

1974

## Abolition of Federal Offices as an Infringement on the President's Power To Remove Federal Executive Officers: A Reassessment of Constitutional Doctrines

Richard A. Cirillo

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Richard A. Cirillo, *Abolition of Federal Offices as an Infringement on the President's Power To Remove Federal Executive Officers: A Reassessment of Constitutional Doctrines*, 42 Fordham L. Rev. 562 (1974). Available at: <https://ir.lawnet.fordham.edu/flr/vol42/iss3/3>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

## COMMENT

### ABOLITION OF FEDERAL OFFICES AS AN INFRINGEMENT ON THE PRESIDENT'S POWER TO REMOVE FEDERAL EXECUTIVE OFFICERS: A REASSESSMENT OF CONSTITUTIONAL DOCTRINES

On May 18, 1973, President Nixon vetoed<sup>1</sup> Senate bill number 518 (S. 518)<sup>2</sup> which would have required the President to submit the appointment of officers to two federal offices in the Office of Management and Budget (OMB)<sup>3</sup> to confirmation by the Senate. This bill was one of nearly fifty similar measures directed toward requiring confirmation of the Director and Deputy Director of the OMB introduced during that session of Congress.<sup>4</sup> A number of other bills and resolutions sought to impose Senate supervision over appointments to other executive offices.<sup>5</sup> Significantly, half of these measures<sup>6</sup> were introduced after S. 518 died with the failure of Congress to override the President's veto.<sup>7</sup>

By introducing such a large number of bills concerning confirmation of exec-

---

1. Presidential Veto Message of May 18, 1973, 119 Cong. Rec. S 9376 (daily ed. May 21, 1973).

2. S. 518, 93d Cong., 1st Sess. (1973).

3. The Bureau of the Budget was created in the Treasury Department in 1921 to assist in compiling the data necessary for the President's annual budget message to Congress. Budget & Accounting Act, 1921, ch. 18, tit. II, § 207, 42 Stat. 20. In 1939 the BOB was transferred from the Treasury Department to the newly-created Executive Office of the President. Reorganization Plan No. 1 of 1939, Part I, 3 C.F.R. 1288 (Cum. Supp. 1943) (printed in Appendix, 5 U.S.C. at 495 (1970)). The present Office of Management and Budget was created in 1970 as a reconstituted version of the BOB. Reorganization Plan No. 2 of 1970, Part I, 3 C.F.R. 197 (1970) (printed in Appendix, 5 U.S.C. at 606-07 (1970)) [hereinafter cited as Reorganization Plan]. For a more detailed history of the evolution of the OMB see H.R. Rep. No. 93-109, 93d Cong., 1st Sess. 7-13 (1973); Hearings on S. 518 & H.R. 3932 Before a Subcomm. of the House Comm. on Gov't Operations, 93d Cong., 1st Sess. 70-94 (1973) [hereinafter cited as Hearings].

4. The following bills were introduced in 1973 during the first session of the 93d Congress: S. Bill Nos. 20; 37; 518; 1920; 2045. H.R. Bill Nos. 204; 2237; 2411; 2966; 3065; 3289; 3290; 3291; 3390; 3932; 4265; 4266; 4370; 4552; 4649; 4650; 5156; 5722; 8182; 8267; 8289; 8290; 8291; 8390; 8476; 8508; 8907; 9181; 9292; 9314; 9628; 10,271; 10,272; 10,273; 10,274; 10,621; 10,912; 11,137; 11,138.

5. S. 590, 93d Cong., 1st Sess. (1973) (Exec. Sec'y Domestic Council, Exec. Sec'y Nat'l Sec. Council, Exec. Dir. Council on Int'l Econ. Policy); S. 1130 (FDA Comm'r); S. 2020 & H.R. 9260 (Social & Econ. Stat. Adm'r); H.R. 9858 (U.S. Comm'rs on Int'l Joint Comm'n); H.R. Res. 500 & 509 (Dir. Energy Policy Office). In addition, confirmation was applied to future Directors of the Council on Int'l Econ. Policy. Pub. L. No. 93-121, § 5 (Oct. 4, 1973).

6. S. Bill Nos. 1920; 2045. H.R. Bill Nos. 8182; 8267; 8289; 8290; 8291; 8390; 8476; 8508; 8907; 9181; 9292; 9314; 9628; 10,271; 10,272; 10,273; 10,274; 10,621; 10,912; 11,137; 11,138. H.R. Res. Nos. 500; 509.

7. See notes 32 & 33 *infra* and accompanying text. It is not likely that this particular bill will be revived during the present session of Congress.

utive officers, Congress has demonstrated its interest in legislation similar to S. 518. Since the failure to override the President's veto of S. 518, a bill which requires confirmation of future directors and deputy directors of the OMB has been passed into law.<sup>8</sup> As the new law acts only prospectively, the constitutional questions raised by applying confirmation to incumbent office-holders remain unresolved.

A recurrent theme expressed during debates on S. 518 was the need for Congress to recapture legislative powers lost to the executive branch.<sup>9</sup> Interjecting Senate supervision over appointments of officers who will be executing the laws of the nation was seen by some as one method of restoring a balance of power among the coordinate governmental units.<sup>10</sup>

Of great importance to the following discussion is the implied constitutional doctrine of separation of powers. The powers of the legislature are limited by those of the executive. The executive's powers are in turn limited by the legislature's. Indeed, there are places where the powers overlap, or where confrontation between branches occurs in conjunction with the exercise of a power. In each case the problem must be resolved by confiding authority to one or the other branch or, where the Constitution demands, to both branches. The issues raised by S. 518 lie mainly in this interface—the grey area—where it is difficult to determine whether the power sought to be exercised properly belongs to the executive or to the legislature.

When one branch acquiesces in the assertion of power by the other, then the court may indulge in the contemplative view of Justice Holmes:

It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires.<sup>11</sup>

---

8. Pub. L. No. 93-250 (Mar. 2, 1974). Passage of this law respecting the OMB does not eliminate questions as to the validity of bills which may be introduced in the future with respect to this or other offices and which seek to impose confirmation on the incumbent rather than only prospectively on future nominees.

9. See, e.g., 119 Cong. Rec. H 3917 (daily ed. May 23, 1973) (remarks of Rep. Hays); id. at H 3914 (remarks of Rep. Brooks).

10. See, e.g., id. at S 9603 (daily ed. May 22, 1973) (remarks of Senator Ervin); N.Y. Times, May 19, 1973, at 12, col. 3. See also id., Jan. 12, 1973, at 15, col. 1; id., Jan. 11, 1973, at 28, col. 3.

Several Congressmen have taken an issue related to that posed by S. 518 to the courts for determination of the limits of the President's power to make unconfirmed interim appointments during recess of Congress. *Williams v. Phillips*, 360 F. Supp. 1363 (D.D.C.), emergency motion for stay pending appeal denied, 482 F.2d 669 (D.C. Cir. 1973), discussed in notes 257-59 *infra* and accompanying text.

11. *Springer v. Philippine Islands*, 277 U.S. 189, 211 (1928) (Holmes & Brandeis, JJ., in the United States 50-76 (1946); A. Vanderbilt, *The Doctrine of the Separation of Powers* (Jackson, J., concurring). See generally C. Swisher, *The Growth of Constitutional Power dissenting*). *Accord*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952)

On the other hand, when one branch refuses to give way and a confrontation develops, the decision must be made, both to resolve the present dispute and to supply guidance in the event of future ones.

This Comment will examine S. 518 in relation to the constitutional questions that it raises. Unfortunately, there are few judicial precedents dealing with similar or analogous situations. As a result, the specific legal issues presented by this bill will be approached through discussion of the development of two separate constitutional doctrines that clash in S. 518.

One doctrine involves the power to abolish federal offices with an attendant loss of tenure by the officer holding the abolished position.<sup>12</sup> This issue is raised by the method Congress used to secure confirmation of the Director and Deputy Director of the OMB. The other is the power to remove federal executive officers from their positions.<sup>13</sup> The traditional vesting of this power in the Chief Executive formed the basis for the President's constitutional objections to the bill. Finally, a tentative opinion will be offered on the validity of the bill as an exercise of powers confided by the Constitution to the legislature.<sup>14</sup>

### I. LEGISLATIVE HISTORY OF S. 518

Under the Constitution, appointments to offices of the United States are to be made subject to the advice and consent of the Senate.<sup>15</sup> All appointments are to be made in this manner unless Congress expressly provides otherwise.<sup>16</sup> However, Congress in its discretion may provide for appointment without confirmation only in the case of inferior officers.<sup>17</sup> At the time of the appointment of the incumbent Director and Deputy Director of the OMB, the applicable statute called for appointment by the President alone.<sup>18</sup>

As introduced<sup>19</sup> and passed<sup>20</sup> by the Senate, S. 518 sought to require the

---

and Its Present-Day Significance 68-95 (1963); Stillman, Woodrow Wilson and the Study of Administration: A New Look at an Old Essay, 67 Am. Pol. Sci. Rev. 582 (1973).

12. Discussed *infra* part III.

13. Discussed *infra* part II.

14. Discussed *infra* part IV.

15. U.S. Const. art. II, § 2 which reads in part: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

16. *Scully v. United States*, 193 F. 185, 187 (C.C.D. Nev. 1910) (citing 18 Op. Att'y Gen. 409 (1886)); see 15 Op. Att'y Gen. 3, 5 (1875). But see 11 Op. Att'y Gen. 209, 213 (1865), where it is argued that, absent a specific statutory term dealing with mode of appointment, appointment shall be by the President alone without confirmation.

17. U.S. Const. art. II, § 2 (reprinted at note 15 *supra*).

18. 31 U.S.C. § 16 (1970), as amended by Reorganization Plan, *supra* note 3.

19. 119 Cong. Rec. S 1112 (daily ed. Jan. 23, 1973). The bill was reported favorably to the Senate by the Senate Comm. on Gov't Operations. S. Rep. No. 93-7, 93d Cong., 1st Sess. (1973).

20. 119 Cong. Rec. S 2088 (daily ed. Feb. 5, 1973).

Director and Deputy Director to appear before the Senate for confirmation proceedings.<sup>21</sup> Failure to appear for, or to secure, confirmation by the Senate within thirty days of the bill's enactment would have led to automatic termination of tenure of office.

The bill was sent to the House<sup>22</sup> and committed to the Government Operations Committee which held hearings.<sup>23</sup> Substantial testimony was taken on S. 518 and on House bill number 3932 (H.R. 3932)—a bill identical to S. 518 which was introduced in the House<sup>24</sup> two days after passage of S. 518 in the Senate. The committee reported out favorably an amended version of H.R. 3932.<sup>25</sup> This bill was passed by the House,<sup>26</sup> but, upon motions from the floor, the passage was vacated. Instead, the language of the recently approved bill was passed again, but under an "S. 518" label.<sup>27</sup> In this form, S. 518 was referred back to the Senate for consideration of the amendments. The Senate accepted the amendments to its bill<sup>28</sup> and forwarded S. 518 to the President.

As amended, S. 518 adopted a scheme by which the offices of OMB Director and Deputy Director would be abolished and two new offices immediately created in their place. Appointment to the new offices would require Senate confirmation. In addition, the new bill transferred to the director certain functions, powers, and duties that originally had been entrusted to the President for delegation under the Reorganization Plan establishing the OMB.<sup>29</sup>

In vetoing the bill the President stressed his view that the legislation would unconstitutionally infringe upon powers confided to the executive branch, thereby violating the doctrine of separation of powers.<sup>30</sup> He regarded the legislature's effort as an invalid legislative exercise of the President's power to remove executive officers under the guise of the legislative power to abolish and create offices:

I do not dispute Congressional authority to abolish an office . . . . When an office is abolished, the tenure of the incumbent in that office ends. But the power of the Congress to terminate an office cannot be used as a back-door method of circumventing the President's power to remove.<sup>31</sup>

21. In addition, the bill provided for a four-year term of office for both positions to coincide with the term of the President under whom the officer would serve. The provision seems to have raised no constitutional issue. See Prepared Statement of Robert G. Dixon, Jr., Ass't Att'y Gen., printed in Hearings, *supra* note 3, at 69.

22. 119 Cong. Rec. H 725 (daily ed. Feb. 6, 1973).

23. Hearings, *supra* note 3.

24. H.R. 3932, 93d Cong., 1st Sess. (1973). The bill was introduced on Feb. 7, 1973. 119 Cong. Rec. H 869 (daily ed. Feb. 7, 1973). Hearings were held on the bill on March 5 & 9, 1973. Hearings, *supra* note 3.

25. H.R. Rep. No. 93-109, 93d Cong., 1st Sess. (1973).

26. 119 Cong. Rec. H 3228 (daily ed. May 1, 1973).

27. *Id.* at H 3228-29.

28. *Id.* at S 8232 (daily ed. May 3, 1973).

29. Reorganization Plan, *supra* note 3.

30. Presidential Veto Message of May 18, 1973, 119 Cong. Rec. S 9376 (daily ed. May 21, 1973).

31. *Id.* An additional justification offered by the President for vetoing this bill is discussed at notes 200-07 *infra* and accompanying text.

Efforts to override the President's veto succeeded in the Senate,<sup>32</sup> but failed in the House.<sup>33</sup>

## II. THE CONSTITUTIONAL SITUS OF THE REMOVAL POWER

### A. *The Early Cases and Commentators*

It has been said that the power to appoint federal officers<sup>34</sup> is an executive function inhering in the executive branch by virtue of the nature of the act and the constitutional mandate that the President

shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.<sup>35</sup>

It can be argued further that the constitutional allocation to the President of three of the four steps in the appointment of officers—nominating, "appoint-

32. 119 Cong. Rec. S 9606 (daily ed. May 22, 1973).

33. *Id.* at H 3920 (daily ed. May 23, 1973).

34. The question of what defines an "officer of the United States" was answered in *United States v. Mouat*, 124 U.S. 303 (1888). There, the Court, developing the definition employed in *United States v. Germaine*, 99 U.S. 508 (1878) (discussed *infra* at notes 268-72 and accompanying text), held "officer" to mean any person in government service who holds office by appointment under one of the methods prescribed by article II of the Constitution. The Court said: "Unless a person in the service of the Government . . . holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States." 124 U.S. at 307. Under this criterion, the Court in *Mouat* held that a paymaster's clerk, whose appointment was approved by the Secretary of the Navy, was not an officer since no statute authorized the Secretary to make appointments to this office. *Id.* at 307-08. The clerk was merely an employee or contractor. *Accord*, *Burnap v. United States*, 252 U.S. 512, 516 (1920) and authorities cited therein.

In *United States v. Hartwell*, 73 U.S. (6 Wall.) 385 (1867), the ratification of the appointment of a clerk by the Secretary of the Treasury, who was empowered to make appointments, made the clerk an officer of the United States. In *Hartwell*, the Court had looked to the nature of the position held by the officer. It said: "An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties." *Id.* at 393. It would seem settled, however, that the Court will look exclusively to the method of employment, and not to the duties of the office in determining whether a public servant is an officer. See *Metcalf & Eddy v. Mitchell*, 269 U.S. 514 (1926) (consulting engineers held not to be officers); *Beal v. United States*, 182 F.2d 565 (6th Cir.), cert. denied, 340 U.S. 852 (1950) (firefighters held not to be officers); *Kennedy v. United States*, 146 F.2d 26 (5th Cir. 1944) (junior instructor of shop math held to be an officer); *McGrath v. United States*, 275 F. 294 (2d Cir. 1921) (income tax inspector held to be an officer).

35. U.S. Const. art. II, § 3. *Accord*, 12 Op. Att'y Gen. 32, 42 (1866). See generally 1 J. Kent, *Commentaries on American Law* \*287 (14th ed. 1896) [hereinafter cited as *Kent*]; *Donovan & Irvine, The President's Power to Remove Members of Administrative Agencies*, 21 *Cornell L.Q.* 215, 216-17 (1936) [hereinafter cited as *Donovan & Irvine*]. But see *Corwin, Tenure of Office and the Removal Power under the Constitution*, 27 *Colum. L. Rev.* 353, 387-88 (1927) [hereinafter cited as *Corwin*].

ing",<sup>36</sup> and commissioning<sup>37</sup>—renders the power of appointment predominantly executive in character. All that the legislature may do is confirm or refuse to confirm.<sup>38</sup> Indeed, in the case of inferior officers where Congress, in its discretion, has vested the power of appointment in the President alone or in the heads of departments,<sup>39</sup> nothing more is necessary to fill an office than action by the executive branch.

To take the position that the power of appointment rests solely in the executive branch, however, disregards the very real power and responsibility of Congress in the appointment process. While the President nominates and appoints,<sup>40</sup> the Senate may frustrate the President's selection by refusing to confirm a nominee. The President cannot appoint or commission without such assent by the legislative body.<sup>41</sup> This role of the Senate vests in the legislature at least a partial power over appointments. If appointment were solely an executive power, the Senate's decision could be only advisory and not binding upon the President; but rejection of the nominee by the Senate has the effect of precluding appointment of such person to the suggested office. Thus, while the Senate cannot act without the President, neither can the President act without the Senate.<sup>42</sup>

If neither branch can exercise full power of appointment, but always must exercise its portion of the power in conjunction with the other, the power of appointment must be considered a concurrent power of the executive and legislative branches of government. The President has both the power and the responsibility to fill offices by selecting men of character and ability to carry out

36. U.S. Const. art. II, § 2.

37. *Id.* § 3.

38. Kent stated that "[t]he President is the efficient power in the appointment of the officers of government." Kent #287.

39. U.S. Const. art. II, § 2.

40. It would seem that the word "appointment" as used in article II, section 2 of the Constitution was intended to refer to the President's discretionary power to issue or not to issue a commission to a prospective officer even after successful confirmation. It can be inferred from the discussion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that the Court believed it to be within the President's power to refuse to issue a commission, and hence to refuse to appoint an officer, even after nomination and confirmation. *Id.* at 155-56, 159-62 (by implication). However, since there can be no appointment without a commission, the word appoint, as used here, must encompass both the decision of the President to issue, and the issuance of a commission to hold office and exercise the powers of the position.

41. *The Federalist* No. 76, at 507 (P. Ford ed. 1898) (A. Hamilton); 2 J. Story, *Commentaries on the Constitution of the United States* § 1531 (5th ed. 1891) [hereinafter cited as Story]. This is the case except where Congress has vested appointment of inferior officers entirely in the President. See text accompanying note 17 *supra* & part IVD *infra*.

42. "The President is to nominate, and thereby has the sole power to select for office; but his nomination cannot confer office, unless approved by a majority of the Senate. His responsibility and theirs is thus complete and distinct. He can never be compelled to yield to their appointment of a man unfit for office; and, on the other hand, they may withhold their advice and consent from any candidate who, in their judgment, does not possess due qualification for office." Story § 1531. See also *The Federalist* No. 76, at 507-08 (P. Ford ed. 1898) (A. Hamilton).

the law. The legislature, through the Senate, has both the power and the duty to inquire into the qualifications of the office holder in order to assure competent execution of the laws.<sup>43</sup>

In many of the cases dealing with the constitutional locus of the removal power, the chief source material employed by the Court has been the debates and votes in the first Congress regarding the establishment of the executive departments of government.<sup>44</sup> The result of those debates is clear: Congress acquiesced in the recognition of a broad Presidential power to remove executive officers.<sup>45</sup> The conclusive nature of the "decision of 1789" as constitutional interpretation or construction, however, is far from convincing.<sup>46</sup> The difficulties attendant using these debates as dispositive of the issue will be discussed below.<sup>47</sup>

At an early date the removal power was held by the courts to be lodged in the appointing officer, as incidental to the power to appoint. This view was first articulated in *Ex parte Hennen*,<sup>48</sup> where the Court was confronted with the question of whether a clerk of a federal district court, appointed by the presiding judge without Senate confirmation, could be removed and replaced by the appointing judge.<sup>49</sup> The Court correctly decided that the appointing officer did possess the power to remove the clerk, stating:

In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment.<sup>50</sup>

Under the facts at issue, this was sound both in practice and in constitutional theory. Unfortunately, the Court's reasoning is unclear, and there has been a lack of critical analysis of the rule.

The *Hennen* decision is silent with regard to several important considerations.

43. But see Kent \*287 ("[T]he power of nomination is, for all the useful purposes of restraint, equivalent to the power of appointment."); The Federalist No. 76, at 508 (P. Ford ed. 1898) (A. Hamilton) ("There can, in this view, be no difference between nominating and appointing.").

Both these statements speak to the practicalities rather than to the theory of the appointment process. Specifically, The Federalist took the position that (1) the Senate would reject no competent man nominated by the President; and (2) since all nominations would originate by the President's action, the ultimate appointee would be the President's nominee whatever action the Senate took on earlier nominations. *Id.* at 508-09. See also Story §§ 1529, 1532, 1534.

44. See, e.g., *Myers v. United States*, 272 U.S. 52, 111-32, 143-46, 174-76 (1926); *Parsons v. United States*, 167 U.S. 324, 328-30 (1897); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259-60 (1839).

45. See generally J. Harris, *The Advice and Consent of the Senate* 30-35 (1968); C. Miller, *The Supreme Court and the Uses of History* 52-70, 205-10 (1969) [hereinafter cited as Miller]; Corwin, *supra* note 35, at 360-69; Donovan & Irvine, *supra* note 35, at 217-20.

46. Corwin 369-79. See Miller 67-70.

47. Notes 58-67, 94-96 *infra* and accompanying text.

48. 38 U.S. (13 Pet.) 230 (1839).

49. *Id.* at 258.

50. *Id.*



First, at no point in its opinion did the Court consider the impeachment clause—the only part of the Constitution that deals directly with removals from office.<sup>51</sup> It must be assumed that the Court felt this clause was not intended as the exclusive means for removing officers. However, it was not until 1903 that the Court squarely confronted and disposed of the argument that this clause was intended to be the sole method for displacing officers improvidently appointed.<sup>52</sup> By that time, the practical existence of a power to remove, apart from impeachment, had been firmly established, and *Hennen* was settled law.

Secondly, the Court did not establish the locus of the appointment power before it determined that of the removal power. This is important insofar as the holding makes removal power an incident to appointment power. By implication, the Court decided that the presiding judge controlled the power of appointment since he was held to have the power to remove.<sup>53</sup>

It can be argued that the power of appointment did not lie in the judge alone; rather, it existed concurrently in the judge and the Senate, with the Senate's consent having been given in advance. That is, where Congress thinks it proper to grant full appointment power for inferior offices without confirmation, it is registering its necessary assent in advance, and reposing trust in the judgment of the named appointing officer. This analysis would contradict neither the rule that the power of removal is an incident to the power of appointment, nor the Court's holding that full power to remove was vested in the appointing judge. Congress merely registered its assent to both the appointment and removal by the named officer in advance and without conference with the Senate.<sup>54</sup>

The *Hennen* Court stated, in reference to the debates in the first Congress over the removal power:

[T]he great question was, whether the removal was to be by the president alone, or with the concurrence of the senate, both constituting the appointing power. No one denied the power of the president and senate, jointly, to remove, where the tenure of the office was not fixed by the constitution; which was a full recognition of the principle that the power of removal was incident to the power of appointment.<sup>55</sup>

---

51. U.S. Const, art. II, § 4 which reads: "The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." During the congressional debates in 1789, which resulted in the decision to recognize a presidential power to remove executive officers (discussed in notes 55-67, 91-92 *infra* and accompanying text), the argument that removal could be achieved only through impeachment was rejected. See R. Berger, *Impeachment: The Constitutional Problems* 139-42 (1973).

52. *Shurtleff v. United States*, 189 U.S. 311 (1903). The Court said: "No one has ever supposed that the effect of this section was to prevent their removal for other causes deemed sufficient by the President. No such inference could be reasonably drawn from such language." *Id.* at 317.

53. 38 U.S. (13 Pet.) at 259-60.

54. This analysis preserves a logical symmetry with the view that the appointment power is, in all cases, a concurrent function. The view that such concurrent power of the Senate extends to removals was rejected by the Court in *Myers v. United States*, 272 U.S. 52, 163-64 (1926).

55. 38 U.S. (13 Pet.) at 258.

If the foregoing analysis were accepted, then the power to remove executive officers would be held to rest jointly in the executive and legislative branches.

Nevertheless, the Court decided that the power to remove was not a concurrent power, but rather vested solely in the executive officer who had exercised the appointing power. In so doing, the Court conceded that the practical exigencies of operating a vast and ever-expanding government, rather than a strict construction of the words and spirit of the Constitution, was the real foundation of its holdings:

[I]t was very early adopted as the practical construction of the constitution, that this [removal] power was vested in the president alone. And such would appear to have been the legislative construction of the constitution.<sup>56</sup>

Later, the Court concluded:

Such is the settled usage and practical construction of the constitution and laws, under which these offices are held.<sup>57</sup>

Discussing these debates in the first Congress over the proper locus of the power to remove cabinet level officers in the major departments of the government, Story wrote:

That the final decision . . . [to recognize the power to be in the President] was greatly influenced by the exalted character of the President then in office, was asserted at the time, and has always been believed. . . . The public, however, acquiesced in this decision; and it constitutes, perhaps, the most extraordinary case in the history of the government of a power, conferred by . . . a bare majority of Congress, which has not been questioned on many other occasions.<sup>58</sup>

The debates in the first Congress on the matter of removal power should be considered, at best, a gratuitous suggestion as to the practical administration of government.<sup>59</sup> What Congress set forth in 1789 was a pragmatic approach to

---

56. *Id.*

57. *Id.* at 259.

58. Story, *supra* note 41, § 1543. The Senate was evenly divided on the issue and the Vice President cast the deciding vote in favor of recognizing a plenary presidential power to remove the officer. Miller, *supra* note 45, at 61 n.27. Miller produces convincing evidence that the votes in the House on how to phrase the removal clause of the bill establishing the Department of Foreign Affairs should not be taken as indicative of the legal or constitutional views of the Representatives. *Id.* at 61-64, 205-10. Professor Berger agrees that the true character of the "decision of 1789" is not persuasive either as a clear statement of the constitutional-political position of the first Congress on the recognition of a presidential removal power, or as an attempt to determine the meaning of article II, section 2. R. Berger, *Congress v. The Supreme Court* 146-50 (1969). See also Corwin, *supra* note 35, at 368-69. Story pointed out that until the Jackson administration, the presidential power of removal, set forth in the "decision of 1789," "had been exercised in few cases, and generally in such as led to their own vindication." Story § 1543.

59. R. Berger, *Impeachment: The Constitutional Problems* 139-40 (1973). Professor Corwin concluded with respect to the "decision of 1789" that: "[W]hile it was regarded as determining the question of the residence of the power of removal . . . in favor of the President as against the Senate, yet even in this respect it was held to rest on grounds of

the way in which removals might be accomplished. While it was concluded in 1803 that the Supreme Court, and not Congress, bears the responsibility for construing the Constitution,<sup>60</sup> Story's comment seems to indicate that no occasion arose for the Court to test the validity of Congress' pronouncement until the *Hennen* case.<sup>61</sup> Even Kent, who favored placing removal power in the Presidency,<sup>62</sup> registered surprise at the degree of authority accorded to the debates:

This question [of removal power] has never been made the subject of judicial discussion; and the construction given to the Constitution in 1789 has continued to rest on this loose, incidental, declaratory opinion of Congress, and the sense and practice of government since that time.<sup>63</sup>

*The Federalist* asserted that since the Constitution had been framed to lend stability to the administration of government, "[t]he consent of [the Senate] would be necessary to displace as well as to appoint."<sup>64</sup> Further, Story reported the reaction of many public figures to President Jackson's abandonment of the custom of infrequent removals of officers (and its replacement by the wholesale purgings resulting from the spoils system):

Many of the most eminent statesmen in the country have expressed a deliberate opinion that . . . the only sound interpretation of the Constitution is that avowed upon its adoption; that . . . the power of removal belongs to the appointing power.<sup>65</sup>

Thus, from the point of view of the early commentators on the Constitution,<sup>66</sup>

---

expediency and to be at the expense of correct theory. And being at the expense of correct theory, it was not beyond the power of Congress to reverse, although reversal might for various reasons be 'impracticable.'" Corwin 379 (emphasis omitted).

60. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). But see Corwin 370, suggesting a different view where the Congress is an equally competent authority to determine an issue such as the extent and limits of appointment and removal power. Professor Berger concludes from Madison's statements subsequent to the debates, and from statements by other Congressmen regarding the "decision of 1789," that the decision was not intended to be a construction of the Constitution binding on the courts or later Congresses. R. Berger, *Congress v. The Supreme Court* 146-48 (1969). See also R. Berger, *Impeachment: The Constitutional Problems* 283-84 (1973) (comparison of the views of various legislators as to the binding effect of the decision on subsequent legislators); text accompanying notes 159-63 *infra*.

61. Early opinions of various Attorneys General considered the debates of the first Congress to have settled the issue. See, e.g., 6 Op. Att'y Gen. 1 (1853); 5 Op. Att'y Gen. 288 (1851); 1 Op. Att'y Gen. 212 (1818). For a brief discussion of the quality of such opinions as a legal resource see notes 75-76 *infra* and accompanying text.

62. Kent \*310.

63. *Id.* Kent continued: "It is . . . a striking fact in the constitutional history of our government, that a power so transcendent as that is, which places at the disposal of the President alone the tenure of every executive officer appointed by the President and Senate, should depend upon inference merely, and should have been gratuitously declared by the first Congress in opposition to that high authority of the *Federalist* . . ." *Id.* at \*310-11.

64. *The Federalist* No. 77, at 511 (P. Ford ed. 1898) (A. Hamilton).

65. Story § 1543. Story believed the appointing power to be a concurrent power of the President and the Senate. *Id.* § 1531. See also *id.* §§ 1537-40 (developing his position).

66. Story, Kent, and *The Federalist* all discussed the division of responsibility between

the decision of the first Congress, and, by extension, of *Hennen*, would not seem to be a solid foundation for a definitive interpretation of the removal power.<sup>67</sup>

Kent mentioned the lack of judicial determinations in this area.<sup>68</sup> As late as 1867, a federal court also noted an absence of sound judicial authority covering the matter. In *United States ex rel. Bigler v. Avery*,<sup>69</sup> the court expressed the belief that *Hennen* should be limited to non-confirmatory inferior officers, and seriously questioned whether the President alone possessed the power to remove officers appointed with the advice and consent of the Senate.<sup>70</sup>

In a carefully reasoned opinion, the court in *Bigler* demonstrated that the elementary text writers Kent and Story believed the constitutional locus of the appointment and removal powers to be in the President and the Senate concurrently.<sup>71</sup> Further, the court pointed out that in congressional debates in 1835, Senator Calhoun among others argued persuasively that the executive could not exercise removal power without some form of approval from Congress.<sup>72</sup> However, since the Constitution did not set out any method for removal as it did for appointment, and since the courts consistently had avoided direct confrontation of the issue, the court concluded that the "subject is one which . . . properly belongs to congress to regulate, rather than the courts. It is a legislative or political question, and not a judicial one."<sup>73</sup> Despite the court's persuasive argument for and belief in the reasons for finding a concurrent power to remove, it

---

the President and the Senate in the appointment process. Kent saw the Senate's role as a mere formality, having little significance on the outcome either in theory or in practice. Kent \*287-88. The Federalist accorded the predominant power and responsibility for making appointments to the executive, but considered the advice and consent of the Senate an important part of the system of checks and balances. The Federalist No. 76, at 505-09 (P. Ford ed. 1898) (A. Hamilton). Story attributed to the Senate a positive power in the appointment process. Story § 1531. It must be remembered that The Federalist and Kent's Commentaries were written before Andrew Jackson's presidency. Jackson is generally recognized as having introduced the spoils system into American government. See B. Schwartz, *American Constitutional Law* 113-14 (1955). Story wrote after the effects of the spoils system were evident, and clearly aimed his statements at Jackson's policy. Story § 1543. See also J. Harris, *The Advice and Consent of the Senate* 53-64 (1968). Insofar as Story wrote as a Justice of the Supreme Court and after observing appointment and removal practices used sparingly and extensively, one may argue that his view of the constitutional doctrine is the most politically realistic of the three early writers.

67. Accord, Miller 58-61, 67-70.

68. Kent \*310.

69. 24 F. Cas. 902 (No. 14,481) (C.C.N.D. Cal. 1867).

70. *Id.* at 904.

71. *Id.* at 904-05.

72. *Id.* at 905-06.

73. *Id.* at 905. The court continued: "Heretofore, the supreme court has regarded the action of congress in the premises and subsequent practice, as establishing or evidencing a regulation of the subject, which it was not at liberty to ignore or disregard. . . . In the passage of [the Tenure of Office Bill, see note 78 infra] by congress it must have been assumed, and as I think correctly, that the constitution left the subject of direct removals from office to be regulated by the legislative power." *Id.*

refused to depart from the *Hennen* doctrine. The court held that under "the law and long established usage . . . the power of removal must be conceded to the executive by the courts."<sup>74</sup>

Apart from *Hennen* and *Bigler* the main source of legal pronouncements, prior to 1925, regarding the power of removal were the opinions issued by various Attorneys General.<sup>75</sup> Such opinions, when solicited by the President, do not represent the ideal of impartial reflection upon major constitutional issues that involve the chief executive.<sup>76</sup>

These opinions confirming presidential control over the removal power, and a number of judicial decisions quite limited in scope,<sup>77</sup> together with the spirit and practice of acquiescence in the "decision of 1789,"<sup>78</sup> formed the background for the monumental opinion handed down in 1926—*Myers v. United States*.<sup>79</sup>

#### B. *Myers v. United States: Illimitable Presidential Power to Remove Executive Officers*

In 1834 Story, reflecting on the repercussions arising from the "decision of 1789," remarked:

If there has been any aberration from the true constitutional exposition of the power of removal (which the reader must decide for himself), it will be difficult, and perhaps impracticable, after forty years' experience, to recall the practice to the correct theory.<sup>80</sup>

74. *Id.* at 906.

75. See, e.g., 12 Op. Att'y Gen. 32 (1866). See generally Opinions discussed by Justice Brandeis in his dissent in *Myers v. United States*, 272 U.S. 52, 291 n.81 (1926).

76. Corwin 379. He stated: "[O]pinions of Attorneys General. . . [are] not a kind of source to be taken too seriously. The Attorney General is the family lawyer of the administration in power, and it is his business to make out as good a legal case as possible for what the head of the family wants to do." *Id.* See Miller, *The Attorney General as the President's Lawyer*, in *Roles of the Attorney General of the United States* 52 (1968); Comment, *Temporary Appointment Power of the President*, 41 U. Chi. L. Rev. 146, 150-51 (1973).

77. Of the very few opinions of the Supreme Court dealing with the removal power of executive officers, Chief Justice Taft cited *Shurtleff v. United States*, 189 U.S. 311 (1903); *Parsons v. United States*, 167 U.S. 324 (1897); *McAllister v. United States*, 141 U.S. 174 (1891); and *United States v. Perkins*, 116 U.S. 483 (1886). The applicability of these cases to the question at hand was dismissed with alacrity by Professor Corwin. Corwin 380-82. The Court also relied on *Ex parte Hennen*, discussed at notes 48-57 *supra* and accompanying text.

78. The spirit of acquiescence ended with the impeachment of Andrew Johnson. President Johnson allegedly violated a statute passed by Congress over his veto restricting the President's unilateral right to remove certain cabinet members. *Tenure of Office Act of 1867*, ch. 154, § 1, 14 Stat. 430, repealed by the Act of Mar. 3, 1887, ch. 353, § 1, 24 Stat. 500. See generally R. Berger, *Impeachment: The Constitutional Problems* 280-85 (1973); C. Fairman, 6 *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88*, pt. 1, at 521-24 (1971).

79. 272 U.S. 52 (1926).

80. Story § 1544. "But, at all events . . . in regard to 'inferior officers' (which appellation

If this were the case in 1834, then the difficulty in implementing "the correct theory" would exist today to an even greater extent. In *Myers*, the Court did not recall practice to theory, but rather expanded the rule of the "decision of 1789" to cover all executive offices.

In *Myers*, the Court was confronted with a narrow issue: whether the removal of a postmaster by the President alone could be effective despite the fact that the legislation which created the office required Senate confirmation of both appointments and removals.<sup>81</sup> Plaintiff's decedent had been appointed after confirmation to a four-year term. The act authorizing appointment to the office specified:

Postmasters . . . shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law . . .<sup>82</sup>

Before the end of his stated term, plaintiff's decedent was removed from office at the direction of the President without the Senate's consent. An action was brought to recover accrued salary and benefits from the time of removal to the end of the four-year term. Plaintiff alleged that the officer had been removed unlawfully and had been prevented from performing his duties.<sup>83</sup>

The Court held, in a six-to-three decision, that the removal was effective without the consent of the Senate.<sup>84</sup> The Court further held that that portion of the act requiring confirmation of removals was an unconstitutional violation of the implied doctrine of separation of powers insofar as it restricted the President's free exercise of removal power.<sup>85</sup>

Despite the fact that *Myers* was limited severely by a unanimous Court less than a decade later,<sup>86</sup> its influence persists.<sup>87</sup> In part, this is because the *Myers*

probably includes ninety-nine out of a hundred of the lucrative offices in the government), the remedy for any permanent abuse is still within the power of Congress, by the simple expedient of requiring the consent of the Senate to removals in such cases." *Id.*

81. The Chief Justice framed the issue in the following fashion: "[W]hether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate." 272 U.S. at 106. Justice Brandeis, dissenting, stated the issue somewhat differently: "May the President, having acted under the statute in so far as it creates the office and authorizes the appointment, ignore, while the Senate is in session, the provision which prescribes the condition under which a removal may take place?" 272 U.S. at 241.

82. Act of July 12, 1876, ch. 179, § 6, 19 Stat. 80.

83. After the removal of *Myers* the President made a recess appointment (which does not require confirmation) to fill the office for the remainder of the four-year term. 272 U.S. at 106.

84. *Id.* at 176.

85. *Id.*

86. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

87. In the debates, hearings and reports on S. 518, the *Myers* decision was continually mentioned in connection with the argument that the bill would infringe upon the President's illimitable removal power. See, e.g., 119 Cong. Rec. S 9605 (daily ed. May 22, 1973) (remarks of Senator Scott); *id.* at S 2078 (daily ed. Feb. 5, 1973) (remarks of Senator Griffin); Presidential Veto Message, *id.* at S 9376 (daily ed. May 21, 1973); H.R. Rep. No.

Court failed to confine itself to the facts and specific issue<sup>88</sup> involved. The opinion was so far-reaching that it has been difficult to determine to what degree the holding in *Myers* later was restricted.<sup>89</sup> In addition, so few questions involving appointment and removal power have come before the Supreme Court since that time that little opportunity has arisen for clarification of the lingering vitality of *Myers*. Nevertheless, *Myers* is important for the legal arguments and historical analyses advanced to support both the prevailing and dissenting views.<sup>90</sup>

Chief Justice Taft, speaking for the Court, began his opinion with a lengthy examination of the debates which culminated in the "decision of 1789."<sup>91</sup> His examination focused heavily upon the views of James Madison, as expressed in the House of Representatives on the question of how the Secretary of the Department of Foreign Affairs would be removed from office. Madison was successful in achieving a phrasing of the removal clause which vested removal power in the President, and also indicated that the power flowed from the Constitution rather than from the statute.<sup>92</sup> A detailed analysis of the debates and voting on the issue, however, leads to the inevitable conclusion that although Madison's view ultimately was embodied in the clause, it was his ability to marshal votes, rather than his reasoning which produced the result.<sup>93</sup>

That the Chief Justice generally employed a highly selective choice of the his-

---

93-109, 93d Cong., 1st Sess. 23-24 (1973); Hearings, *supra* note 3, at 67, 100, 102, 177, 184.

88. See Miller 56-57. See also *Humphrey's Ex'r v. United States*, 295 U.S. 602, 626 (1935).

89. See text accompanying notes 115-16 *infra*.

90. The majority and minority opinions in *Myers* thoroughly discussed the legislative and historical background of the removal power. Yet they reached different conclusions, not only on the proper outcome of the instant case, but also on the lessons of history and past practice. Despite this apparent conflict, subsequent cases treating the subject made mention of this unresolved dilemma, but made no attempt to indicate which side had represented history more accurately. In *Humphrey's*, for example, the Court merely stated: "[T]he prevailing and dissenting opinions [in *Myers*] so fully review the general subject of the power of executive removal, that further discussion would add little of value to the wealth of material there collected. These opinions examine at length the historical, legislative and judicial data bearing upon the question . . ." 295 U.S. at 626.

Insofar as history and practice are relevant to determining the proper construction of article II, the Court seems to have avoided clarifying a confused and potentially vital research tool. Accord, Miller 67-70.

91. 272 U.S. at 110-26. See generally Miller 62.

92. The original phrasing of the removal clause of the bill was that the Secretary of the Department of Foreign Affairs was "to be removable from office by the President of the United States." Miller 61. As passed, the words of the bill were, "whenever [he] shall be removed from office by the President . . ." *Id.* at 62. The latter phrase is ambiguous as to whether it grants authority or recognizes a pre-existing executive power. See *id.*; Corwin 360-62. Corwin remarked about the "decision of 1789": "In brief, a mere fraction of a fraction, a minority of a minority, of the House, can be shown to have attributed the removal power to the President on the grounds of executive prerogative." *Id.* at 362.

In subsequent debates over the establishment of the Treasury Department, Madison expressed the view that Congress validly could limit the President's authority to remove. Miller 67-68; Donovan & Irvine, *supra* note 35, at 219-20.

93. Miller 205-10; Corwin 361-62.

torical materials concerning removal power has been demonstrated convincingly by Professors Corwin and Miller.<sup>94</sup> After analyzing the Court's use of the "decision of 1789" and the political history following it, Miller concluded that on both counts the Chief Justice had misinterpreted the teachings of past practice. He stated:

The *Myers* case is not alone in utilizing history that is neither right nor relevant. But the pounding insistence on the validity and arguments of the decision of 1789 for seventy pages . . . calls attention to two possibilities, both of which unfortunately turn out to be true: that the Court's argument is largely an insubstantial shield for political values, and that other appropriate vehicles of interpretation for reaching its conclusion are largely lacking.<sup>95</sup>

What emerged from the Chief Justice's historical analysis was a finding that neither removal nor appointment is a concurrent power of the executive and legislative branches. Rather, both are powers which inhere in the presidency:

Our conclusion on the merits . . . is that Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed . . .<sup>96</sup>

The Court declined to modify or limit the President's powers in view of the constitutional responsibility of Congress, through the Senate, to confirm appointments to offices which it creates, funds, and may terminate. Instead, the Court vested very broad powers in the President in appointment and removal matters and restricted the power of Congress to interfere with such defined executive actions:

[T]he provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not to be extended by implication . . .<sup>97</sup>

The Chief Justice went on to identify the rationale for these holdings:

[T]o hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed.<sup>98</sup>

Again the possibility arises that the Court, in *Myers*, as in *Hennen*, was searching for a plausible legal or historical foundation upon which to lay an argument favoring the expeditious operation of government by an unfettered executive. Professor Corwin, who exhaustively detailed the historical and legal deficiencies of the *Myers* opinion, points out that

---

94. Miller 64-69; Corwin 360-87.

95. Miller 68.

96. 272 U.S. at 163-64.

97. *Id.* at 164.

98. *Id.* Justice McReynolds angrily responded to this statement by pointing out that "[c]onstitutional provisions should be interpreted with the expectation that Congress will discharge its duties no less faithfully than the Executive will attend to his." *Id.* at 183 (McReynolds, J., dissenting).



Chief Justice Taft was once President himself, and this fact, it may be surmised, accounts in no small measure for the trend of his opinion in the case . . . .<sup>99</sup>

It is significant that the Solicitor General in representing the government did not urge recognition of such illimitable executive removal power as the Chief Justice pronounced. He favored a "middle ground" between "executive despotism" and "legislative absolutism."<sup>100</sup> His proposal would have allowed Congress to restrict removals where the need for such restriction was inherent in the nature of the office, but would have left the discretionary removal power of the President largely unhampered.<sup>101</sup> Such a view was rejected by the Chief Justice; instead, he refused to recognize any legitimate congressional interest in the security, tenure, or fitness of federal officers.

The historical and legal lapses in the Court's reasoning were attacked vigorously in the dissenting opinions of Justices McReynolds<sup>102</sup> and Brandeis.<sup>103</sup> Justice Brandeis, after thorough examination of the historical, legislative and judicial background of the removal power, concluded, at least in the case of inferior officers,<sup>104</sup> as in *Myers*, that:

[t]he historical data . . . present a legislative practice, established by concurrent affirmative action of Congress and the President, to make consent of the Senate a condition of removal from statutory inferior, civil, executive offices to which the appointment is made for a fixed term by the President with such consent. They show that the practice has existed, without interruption, continuously for the last fifty-eight years . . . .<sup>105</sup>

99. Corwin 387. The biographer of Chief Justice Taft indicated that Taft's views on broad executive power, and particularly removal power, antedated his presidency. A. Mason, William Howard Taft: Chief Justice 254 (1965) [hereinafter cited as Mason]. Mason suggested that many factors—including Taft's own view of the role of the presidency in the structure of government and the alignment of the Court on the issue of removal power— influenced the breadth and tenor of Taft's opinion. *Id.* at 225-28, 253-55. See also Miller 55-57.

100. 272 U.S. at 96-97.

101. *Id.* See *id.* at 99-101 (Brief of Solicitor General Beck).

102. *Id.* at 178-239.

103. *Id.* at 240-95. Justice Holmes offered a short but pointed dissent. *Id.* at 177.

104. The Chief Justice did not attempt to draw any distinction between inferior and not-inferior officers. The Solicitor General dealt with the possibility of different treatment— according to status as inferior or not-inferior—in response to questions from the bench. *Id.* at 91-92. The appellant's brief assumed that Myer's position as postmaster was inferior in nature. *Id.* at 61-62 (Brief for Appellant). Mason points out that while the Chief Justice had several available means to limit the scope of his opinion on executive power, "[i]nstead, he chose to exalt the President's office and power by extending to him unlimited power to remove any executive officer, in high-level or 'inferior' posts." Mason 254. For a discussion of the inferior/not-inferior distinction, see part IVD *infra* and accompanying text.

105. 272 U.S. at 283 (Brandeis, J., dissenting). Thus, Brandeis was willing to concede that a legislative practice acquiesced in by the President for a lengthy period of time would be a strong constitutional precedent. He said: "A persistent legislative practice which involves a delimitation of the respective powers of Congress and the President, and which has been so established and maintained, should be deemed tantamount to judicial construction, in the absence of any decision by any court to the contrary." *Id.* (citing *United States v. Midwest Oil Co.*, 236 U.S. 459, 469 (1915)).

According to Justice Brandeis, the facts that Congress created executive offices by legislation, and set terms for such offices, gave Congress a legitimate power to supervise both the appointment to and removal from those offices.<sup>100</sup> In his view, Congress could require consent to removals from, as well as to appointments to, office—both because of the legislative practice of imposing such limitations upon executive action, and because of congressional interest in the supervision of federal offices.<sup>107</sup> “[T]he Constitution has confessedly granted to Congress the legislative power to create offices, and to prescribe the tenure thereof; and it has not in terms denied to Congress the power to control removals.”<sup>108</sup>

### C. *Restrictions Imposed on the Myers Doctrine*

In *Humphrey's Executor v. United States*,<sup>109</sup> the Court was presented with the removal of a member of the Federal Trade Commission before the end of his stated term. The officer had been appointed for seven years under legislation providing that “[a]ny Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.”<sup>110</sup> There was no suggestion in the correspondence between the officer and the President that removal was sought for any of the statutory reasons. Rather, the President sought to appoint an officer more receptive to his own policies and programs.<sup>111</sup> Plaintiff brought suit to recover salary accruing after his removal, alleging that the President's action was ineffective absent proof of malfeasance, neglect or inefficiency.

The question presented to the Court was whether the President had the inherent power to remove at pleasure members of the FTC despite the limitations on removal stated by the act.<sup>112</sup> Under the *Myers* rationale it would seem that the President had the power to remove officers appointed by him notwithstanding any limitation or restriction imposed by Congress. In *Humphrey's*, rather than requiring confirmation of removals initiated by the President, Congress sought to prevent removal entirely, except for conduct which amounted to a breach of the public trust. The legislature had attempted to prevent precisely what the President tried to accomplish: the transformation of a regulatory agency charged with executing the laws of the nation into a partisan advocate of presidential policies and programs.<sup>113</sup>

106. 272 U.S. at 245, 291-92 (Brandeis, J., dissenting). In his opinion Justice Brandeis catalogued in 34 pages numerous legislative limitations upon appointment and removal of inferior officers. *Id.* at 248-82.

107. *Id.* at 245, 291-92 (Brandeis, J., dissenting).

108. *Id.* at 245 (Brandeis, J., dissenting).

109. 295 U.S. 602 (1935).

110. Federal Trade Commission Act, 15 U.S.C. § 41 (1970).

111. See 295 U.S. at 618-19.

112. *Id.* at 621, 626.

113. The Court quoted the President's letters as stating “‘that the aims and purposes of the Administration . . . can be carried out most effectively with personnel of my own selection,’” and that the officer (Humphrey) should “‘realize that . . . your mind and my mind [do not] go along together on either the policies or the administering of the [FTC] . . . .’” *Id.* at 618-19. See notes 120, 122 *infra* and accompanying text.

In upholding the validity of the restriction upon removals, the Court pointed out that the FTC, and hence its members, exercised quasi-legislative and quasi-judicial as well as executive functions.<sup>114</sup> The Court retreated from the broad affirmation of plenary executive removal authority set forth in *Myers*, stating:

[In *Myers*] the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention [in the present case, of illimitable Presidential power of removal], but these are beyond the point involved and, therefore, do not come within the rule of *stare decisis*. In so far as they are out of harmony with the views here set forth, these expressions are disapproved.<sup>115</sup>

The *Humphrey's* Court established a test to determine when Congress possesses a legitimate interest in restricting presidential removal power:

Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power . . . will depend upon the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration . . . no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.<sup>116</sup>

In reaching this decision, the Court identified the reason for which Congress would place an office beyond the President's plenary power of removal. "[I]t is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."<sup>117</sup> This is the same rationale given by the framers of the Constitution for making federal judges unremovable during good behavior.<sup>118</sup> *The Federalist*, quoting Montesquieu, stated that "there is no liberty, if the power of judging be not separated from the legislative and executive powers."<sup>119</sup> In speaking of the removal power over executive officers, *The Federalist* explained that the consent of the Senate would be necessary both in removals and appointments so that

[a] change of the Chief Magistrate . . . would not occasion so violent or so general a revolution in the officers of the government as might be expected if [the President] were the sole disposer of offices.<sup>120</sup>

---

114. 295 U.S. at 628.

115. *Id.* at 626. See Miller 69 n.55.

116. 295 U.S. at 631-32.

117. *Id.* at 629.

118. U.S. Const. art. III, § 1. See R. Berger, *Impeachment: The Constitutional Problems* 122-65 (1973); notes 51, 52 *supra* and accompanying text.

119. *The Federalist* No. 78, at 519 (P. Ford ed. 1898) (A. Hamilton) (quoting Montesquieu, *Spirit of Laws*, vol. i, at 181).

120. *Id.* No. 77, at 511 (P. Ford ed. 1898) (A. Hamilton). *The Federalist* continued: "Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable

The reasonable and practical values which these quotations convey should be applicable to all offices in the federal structure if officers are to be regarded as public trustees<sup>121</sup> rather than minions of the chief executive.<sup>122</sup>

Every federal executive officer is appointed to execute the laws of the nation promulgated by Congress. The President, as chief executive, bears the ultimate responsibility for the success or failure of his branch in executing the law.<sup>123</sup> Clearly, the President cannot perform his function efficiently unless he can control, to some degree, the actions of the people responsible to him.

In order to make certain that executive officers possess the proper ability as well as the inclination to perform their executive function, the Constitution provides a system of checks and balances whereby the Senate must approve the appointment of officers. However, the Constitution provides no express check upon the President's removal power. Under *Myers*, were an officer to disagree

---

to him by the apprehension that a discountenance of the Senate might frustrate the attempt and bring some degree of discredit upon himself." *Id.*

121. See note 157 *infra*.

122. The questions that must be considered are (1) to what extent, if at all, the desired policies of the President should influence officers' attitudes toward the execution of congressional legislation (see notes 123, 124 *infra* and accompanying text); and (2) to what extent the President's power of removal should be used as a sanction to enforce control among his appointees. Carl Friedrich acknowledged that the Court, in *Myers*, viewed removal as a tool of the President to enforce discipline in the executive branch. He wrote: "It is in keeping with this general preoccupation with dismissal as a technique for enforcing responsible conduct that the Supreme Court . . . [in the *Myers* case] proceeded essentially on the assumption . . . that the power of removal was a necessary part of making officials responsible to the President. . . . This view is questionable, to say the least. . . . The power of dismissal is . . . only one of many techniques for making official conduct responsible. In fact, dismissal is not even a particularly effective method. . . . [T]he Supreme Court itself seems to have partially recognized its mistake in the *Myers* Case when it ruled in the *Humphreys* Case that Congress could lay down for officers possessing quasi-legislative or judicial functions such qualifications as it saw fit." C. Friedrich, *Constitutional Government and Democracy* 417-18 (1968) (footnote omitted). Compare this statement with the views of Professors Adams and Schwartz who seem to feel that a broad power to control the actions and attitudes of subordinate officials should be vested in the President. Professor Schwartz observed: "[T]he principal officers of our executive branch are responsible to the President. . . . They are his agents, the instruments through whom he works. . . . [I]t is impossible unless the President's powers are equal to his responsibilities . . . [for him] to ensure that it is his policies that are followed. . . . There is no room here for independence; the accountability within the executive must be absolute.

"Presidential control of the executive branch depends, in the last resort, upon the removal power." 2 B. Schwartz, *A Commentary on the Constitution of the United States* 47 (1963) (footnotes omitted). See T. Adams, *Elements of Government* 65-67 (1960). See generally Jaffe, *The Illusion of the Ideal Administration*, 86 *Harv. L. Rev.* 1183 (1973).

123. "[T]he president has the authority to enforce but not to change the law. Whatever discretion he may exercise, it must be grounded in a constitutional or statutory mandate. . . . The president's substantive-legal position is thus not unlike that of any other agency of the administrative branch of the government." Parker, *The President as the Head of the Executive-Administrative Hierarchy: A Survey*, 8 *J. Pub. L.* 437, 449 (1959).

with the President over the proper course of executive action, the President would be free to remove that officer and replace him with someone more compliant. The only check upon the President's action is the required Senate confirmation of the subsequent nominees.

Brandeis, dissenting in *Myers*, said:

Checks and balances were established in order that this should be "a government of laws and not of men." . . . The doctrine of the separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.<sup>124</sup>

These constitutional safeguards do not seek to remedy actual abuses of power, but rather to prevent the potential abuse of power. It is no more expected that presidents will remove officers for improper purposes than that they will select unqualified persons for appointment to office. Yet, the Constitution provides an express check upon appointments. And, as the Court in *Humphrey's* pointed out, the power to remove summarily is tantamount to the power to direct and control the officer subject to removal.

In contrast, Chief Justice Taft, in *Myers*, approvingly quoted President Grant on the use of the removal power:

It could not have been the intention of the framers of the Constitution, when providing that appointments made by the President should receive the consent of the Senate, that the [Senate] should have the power to retain in office persons placed there by Federal appointment, against the will of the President. The law is inconsistent with a faithful and efficient administration of the Government. What faith can an Executive put in officials forced upon him . . .<sup>125</sup>

The position of the Chief Justice amounts to absolute separation of the branches of the federal government: under his view, since executive officers fall within the President's domain, the President should have untrammelled power to select and displace those officers beneath him, without interference from Congress.<sup>126</sup>

No suggestion is made here, however, that the Senate has, or should have, the power to initiate appointments or removals. It would be at the President's instance alone that an officer would be proposed for appointment or removal. In the area of appointments, the Congress may require that the Senate oversee, approve, or reject nominations to federal executive offices. That power is clearly and expressly given by article II. Insofar as article II does not speak of removals, the question is whether a sound construction should assume that coordinate action by the Executive and the Senate was intended to be applied to all removals.<sup>127</sup> It is submitted that it should.

---

124. 272 U.S. at 292-93 (Brandeis, J., dissenting).

125. *Id.* at 168 (majority opinion) (citation omitted).

126. See, e.g., *id.* at 163-64; Corwin 358.

127. The third possibility is that legislative restrictions on removal should apply to only certain types of offices, as *Humphrey's* concluded. This view is discussed at notes 135-42 *infra* and accompanying text.

Justice Brandeis indirectly underscored the misconception of the doctrine of separation of powers which formed the basis of the *Myers* Court's unwillingness to extend coordinate action to removals:

It is true that the exercise of the power of removal is said to be an executive act; and that when the Senate grants or withholds consent to a removal by the President, it participates in an executive act.<sup>128</sup>

Yet, participation in an executive act by the legislature does not violate separation of powers, any more than does the President's veto of an act of Congress. This is particularly true when the participation is sanctioned by a constitutional plan indicating cooperation between coordinate branches to achieve a specified result.<sup>129</sup> Furthermore, as Professor Rostow has pointed out:

The separation of the three branches of government is not airtight. The President has massive legislative power, through his Roman capacity to veto and through his influence over public opinion. . . . Equally, the Congress has considerable power over the President, beyond its legislative authority and its control of the purse. Public officials, for example, cannot be appointed by the President without "the advice and consent" of the Senate . . . .<sup>130</sup>

In this framework, it is easier to understand the Court's decision in *Humphrey's*, setting apart quasi-judicial and quasi-legislative offices from purely executive ones. After limiting *Myers* strictly to its facts,<sup>131</sup> the *Humphrey's* Court defined a test for deciding whether Congress may limit the President's removal power. The test looked to the character of the office rather than to the locus of the appointment power.<sup>132</sup> Where the officer exercises quasi-legislative or quasi-judicial powers in addition to executive functions, an expression of Congress' intent to limit the removal power of the President will be given effect. Where, on the other hand, the officer exercises purely executive or administrative functions, the *Myers* decision vesting illimitable removal power in the President will control. This "character of the office" criterion has been applied in the cases since *Humphrey's* in reaching a decision as to whether an officer was removable.<sup>133</sup>

One of the difficulties produced by the *Humphrey's* decision (which the Court recognized at the time) lies in the absence of concrete guidelines for determining whether an office is purely executive:

128. 272 U.S. at 245 (Brandeis, J., dissenting) (footnote omitted).

129. See *id.*

130. E. Rostow, *The Sovereign Prerogative: The Supreme Court and the Quest for Law* at xxix (1962). See Justice Brandeis' similar statement, 272 U.S. at 291-92 (dissenting opinion).

131. 295 U.S. at 626, 627. See Miller 69 n.55.

132. 295 U.S. at 629, 631-32.

133. *Wiener v. United States*, 357 U.S. 349 (1958) (member of War Claims Comm'n held not to be removable as quasi-judicial office); *Martin v. Tobin*, 451 F.2d 1335 (9th Cir. 1971) (federal marshal held removable as purely executive office); *Morgan v. TVA*, 115 F.2d 990 (6th Cir. 1940), cert. denied, 312 U.S. 701 (1941) (Director of TVA held removable as purely administrative and executive office). See also Cross, *The Removal Power of the President and the Test of Responsibility*, 40 Cornell L.Q. 81 (1954).

To the extent that, between the decision in the *Myers* case, which sustains the unrestricted power of the President to remove purely executive officers, and our present decision that such power does not extend to an office [quasi-legislative or quasi-judicial in nature], there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.<sup>134</sup>

It is also noteworthy that, in *Humphrey's* and in the cases following, concentration on the constitutional and historical aspects of the doctrine of appointment and removal has given way to mere explanation of the rationale for the Court's holding. For example, in *Wiener v. United States*,<sup>135</sup> the Court said of *Humphrey's*:

It drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body "to exercise its judgment without the leave or hindrance of any other official or any department of the government" . . . . This sharp differentiation derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference.<sup>136</sup>

Essentially, the Court in *Humphrey's* compromised between Taft's and Brandeis' views in *Myers* by recognizing a legitimate congressional interest in removals from the "quasi" offices (Brandeis' view), but refusing to extend such an interest to removals from the purely executive offices (Taft's view). In short, *Humphrey's* chose a position between that of Brandeis who still sat on the bench, and that of Taft whose monumental opinion was so recent.

The Court recognized the danger of abuse when removals are unchecked, especially where rule making or decision making functions are to be performed by an executive officer. Insofar as *Humphrey's* recognized a congressional interest in promoting the security of officers against summary, unilateral removal, it adopted Brandeis' position in *Myers*. On the other hand, the Court refused to extend the same protection to purely executive officers, even though it could be said that these officers are equally subject to summary removal should they hold views discordant with those of the appointing officer. Perhaps the Court considered harmony and expediency to be of relatively greater weight in relations between the President and purely executive officers.

One outgrowth of the *Humphrey's* decision has been to create a distinct class of offices, the character of which has been equated with a fourth branch of government, unsanctioned, expressly or impliedly, by the Constitution. In *Sociedad Nacional De Marineros De Honduras v. McCulloch*,<sup>137</sup> Judge Holtzoff traced the status of the type of office to which *Humphrey's* was intended to apply:

It was at first assumed that these [quasi-legislative and quasi-judicial offices] were in-

134. 295 U.S. at 632. See also *FTC v. Ruberoid Co.*, 343 U.S. 470, 488 (1952) (Jackson, J., dissenting).

135. 357 U.S. 349 (1958).

136. *Id.* at 353 (citation omitted).

137. 201 F. Supp. 82 (D.D.C. 1962), *aff'd*, 372 U.S. 10 (1963) (following writ of certiorari to court of appeals before judgment; see 372 U.S. at 12 n.1).

cluded entirely within the Executive branch of the Government. The Supreme Court [in *Humphrey's*] . . . however, held that to a considerable extent such regulatory bodies were independent of the Executive . . . [and] not subject to removal by the President at will. Mr. Justice Sutherland . . . indicated that these agencies were in part quasi-legislative and in part quasi-judicial.<sup>138</sup>

The court pointed out that if such offices are not within the executive branch, and are not part of the legislative or judicial branches, then they must constitute a fourth branch of government not provided for by the Constitution:

It may well be that from the standpoint of political science and constitutional law, we are gradually evolving a Federal government divided into four coordinate branches, instead of three. . . . It is entirely possible that the development will prove salutary. The law and political institutions cannot stand still or remain static.<sup>139</sup>

The development of this unique class of offices arises from the distinctions drawn between removals from the "quasi" offices and removals from other executive offices.<sup>140</sup> Yet, article II of the Constitution does not indicate that appointments to the "quasi" offices shall be treated differently than appointments to other offices. Since the power to remove is in fact an incident of the power to appoint, it would seem to follow that the same procedure for removal—with or without safeguards against improper removal—should apply to all offices equally.<sup>141</sup> This is particularly true considering the well-reasoned opinions of early writers on the Constitution asserting that the intended procedure for removal, and the one most consistent with the appointment process, would require confirmation of the proposed removals from office.<sup>142</sup>

#### D. Conclusion

It is submitted that by providing a uniform method of removal from all offices, the values inherent in the structure of government provided by the Constitution

138. *Id.* at 85.

139. *Id.* To the effect that the *Humphrey's* decision tends to give rise to a fourth branch of government see *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 108-09 (1948) (CAB); *ICC v. Chatsworth Coop. Mkt. Ass'n*, 347 F.2d 821, 822 (7th Cir.), cert. denied, 382 U.S. 938 (1965) (ICC); *United States ex rel. Brookfield Constr. Co. v. Stewart*, 234 F. Supp. 94, 99-100 (D.D.C.), aff'd, 339 F.2d 753 (D.C. Cir. 1964) (GAO). For an indictment of the use of the term "quasi" in categorizing offices, and its tendency to create, at least conceptually, a fourth branch of government, see *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting). See generally *Larson, Has the President an Inherent Power of Removal of His Non-Executive Appointees?*, 16 *Tenn. L. Rev.* 259 (1940); *Parker, The Removal Power of the President and Independent Administrative Agencies*, 36 *Ind. L.J.* 63 (1960).

140. See text accompanying note 133 *supra*.

141. Among the ancillary problems raised by *Humphrey's* is that of defining which offices are to be "quasi-legislative" and/or "quasi-judicial," and which are "purely executive." *Humphrey's* suggests no satisfactory basis for determination. It has been suggested that, of the many agencies considered regulatory in nature, only some qualify for the preferential treatment accorded to the FTC in *Humphrey's*. *Larson, Has the President an Inherent Power of Removal of His Non-Executive Appointees?*, 16 *Tenn. L. Rev.* 259, 280-87 (1940). See *Donovan & Irvine, supra* note 35, at 229-47.

142. See notes 55-67 *supra* and accompanying text.



would be preserved. First, freedom from arbitrary removal would be secured by the supervisory capacity of the Senate in confirming such action. Where the Constitution provides for a method of appointment that indicates joint action by the President and the legislature, it is most appropriate to construe a logically consistent process for removal. The practice of coordinate action would be preserved in order to lessen the opportunity for abuse of power.

In addition, coordinate action in removals would recognize the legislature's legitimate interest in the effective functioning of the governmental offices it has created and maintained. This counterpart to the legislative interest in appointment to office recognized in article II would give effect to congressional concern regarding the security and tenure of officers charged with executing the laws of the nation.<sup>143</sup>

There is good reason to question the dispositive nature of the "decision of 1789" and the lessons of history upon which the Court relied in *Myers*.<sup>144</sup> While there may be occasions when removals must be accomplished without the delay of confirmation for reasons of overriding national purpose, there is no reason why a power less than summary removal cannot be accorded the President. In such cases, a power of suspension and interim appointment, subject to Senate review at a later date, could satisfy the need for decisive action. Just as Congress may dispense with confirmation for inferior officers by statute,<sup>145</sup> it might grant the same or a lesser power of unilateral action to meet political exigencies. In other instances, there is no reason to suppose that Congress would act less faithfully in considering removals than it does in confirming appointments.<sup>146</sup>

### III. LEGISLATIVE ABOLITION OF OFFICES AND THE INCIDENTAL REMOVAL OF INCUMBENT OFFICERS

#### A. *General Considerations*

It is beyond dispute that Congress controls the power and responsibility to create offices<sup>147</sup> of the federal government. The grant of authority to do so flows from article I of the Constitution which empowers Congress

[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.<sup>148</sup>

By virtue of this grant of power, Congress has created offices and invested them with various functions in order to execute the laws of the nation. Under this

143. Cf. *Nader v. Bork*, 366 F. Supp. 104, 108-09 (D.D.C. 1973).

144. See notes 58-67, 93-95 *supra* and accompanying text.

145. See *Burnap v. United States*, 252 U.S. 512, 515 (1920).

146. See note 98 *supra*.

147. See, e.g., *Myers v. United States*, 272 U.S. 52, 245 (1926) (Brandeis, J., dissenting); *Donovan & Irvine*, *supra* note 35, at 217. This discussion does not deal with the so-called "constitutional offices"—those established by the Constitution. In connection with these offices, like Supreme Court Justiceships or the Presidency, the Congress has limited control over tenure and salary, and no power to abolish the office.

148. U.S. Const. art. I, § 8, cl. 18.

same power, Congress can undo what it has done by abolishing offices which have no further usefulness.<sup>149</sup>

This clause vests in Congress the responsibility for establishing and maintaining the offices of the executive branch of government; yet, it is the President who carries the constitutional mandate to "take Care that the Laws be faithfully executed."<sup>150</sup> Thus, it would seem that there is a concurrent responsibility over the status and productivity of executive offices and officers.

This situation inevitably creates a conflict between the executive and legislative branches over the extent of their respective powers. Obviously, it is impossible for the President to execute the laws without adequate executive machinery—offices and departments. However, it is within the power of the legislature to refuse to create, or even to abolish, offices which the executive might consider necessary for the efficient administration of government.<sup>151</sup>

Congress may wish to eliminate an office due to ineffective structuring of the office, or in order to change the division of powers among several similar offices or to offset difficulties flowing from the inability of the officeholder to perform the functions of the office. Congress can abolish offices, transfer functions among offices, or create new offices to cure the first two difficulties.<sup>152</sup> When an office is abolished, the incumbent officer loses his tenure and is de facto removed from office.<sup>153</sup> However, only the President can remedy the last defect.<sup>154</sup>

This section of the Comment will discuss the limits and extent of the use of legislative power to abolish offices. Particularly important is the issue of whether Congress may abolish one office and immediately recreate a similar one where there is little or no evidence that the actions are intended to eliminate or cure a functional deficiency in the governmental hierarchy. It should be mentioned at the outset that there is no discoverable federal statutory or judicial rule dealing with the limits of congressional power to abolish and create offices. Cases which do exist respecting state offices will be analyzed in an effort to develop a tenable position that the federal courts might adopt in dealing with the abolition of federal offices.

The Supreme Court decided at an early date, in *Butler v. Pennsylvania*,<sup>155</sup> that the abolition by a state legislature of a statutorily created office does not violate the constitutional prohibition against impairment of contract rights.<sup>156</sup> In holding that appointment to public office does not form a contract between the officer and the state, the Court said:

The selection of officers, who are nothing more than agents for the effectuating of such

149. See notes 155-64 *infra* and accompanying text.

150. U.S. Const. art. II, § 3.

151. See text accompanying notes 157, 159, 163 *infra*.

152. Congress has delegated to the President a limited authority to transfer functions and powers among various executive offices, and even to create new ones. 5 U.S.C. §§ 901-13 (1970).

153. See note 164 *infra* and accompanying text.

154. See part II *supra*.

155. 51 U.S. (10 How.) 402 (1850).

156. U.S. Const. art. I, § 10.

public purposes, is matter of public convenience or necessity, and so too are the periods for the appointment of such agents; but . . . [there is no] obligation to continue such agents, or to re-appoint them, after the measures which brought [the office] into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public.<sup>157</sup>

To hold otherwise, the Court asserted, would obligate governments "to become one great pension establishment on which to quarter a host of sinecures."<sup>158</sup>

While that case dealt with state offices, the Court's reasoning clearly applies to all governmental entities under the American system. The Court expressly stated:

It follows, then, upon principle, that, in every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws.<sup>159</sup>

A subsequent case<sup>160</sup> decided by the Supreme Court examined whether a state law, fixing a certain city as a county seat upon the city's meeting certain conditions, operated as an offer to a contract. The city argued that once the conditions were met the state legislature could not repeal the law and change the capital without violating the Federal Constitution's prohibition against impairing the obligation of contracts.<sup>161</sup> The Court discussed the character and effect of public laws in American government and decided that the "impairments" clause did not apply.<sup>162</sup> It said that legislative actions, such as the one at issue in *Butler*,

involve *public interests*, and legislative acts concerning them are necessarily *public laws*. Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. . . . This must necessarily be so in the nature of things. . . . A different result would be fraught with evil.<sup>163</sup>

Further, it has been held that the repeal of a law creating an office abolishes the office and, as of that date, the officer has no right to the title or the benefits of the office.<sup>164</sup>

---

157. 51 U.S. (10 How.) at 416. In 1900 the Supreme Court declared that "public offices are mere agencies or trusts, and not property as such. Nor are the salary and emoluments property, secured by contract, but compensation for services actually rendered. . . . In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right." *Taylor & Marshall v. Beckham* (No. 1), 178 U.S. 548, 577 (1900). See also *Crenshaw v. United States*, 134 U.S. 99, 103 (1890); *Butler v. Pennsylvania*, 51 U.S. (10 How.) 402, 417 (1850).

158. 51 U.S. (10 How.) at 416.

159. *Id.* at 416-17. See also *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 693-94 (1819). This position has been reaffirmed to the present day. *Chambers v. United States*, 451 F.2d 1045, 1066-71 (Ct. Cl. 1971).

160. *Newton v. Commissioners*, 100 U.S. 548 (1879).

161. *Id.* at 556.

162. *Id.* at 556-60.

163. *Id.* at 559.

164. *Lewis v. United States*, 244 U.S. 134, 144 (1917); *Crenshaw v. United States*, 134

### B. *Legitimate Purpose vs. Illicit Motive*

While the creation and abolition of offices are essentially legislative acts, it is obvious that the executive has influence over the process to the extent that he may propose or veto legislation concerning the status of offices.<sup>165</sup> As noted, he has an interest in the establishment and efficiency of offices, especially those in the executive branch of the government.<sup>166</sup> This can be considered the counterpart to the limited voice of Congress in the essentially executive acts of appointment and removal.<sup>167</sup> Similarly, it has been held that the legislature, absent specific constitutional prohibitions, may determine the tenure, salaries and duties of an office, and, having done so, then may modify, restrict or enlarge any of them.<sup>168</sup>

In the cases discussed above, the question presented was the power or authority of the legislature to act. Whether the validity of the act of the legislature was conditioned by a requirement of good faith was never raised. Nor (except for one related case, *United States v. Lovett*<sup>169</sup>) does it seem that the Court has discussed good faith as an element in the legislative creation or abolition of federal offices.

In a number of state court cases,<sup>170</sup> the subject has been raised in this fashion: the incumbent at the time of the abolition challenged the validity of the act, raising the issue of whether the power had been exercised to effectuate a legitimate legislative purpose.

In a New York case,<sup>171</sup> the legislative authority of a village abolished the office of police judge to which plaintiff had been elected. The abolition occurred between the time of the election and the date for taking office. The court found that under the applicable state law the legislative authority had the authority

U.S. 99, 108 (1890); *Abt v. United States*, 146 Ct. Cl. 205, 210, petition for cert. dismissed, 361 U.S. 871 (1959). Cf. *Hall v. Wisconsin*, 103 U.S. 5 (1880), where the Court found that three commissioners held their public positions by contract and allowed recovery on a written executory contract with the state after repeal of the act creating the positions. See note 34 supra discussing the definition of an officer of the United States.

165. See text accompanying notes 128-30 supra.

166. See text accompanying notes 150-51 supra.

167. See text accompanying notes 40-43 supra.

168. *Higginbotham v. City of Baton Rouge*, 306 U.S. 535, 538 (1939), and cases cited in notes 157, 159, 164 supra.

169. 328 U.S. 303 (1946). There, Congress passed a bill, signed into law by the President, which prohibited the paying of three named individuals from government funds. All three were removed from the payroll because of suspicions as to their loyalty. The Court declared the act unconstitutional as a bill of attainder. Justice Frankfurter, concurring in the result, felt that the bill raised serious questions under the power of removals doctrine as set forth by the *Myers* and *Humphrey's* decisions. *Id.* at 327-28.

170. See, e.g., *O'Connor v. Greene*, 174 Misc. 597, 21 N.Y.S.2d 631 (Sup. Ct. 1940); *Caldwell v. Lyon*, 168 Tenn. 607, 80 S.W.2d 80 (1935). See also cases cited in notes 175, 186, 192 infra.

171. *O'Connor v. Greene*, 174 Misc. 597, 21 N.Y.S.2d 631 (Sup. Ct. 1940).

to abolish the office.<sup>172</sup> Speaking in general terms, the court reasoned that, absent some higher authority, such as a constitutional provision guaranteeing the existence of the office, the power to create an office implies the power to abolish it, and emphasized that "[t]he only limitation placed upon the exercise of that abrogating power is that the legislative body using it must act in good faith."<sup>173</sup> Without defining what it meant by "good faith," the court thus imposed a qualification upon the power of the legislative body to abolish offices which it had created.

In *State ex rel. Hammond v. Maxfield*,<sup>174</sup> officers named to an executive commission were appointed by the governor to six-year terms pursuant to legislation enacted in 1933. In 1941, a different commission was established with broader duties. The members of the new commission were to become, *ex officio*, officers of the old commission. The legislation further provided that "[t]he terms of office of the members of the [old] commission . . . shall terminate as and when the members of the [new] commission shall have been appointed and shall have qualified."<sup>175</sup> Thus, the offices of the members of the old commission were abolished, and new offices, on a new commission, were established by the same legislation.<sup>176</sup> Members of the old commission brought action to determine their right to retain their state offices on the old commission.

The court discussed two important issues. One was the question of how the good or bad faith of the legislature was to be determined in assessing the effec-

---

172. *Id.* at 598, 21 N.Y.S.2d at 633. While the plaintiff did not charge bad faith on the part of the legislative body, the court felt constrained to mention that "the [legislative group] is not obliged to establish its good faith. The plaintiff must charge and prove that bad faith motivated the action which extinguished the office. . . . In the absence of such proof good faith will be presumed." *Id.*

173. *Id.* The court went on to emphasize that: "The plaintiff urges that having been chosen at the polls, she has a right to hold the office for which she was elected. This conception is not in conformity with the American system. A person has no vested right in a public office." *Id.* at 599, 21 N.Y.S.2d at 634 (citing *Butler v. Pennsylvania*, 51 U.S. (10 How.) 402 (1850)).

174. 103 Utah 1, 132 P.2d 660 (1942). It is clear that if the constitutionality of a bill similar to S. 518 were to come to court, the Justice Department would rely heavily on *Maxfield* and the *Pennsylvania* cases cited in notes 186 and 192 *infra*. These cases, among others, were discussed at length in the Justice Department's submissions to the subcommittee holding hearings on S. 518 and H.R. 3932. See Hearings, *supra* note 3, at 108-12. But see the summary dismissal of the importance of these same cases by the committee in its report favoring the bill. H.R. Rep. No. 93-109, 93d Cong., 1st Sess. 20, 26-27 (1973).

175. 103 Utah at 5, 132 P.2d at 662, quoting the Utah statute.

176. The old offices abolished were commissions on the State Road Commission. Those created were commissions on the Engineering Commission. While the State Road Commission was not abolished, offices in it were extinguished by the act. *Id.* From the manner in which the court developed its opinion it would appear to have been the plaintiff's position that they could not be deprived of their offices before the end of their six-year terms. If the offices which they had held were not abolished in fact, they contended, the legislation would be void under the doctrine of separation of powers as a usurpation of the executive power of removal under the state constitution. *Id.* at 6-9, 13-14, 132 P.2d at 662-63, 665.

tiveness of an act abolishing an office. The test which the court announced turned on the legislature's purpose in truncating the officers' tenure:

[I]t must be a genuine abolition not something merely colorable or done under pretense.

If it abolishes one office and puts in its place another . . . with substantially the same duties, it will be considered a device to unseat the incumbent.<sup>177</sup>

The second issue which the court discussed was the conflict which arises when a legislative act has the effect of ousting an officer from his office.<sup>178</sup> If the power to remove an executive officer is a function limited to the executive, obviously the power cannot be exercised by the legislature without violating the doctrine of separation of powers.<sup>179</sup> On the other hand, if the legitimate action of the legislature in abolishing an office has the incidental but inevitable effect of terminating an officer's incumbency, the doctrine cannot apply. In this latter situation, the officer is not "removed" because that term implies the continued existence of an office to which another may be appointed.

Where the office is abolished, no one can be appointed because the position to which appointments would be made no longer exists. If the power of removal is incident to the power of appointment, and if there must be a vacant office for any appointment to be made, then, where there is no office in existence, neither the appointment nor the removal power of the executive can exist with respect to that office. Whether there is an unconstitutional usurpation of the executive power of appointment by the legislature must turn, therefore, on whether the same office continues to exist after the legislative abolition. It is in this connection that the court applied the test of legislative purpose: whether the purpose of the legislature expressed by the act was to discontinue completely and forever the subject office.

The court did not define "purpose" in terms of motive. Rather, it chose to look at observable, objective factors in determining whether the office had ceased to exist by virtue of the act.<sup>180</sup> If the office was abolished in fact, then the legislation was a valid exercise of a legislative power. If the office was continued under the same or a different name, then the legislature unconstitutionally had exercised a power vested in the executive—the removal power.

The court delimited three analytical categories based upon whether the responsibilities of the office were suspended entirely or were vested in a different, existing or newly created office:

---

177. *Id.* at 7-8, 132 P.2d at 663 (citations omitted).

178. *Id.* at 8-9, 132 P.2d at 663.

179. See part II *supra*.

180. 103 Utah at 8-10, 132 P.2d at 663-64. The court reasoned that "[t]he chief characteristics of an office are the functions, duties and powers which appertain to it." *Id.* at 9, 132 P.2d at 663.

The name of an office can be changed without changing its nature. And the name may remain the same while the functions change dramatically. As functions, duties, powers and responsibilities of an office change, clearly the qualifications required of the officer exercising the powers of the office necessarily are different. Viewed in this way, it is appropriate to judge the purpose of the legislature by these objective manifestations of change.

[1] If the office is completely abolished and no substitute created nor its duties distributed among other offices, it may be so abolished whatever the motive.<sup>181</sup>

[2] If the newly created office has substantially new, different or additional functions, duties or powers, so that it may be said in fact to create an office different from the one abolished, even though it embraces all or some of the duties of the old office it will be considered as an abolition of one office and the creation of a new or different one.<sup>182</sup>

[3] [I]f the functions, duties and powers are substantially those of the office abolished, the abolition will be considered merely colorable and the pretended new office be considered in actuality a continuation of the old one.<sup>183</sup>

Throughout its opinion the court spoke of valid legislative purposes for which offices may be abolished in the context of reorganizations of the government structure. Specifically, the court mentioned "a general scheme of . . . merger, rearrangement or consolidation genuinely based on reasons of economy or efficiency . . ."<sup>184</sup> However, a broader justification for the use of legislative power to abolish was recognized:

[W]here the power to create or abolish is rightfully used for legislative purposes, the fact that it incidentally results in the loss of office can make no difference.<sup>185</sup>

This statement would seem to indicate that whenever a genuine abolition of an office results from the exercise of any power granted by the Constitution to effectuate any legitimate legislative purpose, the abolition will be upheld against a claim of violation of separation of powers and no inquiry will be made as to the motives of the legislature.

In *Commonwealth ex rel. Kelley v. Clark*,<sup>186</sup> the Pennsylvania supreme court considered two bills which, taken together, would have abolished elective offices and created identical appointive offices.<sup>187</sup> The court determined that here

[t]here was no intention to abolish the office; the language in the Act . . . that it is abolished is mere subterfuge. . . . The best that can be said is that the legislature attempted to abolish and continue the office at one and the same time, an impossible thing.<sup>188</sup>

Having conceded that creation and abolition of offices are legislative functions, the court pointed out that removal power—under the Pennsylvania constitution—was confided to the appointing power.<sup>189</sup> The court declared the actions invalid<sup>190</sup> and asserted:

181. Id.

182. Id., 132 P.2d at 663-64.

183. Id., 132 P.2d at 664.

184. Id. at 10, 132 P.2d at 664.

185. Id. at 13, 132 P.2d at 665.

186. 327 Pa. 181, 193 A. 634 (1937).

187. Id. at 186, 193 A. at 636.

188. Id.

189. Id. at 188, 193 A. at 637. Pa. Const. art. 6, § 4 provided: "Appointed officers . . . may be removed at the pleasure of the power by which they shall have been appointed." This is essentially the position that the Supreme Court developed in the Hennen and Myers cases. See parts IIA, B supra.

190. 327 Pa. at 189, 193 A. at 638.

the legislature can[not], by direct or indirect means, continue the office and remove an incumbent whom it has not appointed. . . . [S]ince there was no real abolishment of the office . . . the attempted removal . . . was beyond the power of the legislature. Under the Constitution they could be removed only by the power which appointed them.<sup>191</sup>

During the same session as the *Kelley* case, the Pennsylvania supreme court considered legislation which, it was claimed, effectuated a valid reorganization of government. In *Suermann v. Hadley*,<sup>192</sup> the court found that a series of three acts did not constitute a true reorganization plan involving the abolition of offices.<sup>193</sup> Rather, it found that the legislature had ended the tenure of the incumbents in violation of the constitutional provision that the power to remove vested in the appointing power.<sup>194</sup>

The court admitted to difficulty in determining whether the reorganization plan went far enough in transferring functions so that the offices involved were abolished.<sup>195</sup> Recognizing that reorganization plans may involve the complete abolition of affected offices, the court set out general guidelines for allowing incidental removals which result from acts restructuring the governmental hierarchy:

[W]here the [reorganization], while adding some new duties and prescribing new qualifications for appointees, leaves intact the basic structure and purpose [of the office] . . . it will not be assumed that the legislature intended by these additions to abolish the offices of the incumbents, unless the Act in other respects clearly works such result or manifests such an intent.

Reorganization . . . does not necessarily require abolition of prevailing offices; in fact, generally that is an unusual procedure . . . . Abolishment of office carries with it the idea of doing away with the identical office perpetually . . . .<sup>196</sup>

Thus, the court did not go so far as to raise a presumption that ordinary reorganizations do not involve complete abolition of offices; neither did it allow the legislature to rest on the opposite presumption of intended abolition. In effect, the court would require the contestant of reorganizational abolitions to introduce competent evidence that the bill did not abolish the office in fact. If the contestant can do so, the legislature must affirmatively demonstrate that the

191. *Id.* at 188, 193 A. at 637. See also *State ex rel. Birdsey v. Baldwin*, 45 Conn. 134 (1877).

192. 327 Pa. 190, 193 A. 645 (1937).

193. *Id.* at 197-99, 193 A. at 650-51.

194. *Id.* at 198-99, 193 A. at 650-51. However, since this portion of the reorganization plan was severable from the other provisions of the three acts, the court issued an injunction restraining removal of the incumbents until the end of their appointed terms. *Id.* at 198, 193 A. at 650.

195. *Id.* at 194, 193 A. at 648. The court said: "[I]n analyzing governmental reorganization statutes . . . the difficulty encountered is in determining whether the change is of sufficient moment to sustain a finding of legislative intent to abolish the offices affected and to oust the incumbents . . . in contravention of the constitutional barrier . . ." *Id.*

196. *Id.* at 197, 193 A. at 650 (citing *Commonwealth ex rel. Kelley v. Clark*, 327 Pa. 181, 193 A. 634 (1937), discussed in notes 186-91 *supra* and accompanying text).



intent to abolish was present, by showing that the result of the legislation would perpetually and completely discontinue the office. This would force the legislature to justify its action—to prove its intent to do a legitimate, rather than an illegitimate act.

In summation, these cases demonstrate that the legislature may act within its power to terminate the tenure of an incumbent officer. The act, however, must be pursuant to a valid reorganization plan or other legislative purpose and must operate to abolish completely and perpetually the office involved.

If, on the other hand, by the terms of the act the office remains in existence, the abolition will be ineffective, and the officers deprived of their positions may challenge their loss of tenure. Under *Maxfield*, and, by implication, under *Kelley* and *Suermann*, the determination of whether an office has been abolished will depend upon an examination of the observable, objective characteristics of the office—its powers, duties and functions. Where these remain in existence in a single office under the same or a different name, it would be impossible to claim abolition: the defining features of the office remain intact. If the powers of the office are distributed among different offices, the abolition will be suspect but not invalid so long as the terms of the act clearly demonstrate that the old structure of the office was abandoned for reasons of economy, efficiency or other legitimate legislative purposes. Failing this, the attempted abolition will be viewed as an unconstitutional attempt to remove the incumbents, in violation of the doctrine of separation of powers.<sup>197</sup>

### C. Conclusion

It is possible to draw from the above cases a rule which might be extended to similar situations arising in the federal government. These cases indicate that "good faith" essentially means action pursuant to a power confided in the legislature. The object in acting must be to exercise a legitimate legislative purpose. Where the action of the legislature meets this test, the loss of tenure will be deemed merely an incident, and not an object, of the legislature's action. Thus, it is clear that the good faith criterion imposes no different restriction in the area of creating and abolishing offices than is imposed upon the legislature in any other area of legislative action. Here, "good faith" means "within legislative power."

The good faith criterion does not refer to, and the court ordinarily will not inquire into, the state of mind of individual legislators.<sup>198</sup> The power sought to

---

197. It should be noted here that if there is no incumbent officer at the time the act becomes effective, the question of violation of the executive removal power is moot. No officer would be removed by operation of the act, and hence constitutional issues dealing with removal cannot be raised. See part IVD *infra*.

198. In certain types of cases, such as those involving bills of attainder, the Supreme Court will allow inquiry into the motive of the legislators in passing legislation. *United States v. Lovett*, 328 U.S. 303 (1946) (discussed in note 169 *supra*). The necessity for such inquiry is founded on the fact that the claim involved depends on the existence of a concealed, illegal motive. Similar limited inquiry into legislators' motive was made where the Court considered the justification analogous to bill of attainder situations such as in *Lovett*.

be exercised must be directed toward a purpose which Congress, and not the President alone, is authorized to effectuate.<sup>199</sup> If the end sought is abolition of the structure of the office (as defined by its powers, duties and functions), and the means adopted eradicate the office completely and perpetually, then the action of the legislature will not violate the executive's power to remove officers.

#### IV. CONSTITUTIONAL DEFECTS IN S. 518

##### A. *Confidential Advisors to the President*

Keeping in mind the state of the law respecting removal of officers and creation and abolition of offices, it is possible to discuss S. 518 and the constitutional objections it may engender.

A preliminary point raised during the hearings was whether the Congress could or should require confirmation of the type of executive appointee involved here.<sup>200</sup> Specifically, it was argued that some members of the executive branch exercise no substantive authority, but merely offer advice to the President.<sup>201</sup> Their status was identified as presidential staff, and likened to an extension of the President himself. It was argued that the doctrine of separation of powers would preclude confirmation of personal staff as much as confirmation of the President.<sup>202</sup>

---

See *United States v. O'Brien*, 391 U.S. 367, 383-84 n.30 (1968) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169-84 (1963) and *Trop v. Dulles*, 356 U.S. 86, 95-97 (1958)). This permissible inquiry extends to cases arising under the 14th amendment where legislation which, on its face, is within legitimate legislative power and purpose, carries prohibited effects in its execution. See *Brest*, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95; *Ely*, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205 (1970); *Note*, *Legislative Purpose and Federal Constitutional Adjudication*, 83 Harv. L. Rev. 1887 (1970). Usually, however, the Court will judge the validity of the legislation solely by its terms and will forego the hazardous process of attempting to uncover legislative motive from the statements of legislators. *Palmer v. Thompson*, 403 U.S. 217, 224-26 (1971); *United States v. O'Brien*, 391 U.S. 367, 383-86 (1968); *Sonzinsky v. United States*, 300 U.S. 506, 513-14 (1937); *Arizona v. California*, 283 U.S. 423, 455 (1931); *McCray v. United States*, 195 U.S. 27, 56 (1904). It would appear that for the Court to probe into the legislative history of S. 518 for expressions demonstrating an illicit congressional motive, the objection to the bill would have to be framed so as to fit into the narrow class of cases which have allowed such investigation. See also *Currie*, *Motive or Purpose and Acts of Congress*, 44 Miss. L.J. 619 (1973).

199. Cf. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

200. Hearings, *supra* note 3, at 107-08. The argument that it would be inappropriate for the Senate to scrutinize some officers who see their roles as close personal as well as professional contact with the President is interspersed throughout the testimony of the incumbent Director of OMB, Roy L. Ash, *id.* at 49-65, and Assistant Attorney General Dixon, *id.* at 65-121, 163-81. This argument seems to form the basis of the President's second reason for vetoing S. 518. See 119 Cong. Rec. S 9376 (daily ed. May 21, 1973); note 31 *supra*.

201. Mr. Ash also bears the title of Assistant to the President, as do a number of heads of departments. 9 Weekly Compilation of Presidential Documents 7 (Jan. 8, 1973).

202. Hearings 107-08. Mr. Ash spent much time trying to place his position in this advisory-confidant category. See *id.* at 51-53.

It need only be pointed out that article II, section 2 of the Constitution makes no special provision respecting advisors to the President who occupy offices of the United States.<sup>203</sup> It is true that Congress may stipulate, in its discretion, that inferior officers who also act as close personal advisors to the President be appointed without Senate confirmation.<sup>204</sup> Alternatively, one may argue persuasively that an advisor to the President who holds no other office is not an officer within the meaning of the Constitution.<sup>205</sup> This argument would be predicated upon the view that an advisor of this type exercises no substantive function or power relevant to the operation of government but is only the President's confidant. Where, as with the officers of the OMB, the officer occupies an office in which he does discharge functional duties and responsibilities,<sup>206</sup> and incidentally confides his thoughts on policy matters to the President in another capacity, confirmation of his appointment to the office of substantive responsibility is both appropriate and constitutional.<sup>207</sup>

---

203. U.S. Const. art. II, § 2 (reprinted at note 15 supra).

204. It was argued that this was precisely the reasoning of the legislature in 1921 when the forerunner to the OMB, the Bureau of the Budget, was established. Hearings 70-73. One may question whether the OMB in its present role is the same type of agency as the BOB was in 1921 when the BOB merely suggested budgetary considerations. Also, since the decision not to require confirmation of the BOB was a congressional decision, the legislature may later reverse itself. See also part IVD *infra*.

205. Status as an "officer" has never been defined in terms of the power exercised. Rather, the method by which a person is appointed determines whether he is an officer of the United States under the Constitution. See note 34 supra.

206. For a list of 67 statutory responsibilities of the Director of the OMB compiled by Senator Ervin see 119 Cong. Rec. S 1969-70 (daily ed. Feb. 2, 1973). See also Herbers, *The Other Presidency*, N.Y. Times, Mar. 3, 1974, § 6 (Magazine), at 16.

207. Where an officer confides his thoughts on policy matters to the President and exercises no substantive authority derived from an office which affects the administration of government, the officer is little different, save for his federal salary, from a personal friend of the President. The President must have consultants, and while these confidant-officers may wield great influence over the President's actions, so also may persons outside government service. Thus, to require confirmation of such officers might restrict unduly the President's sources of counsel, and ultimately be without effect if the President turned to advisors not in the spotlight of public life.

Nor should Congress seek to exact pledges and commitments from nominees as conditions to their confirmation. Pressure placed on nominees in confirmation hearings to reveal the probable nature of their advice to the President would result in refusal to confirm nominees who hold views unpopular to the Senate. This would act as a form of prior restraint on the nominee who later may feel bound by his statements before the Senate not to advocate a particular course of action. This danger is not wholly academic. In early 1973 proposals were advanced, at least with regard to cabinet designees, to require certain pledges to the Senate before confirmation would be given. N.Y. Times, Jan. 12, 1973, at 15, col. 1. The Times reported: "One suggestion was said to be that members of committees screening Cabinet nominees insist on firm pledges from the prospective department heads that they would respond to invitations to testify before Congressional committees." *Id.*, Jan. 11, 1973, at 28, col. 3.

B. *S. 518 as Proposed*

As noted,<sup>208</sup> the legislation originally proposed would have directly removed the incumbent Director and Deputy after thirty days if they failed to appear for, or to secure, confirmation from the Senate.<sup>209</sup> In operation, the bill would have the direct and primary effect of removing from office two executive officers appointed by the President alone.

Assuming that the officers were appointed validly to their offices,<sup>210</sup> then the bill could be considered only as a device to unseat the officers. In both conception and execution, the bill would leave the office intact while ousting the officers from their appointive positions. The requirement of confirmation in no way changes the nature of the office. The requirement runs to the person nominated to fill the position. Once confirmed, the officer would exercise the same powers, duties and functions as the officers had before the requirement of advice and consent.

Under the doctrine of removal power as set forth by *Myers* and limited by *Humphrey's*,<sup>211</sup> this action would be an intrusion by the legislature upon a power reserved to the President. As such, S. 518 would have to be held unconstitutional as attempting to effectuate a purpose or power not entrusted to the legislature.

That Congress may have full power to require confirmation of the positions is a legitimate legislative interest, but not one recognized as sufficient to render the removals merely incidental to the primary effect of the bill. Insofar as the removal provision of the bill would be self-executing, and would usurp a power reserved to the executive, it would constitute an attempt by Congress to exercise an executive function (removal) in order to exercise a legislative function (confirmation).<sup>212</sup>

Assuming valid appointment, any action that Congress may take to implement the bill—such as withholding salaries or ordering contempt citations—would infringe upon the constitutional prohibition against bills of attainder. Insofar as the bill would apply to the two named incumbents, it partakes of the aspects of a bill of attainder similar to those in the *Lovett* case.<sup>213</sup>

---

208. See text accompanying notes 19-21 supra.

209. The original text provided that "no individual shall hold either such position thirty days after [the date of enactment] unless he has been so appointed." 119 Cong. Rec. S 2088 (daily ed. Feb. 5, 1973).

210. See part IVD infra.

211. See parts IIB, C supra.

212. The result would be the same if the structure of the appointing power were "recalled to the proper theory" as proposed above. See part IID supra. Under the view that removal, as well as appointment, is a concurrent power of the executive and the Senate, it would be within the executive's sole power to initiate the removal procedures to which the Senate could consent.

213. See note 169 supra. The possible bill of attainder aspect of the bill was raised in House Comm. on Gov't Operations, *Requiring Confirmation of the Director and Deputy Director, Office of Management and Budget*, H.R. Rep. No. 93-109, 93d Cong., 1st Sess. 46

*C. S. 518 as Amended and Passed by Congress*

A much more difficult question is presented as to the constitutionality of S. 518 as it emerged from the hearings and was passed by Congress. The amended bill set forth essentially four objectives: (1) abolition of the old offices; (2) immediate recreation of two new offices; (3) appointment to the new offices by the President with Senate confirmation; and, (4) transfer of certain functions, previously committed to the President, directly to the control of the Director.<sup>214</sup> In this form, the bill focuses constitutional objections upon the doctrine relating to creation and abolition of offices by the legislature.<sup>215</sup>

On its face, the bill discontinued the old offices and substituted entirely new ones. If the abolition of the old offices were complete, the removal of the officers as a consequence of the abolition would be incidental and not grounds for objection to the bill.

Assuming the appointments of the two incumbent officers to have been valid,<sup>216</sup> the constitutionality of the act turns on two factors. First, it must be determined whether, by the abolition, Congress expressed an intention to end the old offices completely and perpetually. Second, the effect of the transfer of functions directly to the Director's control must be considered in the context of creating an office sufficiently different from that abolished to justify the conclusion that the former office ceased to exist.

With regard to the provisions of the bill abolishing and immediately recreating the offices, it is clear that this portion of the amendment was adopted to circumvent constitutional infirmities which may have inhered in the original version.<sup>217</sup> The staff director to the subcommittee holding hearings on the bill summed up the generally conceded purpose of the abolition-recreation format in these words: "The only reason this office is being abolished is a technical one to meet an asserted constitutional argument."<sup>218</sup>

Even though the amendment was framed for this reason, the amended bill is not rendered invalid, if, by its amendment, the legislation addresses a legitimate legislative purpose. On the other hand, it is a well-known maxim that Congress may not do indirectly that which it lacks the power to do directly.

The state courts have held that a purported abolition of an office with a subsequent re-establishment of a similar or identical office must accomplish a legitimate reorganization if the incumbent officer thereby loses his tenure.<sup>219</sup> These

---

(1973) (dissenting views). The minority's position on this point was refuted by Rep. Breckinridge during debate. 119 Cong. Rec. H 3220 (daily ed. May 1, 1973). The Justice Department referred to the Lovett case and bill of attainder problems during the hearings. Hearings, *supra* note 3, at 68, 108.

214. See 119 Cong. Rec. S 8232 (daily ed. May 3, 1973).

215. See discussion in part III *supra*.

216. See discussion in part IVD *infra*.

217. See, e.g., 119 Cong. Rec. S 1977 (daily ed. Feb. 5, 1973) (remarks of Senator Griffin); H.R. Rep. No. 93-109, 93d Cong., 1st Sess. 5-6 (1973); Hearings 16-17, 97-99, 154-55.

218. Hearings 179 (statement of Mr. Roback).

219. See part IIIB *supra*.

courts have looked primarily to the functions, powers, duties and responsibilities of the office created in comparison with those of the office abolished. The question is whether an officer appointed to the newly created office would discharge the same duties as the officer incidentally removed. It is not clear, however, to what extent the judiciary may probe into legislative history to determine the motive of the legislature in amending S. 518 to present the abolition-recreation format.

The Justice Department asserted at the hearings that the functions of the Director and Deputy Director would be the same both before and after the abolition.<sup>220</sup> This may be true in practice as to the activities engaged in by the officers at the times immediately preceding and following the abolition. However, in transferring the authority for promulgating the duties to be performed by the officers from the President to the legislature, the Congress could change the powers, functions and responsibilities of the office so significantly, as soon as the Act took effect, that the old and new offices would bear little or no similarity. The servant would have a new master who could redirect the servant's activities at will.

Under S. 518 the new offices would be established by the legislature, rather than under an executive reorganization plan.<sup>221</sup> The functions, powers and responsibilities of the office would flow from Congress by legislation, in the case of the Director, whereas previously they had come from the President by executive order.<sup>222</sup> This would give the Director, but not the Deputy Director, substantive authority and responsibility in his own right, and not merely such authority as the President vested in the office.<sup>223</sup> In addition, the change would prevent the President from divesting the office of all authority and transferring control of it to an unconfirmed officer.

In contrast, the Deputy Director's powers, duties and functions both before and after the abolition would be only those that the Director assigned.<sup>224</sup> The only difference that the bill would work as to the Deputy is that at some time

---

220. Hearings 112.

221. See text accompanying note 29 *supra*.

222. See list of executive orders compiled by Senator Ervin and printed at 119 Cong. Rec. S 1970-71 (daily ed. Feb. 2, 1973). The amended bill would have transferred to the Director such powers as had been lodged in the President when the OMB was created. Additional powers could come from the President under section 3(a) of the amended bill. S. 518, printed at 119 Cong. Rec. S 8232 (daily ed. May 3, 1973).

223. The author of the amended version of S. 518, Rep. Brooks, said of the amendment during the hearings: "[W]hat I am planning to do, hoping to do, is to change what the existing Director says is a very weak agency. He says he doesn't have power. . . .

"I want to change that and give him some authority and restore those many functions to the agency which were in its power for many, many generations. . . . This is a realignment of the structure and one which . . . I want to change back." Hearings, *supra* note 3, at 97-98.

Regarding the lack of independent duties, functions or responsibilities of the OMB after the reorganization of 1970 see *id.* at 49-51 (testimony of Mr. Ash).

224. Compare Reorganization Plan, *supra* note 3, § 102(e), (f) with S. 518, § 3(b) (printed at 119 Cong. Rec. S 8232 (daily ed. May 3, 1973)).

in the future the Congress could vest substantive responsibilities in the Deputy's office as well as in the Director's. If the Congress were so to act, neither the Director nor the President could divest the Deputy of power, function and duty.

These being the changes which the amended legislation would make in the offices affected, the question is whether the amended bill would be sufficient, under the reasoning of the state cases, to constitute a "reorganization, abolition, merger, rearrangement or consolidation."<sup>225</sup> If so, the act would be constitutional insofar as the abolition-recreation schema implements a valid constitutional purpose. The resulting loss of tenure to the incumbent Director and Deputy Director would be merely incidental to the operation of the bill. If, on the other hand, the Court decided that the bill did not meet that test, then most likely the bill would fail as an unconstitutional usurpation of a power reserved to the executive. The ousting of the incumbents from office would be considered the object of the bill, and would be viewed as a purpose which the legislature is not empowered to effect in light of the separation of powers within the federal government.

The court in *Suermann*<sup>226</sup> seems to have erected a high barrier which proponents of S. 518 would have to overcome:

Reorganization of an existing system or department of government does not necessarily require abolition of prevailing offices; in fact, generally that is an unusual procedure . . . . Abolishment of office carries with it the idea of doing away with the identical office perpetually; this is not accomplished by stating in one act that the office is abolished, and in another or the same act providing for the recreation of the same office or one substantially similar.<sup>227</sup>

Where the only change made in the office is that at some future time the Congress would be empowered to alter the officer's powers, functions or duties—to a greater or lesser degree as it saw fit—it is doubtful that any court could find a true abolition. If Congress never decided on any change, nor effected any alteration in the duties, the act would not meet the test of perpetual abolition of the old office. In addition, the officer appointed to the new office of Director of the Office of Management and Budget would perform no different duty than had been performed by the incumbent Director. It is submitted that the legislation must implement an immediate and far-reaching reorganization in the office. Vague and indefinite protestations of impending change, though well intentioned, simply will not suffice.

Of course, there are many policy considerations which the Court might and should take into account in formulating law in this area. One is the consequences which would flow were the Court to impose too strict a criterion for defining abolition of office. If such were the case, the legislature would have to accept the incumbent officer in a position to which it desired to transfer substantially

---

225. State ex rel. Hammond v. Maxfield, 103 Utah 1, 10, 132 P.2d 660, 664 (1942) (discussed in notes 174-85 supra and accompanying text).

226. Suermann v. Hadley, 327 Pa. 190, 193 A. 645 (1937); see notes 192-96 supra and accompanying text.

227. 327 Pa. at 197, 193 A. at 650. See also text accompanying note 196 supra.

greater powers and duties in connection with a true reorganization of government agencies. If the officer had not been confirmed for his present post, or had been examined only as to his qualifications for the less important functions, Congress might have to refrain from acting until the incumbent resigned or was removed from office by the appointing power.

Alternatively, a Congress faced with this situation could enact such changes as it considered necessary in the hope that the officer would be sufficiently competent to assume the additional duties, or that the President would initiate a removal in order to install a more capable officer. Possibly, a Congress bent on immediate changes would create an entirely new agency, with a separate staff, to assume the new duties until the old office fell vacant. At that time the old office could be abolished and its functions transferred to the new one without arousing constitutional objection to the removal of officers.

On the other hand, if the Court were to articulate too lax a standard—one that allowed a minimal transfer of duties to suffice as a valid abolition of the old office—abuse might ensue. Legislation framed in abolition-recreation terms, with incidental loss of tenure to the incumbent officers, could conceal a congressional purpose of direct removal in violation of separation of powers.

Whatever standard or test the Court may formulate must be sufficiently flexible to allow congressional action in the interests of efficiency and economy. Such a test must not prevent Congress from acting because of the incumbency of an officer who may not be fit to take on the duties of the office which the legislature desires to establish. Yet, any formula which allowed virtually unrestricted power to discharge executive officers hostile to congressional programs would destroy the plan of the Constitution which contemplates both a balance and a separation of powers.

Finally, there is the question of whether the imposition of the requirement of confirmation suffices to change the nature of the office sufficiently to justify incidental removal of incumbent officers. As has been noted, the imposition of the requirement of confirmation as a condition to taking office is within the competence of Congress.<sup>228</sup> Legislation to this effect expresses a legitimate congressional purpose. However, the requirement of confirmation runs to the officer rather than to the office. An office whose incumbent must be confirmed is no different from the same office whose incumbent is not subject to confirmation. Under the powers, duties and functions test, requiring confirmation of the appointee in no way changes the nature of the responsibilities discharged by the officer once in office.

In view of the absence of federal law on the subject, the Court should devise a test for legislation such as S. 518 which is less skeptical of legislators' motives than that developed by the state courts.<sup>229</sup> Such a test should combine the traditional presumptions of good faith and constitutionality which attach to legislative action, with safeguards for the position of incumbent officers and for the President's discretion to initiate or not to initiate removals of executive officers.

Since there is no standard applicable to the abolition and creation of federal offices, it is unlikely that this bill could overcome the well-founded challenge

---

228. See notes 15-16 *supra* and accompanying text.

229. See discussion in part IIIB *supra*.



of legislative usurpation of the President's power to remove. Viewed entirely from the observable, objective manifestation of change—the similarity or dissimilarity of the powers, functions and duties of the offices before and after the abolition—the legislation can hardly be said to abolish completely and perpetually the offices of Director and Deputy Director of the OMB.<sup>230</sup>

D. *Mandatory Confirmation of Constitutionally "Superior" Officers as a Requirement for Valid Appointment*

Article II, section 2 of the Constitution allows Congress to delegate full appointment power without confirmation only in the case of inferior officers. Since "inferior" is not defined in the Constitution, its meaning must be determined through interpretation of the text and structure of article II.

The main clause of article II, section 2 provides that the President shall nominate and the Senate shall confirm: "Ambassadors, other public Ministers and Consuls<sup>231</sup> . . . and all other Officers . . . whose Appointments are not . . . otherwise provided for, and which shall be established by Law . . ." <sup>232</sup> The "delegation clause" which follows excepts certain officers from mandatory confirmation upon condition:

[B]ut the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>233</sup>

The first distinction between appointment under the main clause and under the "delegation clause" is that unless an officer is inferior his appointment must be made by the President. Appointment by the heads of departments and courts of law extends only to inferior officers. Secondly, delegation of the power to appoint inferior officers must be "by Law;" Congress must act affirmatively to divest the Senate of the discretionary power to require confirmation.<sup>234</sup>

The "delegation clause"—particularly the words "such inferior Officers, as they think proper"—is susceptible of at least two interpretations. The interpretation advanced by the Justice Department at the hearings on S. 518<sup>235</sup> is that all officers except those specifically enumerated—"Ambassadors, other public Ministers and Consuls"—are inferior. This interpretation renders the term "in-

230. For the Justice Department position see Hearings, *supra* note 3, at 108-12.

231. The Constitution also enumerates at this point "Judges of the supreme Court." It is believed that the inclusion of these positions in article II was for convenience and to avoid repeating the provision for their appointment again in article III. Since Justices of the Supreme Court constitute the third branch of government, this discussion of federal law respecting civil officers of the United States will exclude the Justices from consideration.

232. U.S. Const. art. II, § 2 (footnote added).

233. *Id.*

234. See *United States v. Mouat*, 124 U.S. 303, 307-08 (1888); *United States v. Germaine*, 99 U.S. 508, 510-11 (1879); *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1867); *Scully v. United States*, 193 F. 185, 187 (C.C.D. Nev. 1910) (citing 18 Op. Att'y Gen. 409 (1886)); *United States v. Maurice*, 26 F. Cas. 1211, 1213 (No. 15,747) (C.C.D. Va. 1823); 18 Op. Att'y Gen. 98 (1885); 15 Op. Att'y Gen. 449 (1878); 15 Op. Att'y Gen. 3 (1875); 6 Op. Att'y Gen. 1 (1853). But see 11 Op. Att'y Gen. 213 (1865).

235. Hearings, *supra* note 3, at 66-67; see *id.* at 9-11, 26 (remarks of Rep. Horton).

ferior Officers" in the "delegation clause" synonymous with the phrase in the main clause, "all other Officers . . . created by Law."<sup>236</sup>

The Justice Department made no claim that the enumerated officers were somehow "superior" to all other officers. In its normal usage, however, the word "inferior" connotes the existence of a "superior." It is possible that the framers intended to create a class of "superior" officers by the enumeration in the main clause; that in light of the needs of a young nation, they viewed those officers engaged exclusively in foreign affairs to be superior to all others. Nevertheless, it seems unlikely that this enumeration was intended to be an exclusive listing of superior officers.<sup>237</sup>

The "delegation clause" explicitly states that heads of departments may receive from Congress full appointment power as to inferior officers. The Justice Department's interpretation would require the conclusion that since heads of departments are not enumerated in the main clause, they are, therefore, inferior; since under the delegation clause they may appoint inferior officers, one department head could be given the authority to appoint the heads of the other departments. Indeed, by this reasoning appointment of department heads, or of any other officer, irrespective of the officer's power or function, could be vested in the courts of law. In this manner, both senatorial advice and consent and the appointing power of the President could be bypassed. With the stress that they placed on the separation of powers in government, it is unlikely that the framers intended such results which would grant Congress the power to exclude the chief executive from the appointment of the heads of departments in the executive branch.

Furthermore, the use of the word inferior is, at best, strained under the Justice Department view. If the framers intended to equate inferior with "all other officers," it is odd that such indefinite and tortured syntax was chosen. The framers did not use words without a definite purpose, which fact has led to the

---

236. The Justice Department cited E. Corwin, *The President: Office and Powers* 72 (1940), as authority for its position. Hearings 66-67. Corwin's position does not support the Justice Department entirely. He excluded, without explanation, the heads of departments and the courts of law (but not expressly the President) from inferior status. Corwin, *supra*, at 72. Otherwise, Corwin did follow the Collins test (discussed in text at notes 248-56, 260 *infra*) which the Justice Department adopted.

237. It is not disputed that the framers intended to place the foreign affairs officers in a special category. Rather, it is argued that the emphasis given to diplomats was not intended to make them the only officers whose appointments always require confirmation. The fact that the Constitution provides that "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls . . . the supreme Court shall have original Jurisdiction," U.S. Const. art. III, § 2, tends to show that the nature of diplomatic duties, rather than the inherently superior status of the officer, required special attention. This particular supervision was extended both to the selection of the person who would discharge the duties and to the forum for resolution of disputes resulting from the discharge of diplomatic responsibilities. When consideration is given to the threat to the security of the young nation represented by the more powerful nations of Europe and to the unreliability of communications at the time, the rationale for requiring the confirmation in all cases of officers engaged in this sensitive area becomes clearer.

basic rule of construction that effect must be given to each word in the Constitution.<sup>238</sup> If "all other Officers" are inferior, as the Justice Department argued, there is an unexplained inconsistency in article II. The main clause and the "delegation" clause would apply different appointment methods to the same class of officers. If the framers intended alternative methods for the appointment of "all other Officers," one questions why the option to delegate, and the mandate of confirmation in the absence of express delegation, were not set out in a single clause using either "inferior" or "all other Officers," but not both.

Going one step further, if one assumes that ambassadors, public ministers and consuls are superior officers simply by virtue of the fact that they are listed in the main clause, then one must conclude that "all other Officers . . . which shall be established by Law" are likewise superior since they too are listed in the main clause. Assuming that "all other Officers" means each and every other officer created by law, then there could be no inferior officers.<sup>239</sup>

A second possible interpretation of the meaning of "inferior" assumes that the express delimitation of a class of inferior officers implies the existence of a class of "superior" officers. The enumeration of officers who must be confirmed in the main clause is not exclusive. "All other Officers" consists of both "superior" officers who must be confirmed—just as the enumerated officers must be confirmed—and "inferior" officers whose appointment may be delegated without confirmation. Under this view, there are three classes of officers for appointment purposes: (1) "enumerated" officers; (2) "superior" officers; and (3) "inferior" officers.<sup>240</sup> Officers in groups one and two in all instances must be appointed by the President and confirmed by the Senate. Officers in group three may be appointed by the heads of departments, the courts of law or the President without confirmation where Congress affirmatively delegates the full appointment power. Under this interpretation, "such inferior Officers" means "such among all other Officers as are in fact inferior."

This second interpretation derives support from the division of article II, section 2 into the main and delegation clauses. The main clause sets forth the manner of appointment of *all* officers, including inferior officers, where there has been no "by Law" delegation of full appointment power.<sup>241</sup> The delegation

---

238. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

239. The text of article II might be stretched even further under this argument so that "inferior Officers" might be construed to mean that class comprised of neither the "enumerated" officers, nor the category of "all other Officers . . . whose Appointments are not herein otherwise provided for, and which shall be established by Law." This would limit "inferior Officers" to a class of officers created by law but whose appointments are otherwise provided for in the Constitution. If their appointments are already provided for, however, article II would not apply at all. Thus, to extend the Justice Department's view to its fullest implication, the delegation clause would be without effect because no officers could be defined as inferior.

240. It is possible that Professor Dumbauld had this interpretation in mind when he delimited mutually exclusive categories of "all other Officers" and "inferior Officers." E. Dumbauld, *The Constitution of the United States* 305-06 (1964). Unfortunately, Professor Dumbauld did not clarify the reason for his distinction.

241. See note 234 *supra* and accompanying text.

clause excepts from mandatory confirmation only such inferior officers as Congress determines need not be subjected to the check of advice and consent.

There is very little evidence on which to conclude definitively which of these two interpretations more accurately reflects the intention of the framers. The Journal of the Constitutional Convention did note an objection made by James Madison to the proposed "delegation" clause:<sup>242</sup>

Mr. Madison. [The delegation clause] does not go far enough if it be necessary at all—Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices.<sup>243</sup>

Madison's objection clearly reflects the framers' view that heads of departments were to be considered "superior" officers. Heads of departments are not enumerated in the main clause. If they are neither enumerated officers nor inferior officers in the terminology employed in article II, but rather are superior officers, then they must exist among the class of "all other Officers." Once it is established that the framers envisioned at least one group of officers who are neither "enumerated" nor "inferior," the Justice Department's interpretation loses its entire basis.<sup>244</sup> If the entire class—"all other Officers . . . which shall be established by Law"—is not incorporated in the group "inferior officers," then Congress under the "delegation clause" may not vest the appointment of every officer except those "enumerated."

Once an officer has been validly appointed to office he can be removed only by his appointing officer,<sup>245</sup> by impeachment, or incidentally by the abolition of the office he occupies.<sup>246</sup> The Supreme Court has held that once confirmation of a nominee has been given, and the officer's commission issued, the Senate cannot avoid the appointment by withdrawing its consent.<sup>247</sup> By extension it can be argued that if an officer is inferior and has been appointed pursuant to a valid delegation, Congress cannot remove the officer by withdrawing its delegation of full appointment power.

---

242. Gouverneur Morris proposed the delegation clause, to be engrafted onto the already accepted main clause, on Sept. 15, 1787, the penultimate day of the constitutional convention. The measure lost on the first ballot, but was accepted on a second vote taken almost immediately. 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 627-28 (rev. ed. 1937). If there was any debate (other than Madison's objection and an incompletely recorded rejoinder by Morris) it was not committed to the convention journals.

243. *Id.* at 627.

244. In addition, as Madison's statement seems to indicate, superior officers other than heads of departments were envisioned by the framers. The argument may be advanced that even though department heads are not enumerated in the main clause, their denomination in the delegation clause should be read to be an incorporation by reference for the purposes of confirmation, thus eliminating the anomaly referred to in text at note 239 *supra*. Superior officers below heads of departments could only come from the class of "all other Officers," thus supporting the view that all other officers includes both inferior and superior ones. Depending on the substantive standard applied to "superior officers," the potential for the creation of a class of superior officers below department heads may be significant.

245. See part IID *supra*.

246. See part IIIC *supra*.

247. *United States v. Smith*, 286 U.S. 6, 47-49 (1932).

Constitutional questions arise, however, as to the validity of the appointment of a superior officer pursuant to an invalid congressional delegation of full appointment power. If an ambassador, public minister or consul were installed in office without the advice and consent of the Senate, it would be difficult to argue that such person validly held office. It would seem, therefore, that the appointment of a "superior" officer, without confirmation, would be an unconstitutional delegation of congressional power, and would not confer officer status on the appointee.

The nature of such a delegation was raised in *Collins v. United States*.<sup>248</sup> Collins, a military officer, had been honorably discharged from the army. A special act of Congress empowered the President to place officers such as Collins on a list of inactive officers entitled to pension benefits. The Treasury Accounting Officer refused to pay Collins such benefits on the ground that his appointment was invalid because he was never confirmed by the Senate.<sup>249</sup> The court addressed two questions: (1) whether Congress had intended by the private act to confer upon the President full power to appoint the officer; and (2) whether Congress had the power under the Constitution to do so.<sup>250</sup>

The court pointed out that this so-called appointment was to a roster of inactive officers and listed prior examples of the vesting of full appointment power in the President where such appointment imposed no duties on the officer.<sup>251</sup> It contrasted special acts authorizing reappointment to active service in which cases Congress had retained the requirement of confirmation.<sup>252</sup> In so doing, the court clearly implied that there was no necessity for the safeguard of confirmation in Collins' case.<sup>253</sup> Moreover, since the Senate had participated in the passage of the private bill, the court felt that "[t]he Senate [had] in fact, though not in technical form, given its consent to the reinstatement . . ."<sup>254</sup> The court then concluded that Collins was an inferior officer and that his appointment could be delegated to the President alone under the "delegation clause."

Thus [Congress] may authorize the President or the head of the War Department to appoint an Army officer, because the officer to be appointed is inferior to the one thus vested with the appointing power. The word inferior . . . means subordinate or inferior to those officers in whom respectively the power of appointment may be vested . . .<sup>255</sup>

The *Collins* court thus attempted to create a standard by which inferior and superior officers could be identified. The standard created, however, is completely circular in its application. If an "inferior" officer is "one who may be appointed without the advice and consent of the Senate," and a "superior" officer is "one who may so appoint," then Congress could make any non-enumerated

---

248. 14 Ct. Cl. 568 (1879).

249. Id. at 570.

250. Id.

251. Id. at 571.

252. Id. at 573.

253. See id. at 571-73.

254. Id. at 576.

255. Id. at 574.

officer "inferior" simply by vesting the appointment power under the delegation clause. The flaw in the *Collins* rationale is that the officer must be "inferior" in order for Congress to have the power under the Constitution to delegate his appointment; the officer's inferiority cannot be established by the fact of delegation.

In *Collins* the court did entertain the issue of congressional authority to delegate full appointment power.<sup>256</sup> In attempting to formulate standards of review it demonstrated that the status of an officer under article II and the validity of his appointment are questions within the competence of the judiciary. Further evidence of the justiciability of these issues can be found in *Williams v. Phillips*.<sup>257</sup> In *Phillips* the appointment of an Acting Director of the Office of Economic Opportunity during a congressional recess was held to be invalid because the President failed to submit the nominee for confirmation within a reasonable time after Congress reconvened.<sup>258</sup> Finding that Phillips had not been appointed lawfully, the court declared "that in the absence of . . . legislation vesting a temporary power of appointment in the President, the constitutional process of nomination and confirmation must be followed."<sup>259</sup> The court then enjoined the officer from exercising any of the powers of the office.

While the officer's status as "superior" or "inferior" was not in issue, the case clearly demonstrates that the validity of appointments depends upon interpretation of the Constitution and is a matter for determination by the courts. This negates the possible argument that since the delegation of full appointment power in the case of inferior officers is solely within the discretion of Congress, Congress in its discretion should be able to define which officers are inferior or superior.

In its attempt to create a judicially manageable standard, the *Collins* court asserted that the appointer/appointee relationship was the only acceptable criterion, stating:

It would be impossible to define, except arbitrarily, the meaning of the words "inferior officers," in their application to officers of the different branches of the public service who have no official relation to each other . . . .<sup>260</sup>

However, if the judicial power to rule invalid the unconfirmed appointment of superior officers is to be exercised, a workable standard distinguishing among the many federal officials must be developed.

In the "delegation clause" the framers expressly granted a special status to heads of departments—the capacity to receive from Congress the power to appoint inferior officers without the check of confirmation by the Senate. This may provide the key to determining the proper standard to be applied. The framers

---

256. *Id.* at 573-74.

257. 360 F. Supp. 1363 (D.D.C.), emergency motion for stay pending appeal denied, 482 F.2d 669 (D.C. Cir. 1973).

258. In connection with recess appointments see Comment, Temporary Appointment Power of the President, 41 U. Chi. L. Rev. 146 (1973).

259. 360 F. Supp. at 1371 (footnote omitted).

260. 14 Ct. Cl. at 574.

certainly did not contemplate the complexity of the executive branch as it exists today. However, their conception of "Heads of Departments" remains indicative of the type of officer they considered "superior."<sup>261</sup>

*Collins* implied that the only possible standard, other than appointer/appointee, would have to be based on the quantum of power exercised.<sup>262</sup> It is submitted that a better measure, consistent with the intent of the framers, is to be found in terms of reviewability.

As conceived, a department head was an officer whose functions were reviewable only by the President (who is not an officer within the meaning of the term in the Constitution), and not reviewable by any executive officer. This distinction has present viability. Thus, an officer is superior if he functions as a department head—if his actions are reviewable only by the President.

The quantum of power exercised by the officer remains a factor. The framers clearly considered a department head to be an officer exercising powers of national scope.<sup>263</sup> Thus, a director of a minor federal agency, even if directly responsible only to the President, would not be a "head of department"—a "superior" officer—unless the scope of his function were national in character.

It is interesting to note that the *Collins* court in fashioning its definition struck upon the proper distinction, but for the incorrect reason. The department head is not superior (and his appointee inferior) because of the fact of appointment; rather, the appointee is inferior because his authority is subject to review by the superior.

Thus, any officer who functions as the head of a department of national scope and power would be in the superior officer class and his appointment would require the advice and consent of the Senate. Under article II, section 2 the duty of the Senate to confirm would be non-delegable.

This definition of superior officers obviously restricts the class to a very few among very many officers. The effect of labelling the remaining federal officers inferior does not mean, however, that their appointments will not be subject to confirmation by the Senate. Delegation of full appointment power is at the discretion of Congress and must be accomplished by affirmative act. Expediency of investiture and removal seldom should outweigh the interest of Congress in establishing the character and fitness of nominees. Indeed, it can be argued that, where the quantum of power to be exercised is great, failure of Congress to re-

---

261. At the constitutional convention the framers seem to have envisioned only a few large departments and hence department heads, to carry out the functions of the federal government. There are mentions of departments of war, finance, foreign affairs, marine and state. See, for example, the proposal of Gouverneur Morris for a Council of State, similar to the present Cabinet, printed in 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 342-44 (rev. ed. 1937). It is clear from the context of the discussions regarding heads of departments and cabinet councils that the framers considered department heads to be officers supervised, in the executive hierarchy, only by the President. See text at note 273 *infra*.

262. 14 Ct. Cl. at 574.

263. See 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 342-44 (rev. ed. 1937).

quire confirmation would constitute a serious breach of a moral or political—though not a constitutional—duty.

Finally, it remains to be determined what officers are included in the category of heads of departments. A frequently cited definition was offered by the Supreme Court in *Burnap v. United States*:<sup>264</sup>

The term head of a Department means . . . the Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, and War [Departments], who is a member of the Cabinet.<sup>265</sup>

Another often quoted opinion asserts, in effect, that the terms head of department and Cabinet member are synonymous.<sup>266</sup>

In both of the above opinions the Court claimed to be reiterating the interpretation of head of department as set out in *United States v. Germaine*.<sup>267</sup> There, the Court did not actually equate heads of departments with Cabinet members. Using as examples the well-known independent departments of the executive branch existing at that time—the heads of which just happened to be Cabinet members—the Court drew a distinction between heads of departments in the constitutional sense and the heads of departmental subdivisions:

The association of the words "heads of departments" with the President and the courts of law strongly implies that something different is meant from the inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of the departments. Such, also, has been the practice, for it is very well understood that the appointments of the thousands of clerks in the Departments of the Treasury, Interior, and the others, are made by the heads of those departments, and not by the heads of the bureaus in those departments.<sup>268</sup>

In the course of his opinion, Mr. Justice Miller never once mentioned the words Cabinet or Cabinet member.

That the term head of department should not be applied exclusively to Cabinet members is demonstrable both constitutionally and historically. During the constitutional convention the framers discussed the advisability of creating a body similar in nature to the English Privy Council.<sup>269</sup> While the records of the convention are inconclusive as to the reason, no Cabinet or similar council composed of high level executive officers found its way into the final draft of the Constitution. Provision was made whereby the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . ."<sup>270</sup> With reference to the class of officers in this provision and in the appointment clauses, the Court in *Germaine* stated:

264. 252 U.S. 512 (1920).

265. *Id.* at 515.

266. *United States v. Mouat*, 124 U.S. 303, 307 (1888).

267. 99 U.S. 508 (1879).

268. *Id.* at 511.

269. 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 367, 541-43 (rev. ed. 1937); 4 M. Farrand, *supra*, at 15-20.

270. U.S. Const. art. II, § 2.



The word "department," in both these instances, clearly means the same thing, and the principal officer in the one case is the equivalent of the head of department in the other.<sup>271</sup>

In neither instance does the Constitution impose an obligation upon or grant a privilege to some heads of departments and not to others.<sup>272</sup>

The absence of any express provision for a Cabinet, the authorizing of a written substitute for communicating information and advice in conference, and the lack of any distinction in the Constitution between various types of department heads, all militate against the conclusion in *Burnap* that the term "Heads of Departments" was intended to include only those officers elevated to Cabinet status. This distinction which *Germaine* actually drew was based on the reviewability of officers' actions within the organizational hierarchy of the executive branch. "Inferior" status was equated with the officer's position as head of a bureau or office which is only a subdivision of a larger department. "Heads of Departments" were defined as the chief officers of those larger departments. The functional difference between the heads of departments and the bureau chiefs is the fact that the actions of the bureau chiefs are subject to review by other officers, including the department head. The actions of heads of departments are reviewable only by the President.<sup>273</sup>

Also, it can be questioned whether the *Burnap* definition, if ever correct, would remain viable today. The growth in the size and scope of the federal government has led to the creation of innumerable executive agencies, offices, commissions and departments. Some have been created within the infrastructure of pre-existing departments. Others, however, are independently constituted. As with the Cabinet level departments, their principal officers are accountable to no member of the executive branch except the President.

In this regard it is appropriate to ask in what manner, if any, membership in

---

271. 99 U.S. at 511. See M. Farrand, *The Framing of the Constitution of the United States* 166, 171-72 (1913).

272. The Cabinet, as it is known today, developed spontaneously under the leadership of President Washington. In the early days of the republic there were few departments, and all were represented in Washington's Cabinet. In fact, the Attorney General, whose office was not raised to department status until 1870, was a member of the early Cabinets. See C. Beard, *American Government and Politics* 147 (8th ed. 1939); E. Corwin, *The President: Office and Powers* 80-81, 240 (1940).

273. In connection with the implication of Madison's objection to the delegation clause mentioned in text accompanying note 243 *supra*, it should be recognized that a less restrictive test for status as a superior officer might be developed, the effect of which test would be to include other than heads of departments among the class of superior officers always to be confirmed. Such a test would have to be based on the quantum of power exercised by "superior" officers in relation to the quantum exercised by "inferior" officers. It is difficult to conceive of a method to arrive at the point—with some basis in logic—where the quantum of an officer's power crosses from superior to inferior. If it becomes possible to measure ordinarily the power of various officers, and to formulate a boundary which is not wholly arbitrary, then the restrictive test set forth in the text could be revised. In all events it is clear that heads of departments, at least, would be included in the class of superior officers under any test formulated.

the Cabinet affects the status of an officer. The constitutional designation of an officer as a department head is determined by the test of reviewability. Admission to Cabinet membership imposes only the verbal equivalent of the "written Opinion" which the President may demand, in any event, from all department heads. No substantive function, duty or power attaches by virtue of Cabinet status which is not present in the case of non-Cabinet officers who meet the criterion for department head. Any added stature to the office can result only from the prestige of close contact with the President, rather than from any objective factor.

If "Head of Department" is defined as the highest level officer in any independent executive department exercising a power national in scope and reviewable only by the President, and if heads of departments are superior officers, then the appointment of these officers always must be made by the President with consent of the Senate. As in the case of the "enumerated" officers, the delegation by Congress of full appointment power to fill these offices would violate the express constitutional mandate for confirmation. Upon proper suit, a court could rule the delegation void and the appointment invalid, and could enjoin the officer from enjoying the benefits and exercising the powers of the office.<sup>274</sup>

These propositions can be applied to the officers affected by S. 518. The Office of Management and Budget is an independent executive department. Its powers are national in scope. It is not currently a subdivision of a larger department in the executive branch.

If the restrictive definition of "superior" officer developed herein is applied to the Deputy Director of the OMB, it is clear that the delegation of his appointment to the President alone was valid. The Deputy is not the highest level officer of the department. Thus, by exclusion from the narrow class of "superior" officers, the Deputy Director would be an inferior officer.

The Director of the OMB, however, is the principal officer of the department. His actions are reviewable only by the President and not by another executive officer. Thus, it is submitted that the Director is the head of a department, and hence a "superior" officer within the meaning of the Constitution. If the definition and reasoning set forth herein were applied by the Court, Congress' delegation of full power to the President to appoint this officer would be ruled void, and the officer would be enjoined from exercising the powers of the office.

Insofar as S. 518 would affect the Deputy Director, any constitutional objection sounding in the doctrine of separation of powers could be asserted to block his removal. However, if the Director were excluded from office by a judicial ruling that his appointment was invalid to confer office, these above-mentioned constitutional defenses to the operation of S. 518 could not be asserted. There would be no incumbent for the bill to remove, directly or incidentally. That is not to say that any constitutional defects inherent in S. 518 would be cured. Rather, in the absence of an incumbent officer, the constitutional problems would be moot.

*Richard A. Cirillo*

---

274. See text accompanying notes 257-59 *supra*.