to Congress.⁵⁷³ Madison was Washington's chief ghost writer in April and May, and he was his chief statute writer (and constitutional amendment writer) throughout 1789. Madison's biographers consistently describe his relationship with Washington in 1789: he was "Washington's most influential confidant at the beginning of the new administration, a principal adviser on appointments, presidential protocol, and the interpretation of the Constitution,"⁵⁷⁴ "the president's closest confidant,"⁵⁷⁵ and "at the President's right hand, at once his aide, grand vizier, and prime minister."⁵⁷⁶ In fact, one biographer titled the chapter on this two-year period: "Washington's 'Prime Minister.'"⁵⁷⁷ At the same time, he was in close contact with Jefferson. Madison stayed in Jefferson's good graces by keeping him informed about amending the Constitution in order to protect rights and assuring him of his leadership on this cause dear to Jefferson.⁵⁷⁸

Senator Maclay reported on July 1, 1789 on others' charge that Madison was conspiring with Jefferson on the tariff program "to pay Court, to the French Nation" (the same controversy that coincided with the House removal debate in mid-June).⁵⁷⁹ Maclay wrote that he felt "much readier to believe him [g]uilty of another [c]harge . . . [namely] his [u]rging the [d]octrine of taking away the right of removals of [o]fficers from the Senate. [I]n [o]rder to pay his Court, to the President, whom I am told he already affects to Govern."⁵⁸⁰ A month later, Maclay reported a concern among many senators that Washington, contrary to the design of Senate advice-and-consent, was consulting the House and not the Senate on appointments (i.e., patronage), which he called a "Courtship" of the House, and which other senators blamed

⁵⁷² RALPH KETCHAM, JAMES MADISON 275-76.

⁵⁷³ FELDMAN, *supra* note 566, at 262.

⁵⁷⁴ BANNING, *supra* note 565, at 274.

⁵⁷⁵ BURSTEIN & ISENBERG, *supra* note 564, at 191.

⁵⁷⁶ KETCHAM, *supra* note 572, at 287.

⁵⁷⁷ LEIBIGER, *supra* note 569, at 97; *see also* DAVID O. STEWART, MADISON'S GIFT: FIVE PARTNERSHIPS THAT BUILT AMERICA 91 (2016) ("Through those early months, Washington and Madison were the heart of the government.").

⁵⁷⁸ *See* BURSTEIN & ISENBERG, *supra* note 564, at 198-99 (describing Madison's efforts to garner support for new Constitutional amendments and his efforts to keep Virginia politicians happy).

⁵⁷⁹ *See* The Diary of William Maclay (July 1, 1789), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 96-97; *see also supra* Section III.B.

⁵⁸⁰ *Id.* at 97.

on Madison being “deep in this business.”⁵⁸¹ Madison was the architect of the cabinet, endorsing particular nominees and playing a direct role in building the Washington administration.⁵⁸² He was also communicating in code with Jefferson about joining Washington’s cabinet in May 1789, just as he was drafting the three departments.⁵⁸³ In general, Madison was siding with executive power over legislative power.⁵⁸⁴ Maclay described a “Court party,”⁵⁸⁵ and “caballing” during these removal debates several times.⁵⁸⁶ When the departmental bills were introduced on July 9, Maclay complained about “the [v]eneration entertained for General Washington” as “they endeavour to make him a party.”⁵⁸⁷ Letters to and from Madison confirm an organized effort among Virginia’s elite to strengthen Washington’s hand.⁵⁸⁸ At the end

581 The Diary of William Maclay (Aug. 16, 1789), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 122; *see also* KETCHAM, *supra* note 576, at 286 (describing the “effective working arrangement” between Washington and Madison on appointments).

582 KETCHAM, *supra* note 576, at 286-87.

583 BURSTEIN & ISENBERG, *supra* note 564, at 193 (pointing out that Madison and Jefferson communicated with a private cipher).

584 KETCHAM, *supra* note 576, at 286 (describing Madison’s role in “protecting the executive from undue legislative interference”); *id.* at 288 (“In Congress Madison persistently sought to defend the authority of the executive department, since . . . legislative domination, not executive tyranny, was the chief threat to republican government.”).

585 The Diary of William Maclay (July 15, 1789) (referring to Dalton, Bassett, and Paterson), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 113.

586 *Id.* at 113; *see also* The Diary of William Maclay (July 20, 1789) (“You must intreague and cabal as deep [a]nd deeper too, than [y]our [a]dversaries, or we [w]ill not see [y]ou here [a]gain.”), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 120. It is important to note that the term “cabal” originates from European anti-Semitism, a reference to Jewish mystical “Kaballah” as a delusion about the occult and secret intrigues by conspiratorial rabbis. *See Cabal, in* 4 ENCYC. BRITANNICA 913 (11th ed. 1910); Elizabeth Knowles, *Cabal, in* OXFORD DICTIONARY OF PHRASE AND FABLE (2d ed. 2005). There is no reason to think Maclay, Ames, or Madison had any such awareness or intent; the word “cabal” was appropriated in seventeenth-century England as an acronym for Charles II’s ministers (Clifford, Arlington, Buckingham, Ashley, and Lauderdale) suspected of corruption, providing bad counsel, and negotiating the disastrous pro-Catholic “Secret Treaty of Dover” of 1670. *Id.*

587 The Diary of William Maclay (July 9, 1789), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 104.

588 After discussing the removal debate right before he and Benson proposed their change to the ambiguous clause, Madison wrote to Edmund Pendleton (the wealthy planter, chairman of the Virginia Ratifying Convention, and state supreme court judge), “[i]f the possibility of encroachments on the part of the Ex[ecutive] or the Senate were to be compared, I should pronounce the danger to lie rather in the latter than the former.” Letter from James Madison to Edmund Pendleton (June 21, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 828-29; *see also* Letter from Edmund Randolph to James Madison (June 30, 1789) (“I am now well-persuaded, that there is danger of the executive being a feeble member of the government, than I once supposed. I therefore much approve of the power of removal for which you have lately contended.”), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 894-95; Letter from James Madison to Edmund Randolph (June 17, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 800 (warning against a “two headed [m]onster”: a conflict between the president and the Senate over removals and subsequent appointments).

of the Senate vote on the Foreign Affairs Bill, John Adams also warned, “[w]e [s]hall very soon have [p]arties formed—a Court and Country Party” organized for and against the president.⁵⁸⁹ And the Country party alleged his insider self-dealing: Abigail Adams acknowledged that her husband’s opponents alleged he supported presidential removal “as voting power into his own [h]ands,” as he was next in line to that office.⁵⁹⁰ Similar allegations about presidential ambition and self-aggrandizement dogged Madison.⁵⁹¹

The frequent references to a “Court Party” and “courtship” were an important trope that American revolutionaries had borrowed from English republican or “Whig” ideology: a popular “Country Party” opposing the corruption and self-interested patronage of an elite insider “Court Party.”⁵⁹² In Maclay’s framing, Washington and Madison were leading a new group of “Court Party” elite insiders, and he was one of a new group of “Country Party” outsider-critics, which would later coalesce as Federalists versus Republicans (to whom Madison would later defect).

Over the next year, Madison would be eclipsed by Hamilton in Washington’s orbit, and Madison shifted to Jefferson’s patronage. Starting in October 1789, Washington started following Hamilton’s advice more than Madison’s.⁵⁹³ But before then, he had Washington’s ear. Perhaps out of insecurity about that relationship, which Madison may have foreseen, or just out of ambition, he worked to gain the approval and appreciation of both Washington and Jefferson during the summer of 1789.

Thus, it makes sense that Madison worked so hard to win presidential removal and to increase Washington’s presidential powers—and to get credit for these efforts. In this light, it becomes apparent that Madison was not simply describing events neutrally. He was spinning a story in which he was the star. Once, to insider Edmund Randolph, who shared the goal of strengthening Washington, Madison confided that the newspapers were reporting confusion, but he blamed the media for “misconception” and

⁵⁸⁹ Letter from John Adams to Roger Sherman (July 20, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 1081.

⁵⁹⁰ Letter from Abigail Adams to Mary Cranch (Aug. 9, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 1259.

⁵⁹¹ *See* Letter from William Smith (S.C.) to Edward Rutledge (Aug. 9, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 1267.

⁵⁹² *See* J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORETINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 430-31, 459-60, 499-505 (1975) (discussing the Whig ideology); *see also* James H. Hutson, *Country, Court, and Constitution: Antifederalism and the Historians*, 38 WM. & MARY Q. 337, 338 (1981) (drawing distinctions between federalists and antifederalists with the references to British political terms, “Country and Court”). It is not surprising that the power over appointment and removals in 1789 would trigger references back to the English battles over patronage and the American revolutionary rhetoric of anti-corruption.

⁵⁹³ *See* KETCHAM, *supra* note 576, at 288 (telling of Madison’s confusion that his advice had been rejected regarding Washington’s appointment of Madison).

“mutilated” arguments.⁵⁹⁴ But to others, Madison’s letters projected clarity and victory, building up the myth of a presidentialist decision—often repeating the same wording of a “decision” that “prevailed,” “most consonant with the Constitution,” and a policy against “mixing Legislative and Executive Departments.”⁵⁹⁵ Madison also raised the danger that the Senate would “destroy[] the responsibility of the President.”⁵⁹⁶ Just a few months into the first Congress, Madison and Maclay were on opposite sides of the same emerging divide that led to the first party system and mutual suspicion of factional conspiracy.

Madison was planting seeds to influence his contemporaries of his success in promoting presidential power and his patron George Washington. It turned out those seeds grew over the years and centuries, into modern originalism mythology in the opinions of Chief Justices Taft and Roberts. Chief Justice Roberts relied heavily—and naively—on letters from Madison to Jefferson in France soon after these votes.⁵⁹⁷ The Roberts Court treated these letters as objective descriptions of what happened in the First Congress, as opposed to taking them in context as Madison’s self-serving story. These letters are obviously not public statutory text like a declaratory act or an explanatory preamble. They are not even public legislative history, as problematic as floor speeches and committee reports can be, and as vulnerable to cherry-picking. These private letters are even less reliable and less credible because they are less accountable to scrutiny and rebuttal in the public eye. It

⁵⁹⁴ See Letter from James Madison to Edmund Randolph (June 24, 1789) (reporting that “[t]he decision was in favor of the [presidentialist exposition],” as would be confirmed by “the [n]ewspapers” despite some “mutilated and erroneous” accounts), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 853; see also Letter from James Madison to Tench Coxe (June 24, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 853.

⁵⁹⁵ See Letter from James Madison to Samuel Johnston, COLONIAL AND STATE RECORDS OF NORTH CAROLINA (June 21, 1789), <https://docsouth.unc.edu/csr/index.php/document/csr22-0482> [<https://perma.cc/ZB9B-5ZCL>] (describing how the House “has adopted [the presidentialist] opinion, as most consonant to the frame of the Constitution, to the policy of mixing the Legislative & Executive powers as little as possible, and to the responsibility necessary in the head of the Executive Department.”); Letter from James Madison to Tench Coxe (June 24, 1789) (“The decision was in favor of the [presidentialist exposition] as most consonant to the text of the [Constitution]”), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 853; Letter from James Madison to Thomas Jefferson (June 30, 1789) (“After very long debates, the [presidentialist] opinion prevailed, as most consonant to the text of the Constitution”), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 890-94; Letter from James Madison to George Nicholas (July 5, 1789) (“The opinion which prevailed was th[e Executive] power being generally vested in the President, and this not [being] particularly taken away, it remained to him”), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 954.

⁵⁹⁶ Letter from James Madison to Edmund Pendleton (June 21, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 828-29.

⁵⁹⁷ See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (treating Madison’s letters as conclusive evidence); see also *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010) (same).

is remarkable how much Chief Justice Roberts treats these insiders' letters to each other as primary evidence. Because the public evidence is so inscrutable, from the ambiguous statutes to the confusing cycle of votes to the deliberately messy legislative history, the presidentialist letters are very appealing as they simplify a story—all too cleanly, all too conveniently for their side, and all too vulnerable to confirmation bias.

For example, here is Chief Justice Roberts in *Seila Law*, as his main evidence for what happened in the First Congress, quoting a letter from Madison to Jefferson a week after the House adopted his ambiguous clause: “[t]he view that ‘prevailed, as most consonant to the text of the Constitution’ and ‘to the requisite responsibility and harmony in the Executive Department,’ was that the executive power included a power to oversee executive officers through removal.”⁵⁹⁸

Roberts also relies on the same letter from Madison to Jefferson in *Free Enterprise*—a private letter—instead of focusing on the public debate, perhaps because those public debates were far more complicated, messy, and unclear than the one-sided private letter portraying a simple and clear triumph.⁵⁹⁹

Prakash also relies on Madison's private letters as objective, and he generally gives much attention and weight to the presidentialists' description of themselves and their perceptions without taking into account their agenda or their biases.⁶⁰⁰ Fisher Ames engaged in his romanticizing of the debate: each side “a most sanguine belief of their creed.”⁶⁰¹ He continued: “[i]f [a group] wish to carry a point, it is directly declared, and justified. Its merits and defects are plainly stated, not without sophistry and prejudice, but without management There is no intrigue, no caucusing.”⁶⁰² Ames again claimed that there had been no “caucusing and cabal,” which he used to excuse the confusion on the House floor throughout the debate.⁶⁰³ This self-serving description does not line up with the context and the other records. Prakash also relied on other biased accounts like John Adams,⁶⁰⁴ a letter to George

⁵⁹⁸ *Seila L.*, 140 S. Ct. at 2197 (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 30, at 893).

⁵⁹⁹ *Free Enter. Fund.*, 561 U.S. at 492 (citing Letter from James Madison to Thomas Jefferson (June 30, 1789), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 30, at 893).

⁶⁰⁰ Prakash, *New Light*, *supra* note 7, at 1065, nn.289-92 (citing several presidentialists' private letters to support the claim that House endorsed the executive-power theory).

⁶⁰¹ Letter from Fisher Ames to George R. Minot (July 9, 1789), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 30, at 983-84.

⁶⁰² *Id.* at 985.

⁶⁰³ Letter from Fisher Ames to George R. Minot (July 8, 1789), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 30, at 978.

⁶⁰⁴ See Prakash, *New Light*, *supra* note 7, at 1066 n.296 (citing Letter from John Adams to John Lowell (Sept. 14, 1789), reprinted in 17 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789-3 MARCH 1791, at 1538

Washington,⁶⁰⁵ and the pro-administration, proto-Federalist *Massachusetts Centinel*.⁶⁰⁶

Justice John Marshall, celebrating the legacy of Washington, would also celebrate this moment as “a full expression of the sense of the legislature” in his biography *The Life of Washington*.⁶⁰⁷ Chief Justice Taft would rely on this passage to overcome the *Marbury* problem for removal in *Myers*,⁶⁰⁸ and in turn, Chief Justice Roberts—despite acknowledging Chief Justice Marshall’s *Marbury* problem—would rely more on Chief Justice Taft in bringing the “Decision of 1789” back from exile.⁶⁰⁹ The self-serving Federalist mythology continued to infiltrate the pages of Supreme Court opinions over the years. The Court even cited as historical evidence the writings of John Adams’s grandson, the influential writer Charles Francis Adams, recounting *eighty years after the First Congress* how John Adams understood his tie-breaking vote to be a vote on the constitutional question—despite the long delay and John Adams’s self-regarding bias.⁶¹⁰

In the early republic, the federal government continued its shift toward more centralized presidential power over the executive branch—and, in some mix of hindsight bias, ideological confirmation bias, and the success of the “Court Party” spin project, more mythologizing of the First Congress. In 1820, Congress passed a new statute that broadly granted the President the power to remove “at pleasure” for essentially the first time.⁶¹¹ In the 1830s, as President Jackson consolidated power over executive patronage and removed the holdovers from the previous administration,⁶¹² prominent judges, treatise writers, and the powerful Senator Daniel Webster traced these powers back

(Charlene Bangs Bickford, Kenneth R. Bowling, Helen E. Veit & William Charles DiGiacomantonio eds., 2019)).

⁶⁰⁵ *Id.* at 1066 n.297 (citing Letter from David Stuart to George Washington (Sept. 12, 1789), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 30, at 1519).

⁶⁰⁶ *Id.* at 1066 n.295 (citing *Massachusetts Centinel* (July 25, 1789), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 30, at 1077).

⁶⁰⁷ 5 JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON* 200 (1807).

⁶⁰⁸ See *Myers v. United States*, 272 U.S. 52, 144 (1926) (citing John Marshall’s biography).

⁶⁰⁹ See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483, 492-93 (2010) (citing Chief Justice Taft’s opinion in *Myers*); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197-98, 2205 (2020) (same).

⁶¹⁰ See *Parsons v. United States*, 167 U.S. 324, 330 (1897) (citing 2 CHARLES FRANCIS ADAMS, *THE LIFE OF JOHN ADAMS* 143-44 (n.p., 1871)).

⁶¹¹ See Act of May 15, 1820, ch. 102, 3 Stat. 582 (providing that a list of public officials “shall be appointed for a term of four years, but shall be removable from office at pleasure”); see also *Myers*, 272 U.S. at 146-47 (providing Chief Justice Taft’s discussion of the statute’s significance).

⁶¹² See DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848*, at 328-33 (2007) (discussing Jackson’s commitment to “reform,” meaning the purging of federal offices).

to the First Congress.⁶¹³ Chancellor James Kent referred to it as “this loose, incidental, declaratory opinion of Congress, and the sense and practice of government since that time.”⁶¹⁴ Justice Joseph Story referred to the First Congress as a “decision,” and also acknowledged the role that Washington played over the debate: “[t]hat the final decision of this question so made was greatly influenced by the exalted character of the President then in office, was asserted at the time, and has always been believed.”⁶¹⁵ Chief Justice Taft even recorded these observations in *Myers*, without pausing to wonder if “loose” or “incidental” were odd ways to describe a “Decision”; if “declaratory” fit the text; or if Washington’s influence might have biased interpretations during post-Ratification, pro-Washington insider politics.⁶¹⁶

One of the problems in originalist interpretation is a tendency to treat the Founding generation as infallible heroes and political philosophers who are above politics and self-interest. It should be readily apparent that George Washington, James Madison, Alexander Hamilton, John Adams (and William Maclay), as well as the other figures in this story, all had their own political interests in mind in 1789, and those interests diverged in many ways from their ideas and interests in the summer of 1787 or in writing the *Federalist Papers*. One big blindspot for the Supreme Court and unitary originalist scholarship on the First Congress was their failure to see the “Founding Fathers” as ambitious self-interested political actors—using their remarkable intelligence sometimes for great insight, sometimes to engage in factional and proto-partisan strategy, and sometimes to engage in personal self-promotion. But when one reads their writings carefully, they warned us explicitly what was going on: “intrigue,” “caballing,” and Court Party vs. Country Party spin by all sides.

Emulating James Madison sounds like a good idea, but not in this case. Just as Madison retreated from head counts and instead produced ambiguity and confusion to spin a myth, so too the unitary originalists scholarship also

⁶¹³ The first use of the term “The Decision of 1789” appears to be on the Senate floor in the 1830s, from the powerful Senator Daniel Webster, and Webster corresponded with Kent on the matter. See 10 REG. DEB. 382 (1834) (“The gentlemen from Virginia . . . held up the decision of 1789, in favor of a constructive power of removal from office in the President, as conclusive authority . . .”); see also Daniel Webster, Speech on the Appointing and Removing Power, Delivered in the Senate of the United States, on the 16th of February, 1835, in 2 SPEECHES AND FORENSIC ARGUMENTS 461, 477 (Boston, Perkins, Marvin & Co. 1835) (“I think the decision of 1789 has been established by practice, and recognized by subsequent laws, as the settled construction of the Constitution . . .”); *Myers*, 272 U.S. at 149, 152-53, 159 (contending with Webster’s statement that it was an established construction of the Constitution that the removal power was in the president).

⁶¹⁴ 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 310 (New York, O’Halsted 1832).

⁶¹⁵ 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 368 (Melville M. Bigelow ed., William S. Hein & Co., 5th ed. 1994) (1833).

⁶¹⁶ *Myers*, 272 U.S. at 149-51.

avoided specific counts and instead retreated to ambiguity and enigma. They play out the strategy of ambiguity with a glaring internal contradiction: the Foreign Affairs text was so ambiguous, such a surprising, confusing “shadowy implication,”⁶¹⁷ that one might speculate about an “enigmatic faction” voting not against presidentialism but against ambiguity; and simultaneously, it was clear enough to reflect deliberation and establish original public meaning. These contradictions and repeated misuses of sources indicate that strategic ambiguity and “Court Party spin” worked after 1789, and they have been at work again in the Roberts Court era. Madison had snatched victory from the laws of defeat with his strategic retreat and his spin team to expand presidential power beyond the Founding design in his own era. Could he have imagined a method of constitutional interpretation two centuries later that would be based on finding these “Easter egg” hidden texts and flexible cherry-picking of legislative history to expand presidential power in our era?

CONCLUSION: THE IMAGINARY UNITARY EXECUTIVE

The real “Decision of 1789” was the rejection of the unitary executive theory of unchecked presidential powers. Madison had to “evacuate untenable ground” and retreat to strategic ambiguity in the Foreign Affairs bill because he and the presidentialists were outnumbered by their opponents in the House and Senate.⁶¹⁸ Less than a third endorsed even a thin version of presidential removal power as implied by Article II, even if we count the silent representatives voting yes. A clear majority rejected this position, and an even more substantial majority opposed the indefeasibility of those powers. The debates and final statutes creating the Treasury Department and executive offices in the Judiciary Act reflect opposition to tenure “during pleasure” and support for legislative conditions limiting removal, similar to requirements of “good cause.”

The mythology of presidential power is also a crisis of methodology. The originalist scholarship is riddled with errors and oversights. First, pro-unitary judges and scholars cited Senator Maclay’s diary for a record of the tie votes (and sometimes a single pro-unitary speech) but overlooked his many pages of contrary evidence.⁶¹⁹ Second, the pro-unitary scholarship misread the personal letters of many congressmen and a series of speeches out of context as part of an erroneous interpretation of a dozen pivotal votes as “enigmatic” and arguably presidential.⁶²⁰ Without those errors, the evidence is clear that

⁶¹⁷ Prakash, *New Light*, *supra* note 7, at 1052.

⁶¹⁸ See *supra* Section III.C.

⁶¹⁹ See *supra* notes 139-140 and accompanying text; Myers, 272 U.S. at 115 n.1; Prakash, *New Light*, *supra* note 7, at 1032; AMAR, *supra* note 18, at 359.

⁶²⁰ See *supra* Section III.E.

presidentialism fell far short of a majority. Third, the unitary scholarship simultaneously argues that the removal clause was ambiguous enough to explain the dozen “enigmatic” vote against it, yet also clear enough to represent a decisive “Decision.”⁶²¹ The “enigmatic” framing itself is internally inconsistent because it is inconsistent with the concept of a decisive “Decision.”

There are more ironies: The Supreme Court’s textualists would ordinarily read the First Congress’s departmental clauses closely on their own, and they would ordinarily flag these statutory texts as highly ambiguous and silent on a constitutional question. Typically, they would caution against reading too much into an obscure clause (“elephants in mouseholes”⁶²²), and they would be skeptical or dismissive of legislative history (i.e., it is an exercise in “cherry-picking”⁶²³ or “finding one’s friends at a party”⁶²⁴). But here, they rely selectively on a unicameral legislative history, and even then, they cherry-pick from it.

This episode illustrates some of the risks in the practice of originalism, which overlap with many of these Justices’ critiques of legislative history: motivated reasoning, selection bias, confirmation bias, and belief preservation. The unitary theory makes similar assumptions about the Executive Vesting Clause and the Take Care Clause that also do not hold up to historical scrutiny.⁶²⁵ The research challenging those assumptions depended on deep dives into archives, old English statutes, obscure colonial practices, old dictionaries, and complicated pre-modern histories. But this Article on the Decision of 1789 is different, because it presents historical evidence that has been on all our bookshelves the entire time. Despite the availability of this historical evidence, originalist scholars and the Roberts Court have either ignored or distorted it.

Heidi Kitrosser called for “interpretive modesty” before courts could invoke judicial review in structural cases.⁶²⁶ In the very least, this new

⁶²¹ See Prakash, *New Light*, *supra* note 7, at 1042–43 (identifying the “enigmatic” faction and explaining his view as to why they voted for a Foreign Affairs bill that did not delegate removal authority).

⁶²² See *supra* note 561 and accompanying text.

⁶²³ See Amy Coney Barrett, Essay, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2196 (2017) (“[J]udges, who are typically unschooled in the way Congress works, have been guilty of cherry-picking statements unlikely to reflect the way that supporters of a statute understood its language”).

⁶²⁴ See *supra* note 562.

⁶²⁵ See Shugerman, Vesting, *supra* note 11, at 1499 (discussing how the Take Care Clause is a limit on executive power); Kent, Leib & Shugerman, *supra* note 11, at 2133–34 (explaining that the original understanding of the Vesting Clause was that the power to execute a law was “inherently subordinate to legislative power”); Bradley & Flaherty, *supra* note 3, at 642–43 (discussing how historical documents do not support the thesis that the Vesting Clause implicitly grants the President powers not stated in Article II).

⁶²⁶ See Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 505–07 (2016) (providing a framework to challenge uncertainty in constitutional interpretation); Richard H. Fallon Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1757 (2015) (“[M]any kinds of history matter to constitutional adjudication . . .”).

historical evidence counsels “interpretive modesty” about Article II, as the unitary theory cannot claim any clear “decision” for presidentialism in 1789. In the domains of constitutional structure, originalists arguably bear a burden to show clear original public meaning.⁶²⁷ This examination of the First Congress shows that the unitary version of a “Decision of 1789” does not meet such a burden.⁶²⁸ Perhaps even more importantly, this episode also counsels “interpretive modesty” against the Supreme Court’s misuse of historical sources and its use of originalism as a façade for its pro-presidential ideology and other cultural commitments. If originalism and textualism arose in the 1980s as a caution against ideological judging and judicial activism, the erroneous interpretation of the Decision of 1789 should be a decisive cautionary tale about ideological and activist originalism.

⁶²⁷ See John O. McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843, 918 (2016) (presenting an originalist argument that courts must find “clear incompatibility between the Constitution and a statute before displacing the latter by the former”); see also Michael D. Ramsey, *Beyond the Text: Justice Scalia’s Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1971 (2017) (“Some other controversial cases . . . may be best read as failing a high burden of proof.”).

⁶²⁸ See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 511 (2013) (“[W]ith respect to the Constitution of 1789, it is not clear that the content of the original methods were settled.”); Baude, *supra* note 21, at 53-54 (discussing the concept of constitutional liquidation in relation to the decision of 1789 debates over removal power).

APPENDIX I

Table A: Summary of Positions in the House and Senate

House

Presidentialist (or strategically ambiguous)	Silent or unclear	Opposed to presidentialism
7 explicit YYY 7 silent YYY 2 YNY	6 silent YNY (likely congressional or pragmatic/agnostic) 3 unclear (likely pragmatic) ⁶²⁹	17 Senatorial 7 explicitly Congressionalist 3 impeachment only 2 unclear
16	9	29

Senate

Presidentialist	Silent, unclear, or ambivalent	No (likely Senatorial)
7	3 (Dalton, Elmer, and Bassett ⁶³⁰)	10

⁶²⁹ Wadsworth as a “YNx” member was unclear on the bill, and thus belongs in this column, but in Table C, he fits the “opposed or unclear” column.

⁶³⁰ Dalton had been described as initially opposed. Letter from William Smith (S.C.) to Edward Rutledge (July 5, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 960. Dalton changed late in the debate. Fragmentary notes indicate Dalton gave a short ambiguous endorsement of removal with no signal of presidentialism, congressionalism, or pragmatism. *See* Notes of William Patterson (July 16, 1789), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 39, at 488 (“[Dalton] [t]hinks the removability belongs to the Executive . . .”). There are no records of Bassett or Elmer speaking on the bill.

Table B: The Votes on Removal Power⁶³¹

This chart is organized by the three key votes, noting correlations with interpretations and alternative explanations:

- Vote 1 (30–18):⁶³² Add ambiguous clause: “[T]here shall be 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”
- Vote 2 (31–19):⁶³³ Delete explicit clause: “removable by the President.”
- Vote 3 (29–22):⁶³⁴ Vote on the final bill.

YYY Presidentialist? and/or strategic ambiguity?	YNY Pivotal: Congressional or “Enigmatic”?	Unusual Mix	NYN (generally Senatorial)
Ames Benson Brown Burke Clymer Goodhue Griffin Madison Moore Muhlenberg Scott Sinnickson Vining	Boudinot xNY Carroll Contee Fitzsimons Gilman Hartley Hiester Laurance Lee Sedgwick Seney Silvester Trumbull	Baldwin YYx Cadwalader NNY Huger xxY Jackson xxN Leonard YYN Tucker NNN Wadsworth YNx Schureman xNY Smith (MD) YNN Stone xxN Thatcher YNN	Coles Gerry Grout Hathorn Huntington Livermore Matthews Page Parker Partridge Van Renssalaer Sherman Smith (SC) Sturges Sumter White
13	13	11	16

⁶³¹ Y = yes, N = no, x = missed vote (e.g., YNY = vote 1 “yes,” vote 2 “no,” vote 3 “yes”).

⁶³² 1 ANNALS OF CONG. 578, 580 (1789) (Joseph Gales ed., 1834).

⁶³³ 1 ANNALS OF CONG. 580, 585 (1789) (Joseph Gales ed., 1834).

⁶³⁴ 1 ANNALS OF CONG. 590–91 (1789) (Joseph Gales ed., 1834).

Table C: Positions on Removal Power⁶³⁵

Explicitly Presidential (generally yyy)	Silent or unclear (yyy)	Silent (yny)	Explicitly Congressional (yny)	Opposed or unclear	Opposed, Senatorial (nyn)	Opposed, Impeachment only
Ames Benson <i>Boudinot</i> ^x xny Clymer Goodhue ^{xii} Moore Vining *** <i>Fitzsimons</i> ^{xiii} Madison ^{2iv}	Baldwin ^{ix} yyx Brown *** Burke Griffin Muhlenberg ^x Scott Sinnickson	<i>Carroll</i> <i>Contee</i> <i>Gilman</i> <i>Hiester</i> <i>Seney</i> <i>Trumbull</i> *** Huger xxy Schur. xny	<i>Hartley</i> ⁱⁱ <i>Lee</i> ⁱⁱⁱ <i>Sedgwick</i> ^{iv} <i>Silvester</i> ^v Tucker ^{vi} nnn *** Laurance ^{vii} Cadw. ^{viii} nny	Leonard yyn Thatcher yyn Wadw th ynx	Coles Gerry Grout Hathorn Livermore Matthews Page Parker Partridge VanRenss. Sherman Smith (MD) Stone Sturges Sumter White (Bland) ⁱ	Smith (SC) Hunt ⁿ nyn Jackson xxn
9	7	8	7	3	17	3

⁶³⁵ Representatives who voted yes/no/yes, “the pivotal bloc,” are in bold and italics. An asterisk divider between names represents a clearer group on top and a less clear group below. Endnotes follow on the next page.

ⁱ Bland did not vote on June 22 but had been a vocal Senatorial on May 19. See *The Congressional Register* (May 19, 1789) (“[T]he power given by the constitution to the senate, respecting the appointment to office, would be rendered almost nugatory if the president had the power of removal.”), reprinted in 10 DOCUMENTARY HISTORY, *supra* note 111, at 729, 737.

ⁱⁱ See *The Daily Advertiser* (June 19, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 886; *The Congressional Register* (June 17, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 904-07; *The Congressional Register* (June 22, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 1035. Hartley’s later correspondence is consistent with his congressionalism. *But see* Prakash, *New Light*, *supra* note 7, at 1054 (arguing that Hartley supported the executive-power theory, despite his preference for the original language).

ⁱⁱⁱ See *The Congressional Register* (June 18, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 962-65; 1 ANNALS OF CONG. 523-26 (1789) (Joseph Gales ed., 1834).

^{iv} *The Congressional Register* (June 18, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 983; *The Congressional Register* (June 22, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 1029-30.

^v *Gazette of the United States* (July 1, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 996; *The Congressional Register* (June 19, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 1008-09. Silvester also referred to the “Constitution,” likely Article I legislative delegation against senatorial constitutional interpretation, given his earlier statements and given this stage of debate before the Madison/Benson motions. See Letter from Peter Silvester to Peter Van Schaack (June 20, 1789), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 30, at 1092 (likely erroneously corrected by editors as July 20, 1789 considering his reference to the Foreign Affairs vote on June 18 or 19 as “yesterday”). Although the letter is dated July 20, 1789, this is likely erroneous because Silvester referred to the Foreign Affairs vote on June 18 or 19 as “[y]esterday.” See *id.*

^{vi} See *The Congressional Register* (June 22, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 1034-35.

^{vii} For discussion of Laurance, see Appendix II, *supra* note 12, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359596 [<https://perma.cc/V6GA-NZJP>].

^{viii} See Letter from Lambert Cadwalader to James Monroe (July 5, 1789), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 30, at 946-47 (“It was scarcely declaratory of the [removal] [p]ower being vested in the President by the Constitution . . .”). He voted against both of Madison’s June 22 proposals, which would make him a clearer opponent of Madison’s approach, and less “enigmatic.” A congressionalist could worry about the text’s lack of clarity, as an additional problem on top of the constitutional theory.

^{ix} Baldwin’s speech on June 19 was unclear as to whether he was presidentialist or congressionalist. See *Gazette of the United States* (July 1, 1789), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 996.

^x Muhlenberg did not speak on the House floor, and his letter cited by Prakash is ambiguous and non-committal on the constitutional question. See Letter from Peter Muhlenberg to Benjamin Rush (June 25, 1789), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 30, at 856.

^{xi} See *The Congressional Register* (June 22, 1789) (criticisms from Reps. Page and Smith), reprinted in 11 DOCUMENTARY HISTORY, *supra* note 25, at 1028-30.

^{xii} Goodhue described “convert[ing]” Senator Dalton and his own reference to “the Executive part of the Constitution” where “responsibility out to be so [centered] in a focus as [w]e know where to find it.” Letter from Benjamin Goodhue to Cotton Tufts (July 20, 1789), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 30, at 1085.

^{xiii} A June 20, 1789 letter oversimplified the debate into two sides, presidential versus senatorial, and referred to the “vesting” argument, but it was a bit too early to focus on the presidentialist/congressionalist divide. *See* The Congressional Register (June 8, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 819-20. An August 24, 1789 letter makes only an oblique reference to “the Constitutional power of the President” to remove two months after the vote. *See* Letter from William Ellery to Benjamin Huntington (Aug. 24, 1789), *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 30, at 1389.

^{xiv} Madison was actually more consistently congressionalist, except for June 15-22. *See* THE FEDERALIST NO. 39 (James Madison) (Ian Shapiro ed., 2009); The Congressional Register (May 19, 1789), *reprinted in* 10 DOCUMENTARY HISTORY, *supra* note 111, at 730 (“[I]t is in the discretion of the legislature to say upon what terms the office shall be held”); The Daily Advertiser (June 18, 1789), *reprinted in* 11 DOCUMENTARY HISTORY, *supra* note 25, at 845-46.

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