

2023

Beyond Removal

Jane Manners

Temple University Beasley School of Law

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



Part of the [Administrative Law Commons](#), and the [Constitutional Law Commons](#)

Recommended Citation

Jane Manners, *Beyond Removal*, 92 Fordham L. Rev. 463 (2023).

Available at: <https://ir.lawnet.fordham.edu/flr/vol92/iss2/6>

This Symposium 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.

BEYOND REMOVAL

*Jane Manners**

The contemporary debate over presidential power often assumes that removal is the primary tool through which a President exercises control over executive branch officers to fulfill the Constitutional duty to “take Care that the Laws be faithfully executed.”¹ This must be so, the logic goes, because without this authority, “the President could not be held fully accountable for discharging his own responsibilities.”² The power to remove, the U.S. Supreme Court has reasoned, also endows the President with the power to supervise.³ To be sure, other scholars and jurists have pointed out the ways that this fails to capture the range of disciplinary options available to the President.⁴ But the general view is that removal is key because otherwise “the buck would stop somewhere else.”⁵

The three essays in this symposium issue dedicated to the founding era help us to see that this assumption is, in some ways, a failure of imagination.⁶ As a matter of constitutional text and historical practice, they argue, there were many ways in which officers could be held accountable for their actions in the absence of a presidential removal power, just as there were other ways in which Congress could assure that the law would be executed, with or

* Assistant Professor, Temple University Beasley School of Law. I am grateful to Jed Shugerman for his insightful suggestions, to the participants in the “Founding Era” panel for stimulating papers and discussion, and to the editors of the *Fordham Law Review* for excellent work on this piece and the symposium itself. This Essay was prepared for the Symposium entitled *Unitary Executive: History, Practice, Predictions*, hosted by the *Fordham Law Review* on February 17, 2023, at Fordham University School of Law.

1. U.S. CONST. art. II, § 3.
2. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513–14 (2010) (Roberts, C.J.).
3. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191–92 (2020); see also Gillian Metzger, *The Constitutional Duty to Supervise*, 124 *YALE L.J.* 1836, 1875–79 (2015); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *COLUM. L. REV.* 1, 110–11 (1994) (positing that the standard removal provisions permit a “degree of substantive supervision [of independent agency officials] by the President”).
4. See, e.g., *Seila L. LLC*, 140 S. Ct. at 2225 (Kagan, J., dissenting) (questioning the majority’s assumption that the President has less control over single-headed agencies than he does over commission-headed agencies).
5. *Free Enter. Fund*, 561 U.S. at 514.
6. See generally Gary Lawson, *Command and Control: Operationalizing the Unitary Executive*, 92 *FORDHAM L. REV.* 441 (2023); James E. Pfander, *Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement in a Partisan World*, 92 *FORDHAM L. REV.* 469 (2023); Christine Kexel Chabot, *The President’s Approval Power*, 92 *FORDHAM L. REV.* 373 (2023).

without the cooperation of executive officials.⁷ Professor Gary Lawson argues for the potency of a presidential negative rooted in the Constitution, a power that he sees as both more supple and more textually grounded than a constitutional removal power, which he does not believe exists.⁸ Professor Christine Kexel Chabot, focusing on the powers that the First Congress actually delegated to the President by statute, argues that—whatever one thinks of the constitutionality of presidential removal—the historical record indicates that the First Congress granted President George Washington the power to approve the actions of subordinates only in cases in which he would otherwise be unable to roll back any decisions, often involving expenditures, with which he disagreed.⁹ Professor Chabot offers this historical record to suggest that the founding era Congress envisioned a presidential supervisory power that would be used far less often and far more precisely than would be possible with the blunt tool of removal.¹⁰ Finally, Professor James E. Pfander, by demonstrating the widespread acceptance of private informer suits in the early republic, reveals not only how far current, narrow conceptions of standing stray from this original understanding, but also how, in practice, the prosecution of state and federal crimes—an act that we today consider a “quintessentially executive function”¹¹—was frequently left to individual private citizens to pursue.¹²

What do these accounts of the President’s supervisory power in the early republic have in common? This Essay argues that they each, through textual analysis and through examinations of early congressional and prosecutorial practice, demonstrate the relative insignificance of presidential removal. By Professor Lawson’s telling, removal is unnecessary, because the President’s constitutional negative provides a far more surgical tool with which to control the actions of underlings.¹³ Professor Chabot’s account shows that when the First Congress wanted the President to weigh in on a decision, it said so explicitly and only in situations in which a post hoc review of a subordinate’s actions would be too late.¹⁴ And Professor Pfander explains that early American prosecutions were not infrequently undertaken by private citizens, incentivized by the promise of half the profits of a successful suit, thereby demonstrating that the President’s authority to remove prosecutors did not,

7. See generally Lawson, *supra* note 6; Pfander, *supra* note 6; Chabot, *supra* note 6.

8. See Lawson, *supra* note 6, at 443–44.

9. See *id.*

10. See *id.*

11. *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting); cf. Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 129 (2014) (explaining that, at the founding, there was in fact “no consensus that government prosecution was a ‘quintessentially executive function’” and arguing that formal presidential control over prosecution largely emerged with the post–Civil War creation of the U.S. Department of Justice).

12. See Pfander, *supra* note 6, at 469–71.

13. See generally Lawson, *supra* note 6.

14. See generally Chabot, *supra* note 6.

in critical instances, translate to presidential control of the act of prosecution itself.¹⁵

To help us think about why the founding generation might have employed this flexible approach to ensuring the law's execution, the remainder of this Essay will return to Professor Pfander's account of Congress's 1794 prohibition on the building or outfitting of boats for the international slave trade in U.S. ports.¹⁶ Focusing on the implementation of the ban in Providence, Rhode Island, Professor Pfander finds that "popular" or "public" actions—those initiated by private informers who lacked what we today would call an injury in fact—were a key method of enforcing the prohibition, in no small part because executive officers were often reluctant to do so themselves.¹⁷ The statute created strong incentives for such suits, establishing that anyone found to be knowingly violating the ban was subject to a \$2,000 penalty, while any U.S. citizen found to have "take[n] on board, receive[d] or transport[ed] any such persons . . . for the purpose of selling them as slaves" would owe \$200 per person thus illegally transported—with half the proceeds (the "moiety") in all instances going to the person who brought the suit.¹⁸ Faced with wealthy and influential merchant-scofflaws, customs officials too timid to sue, and—after Thomas Jefferson's election in 1800—a presidential administration sympathetic to violators, the Providence Society for Abolishing the Slave-Trade ("Providence Society") used the popular actions made possible by the 1794 ban to curtail Americans' participation in the international slave trade.¹⁹

Professor Pfander recounts the Providence Society's strategic use of public actions primarily to demonstrate that the founding generation seems to have harbored none of the contemporary Court's skepticism towards informer-based litigation.²⁰ As Professor Pfander notes, all three branches of government were aware of such suits and expressed no objections;²¹ indeed, the 1808 ban on the importation of slaves that President Jefferson signed into law contained very similar public action provisions.²² District

15. See generally Pfander, *supra* note 6.

16. Following the lead of Professors Tiya Miles and Dylan C. Penningroth, this Essay uses the words "slave" and "slavery" when "referring to categories defined and imposed by southern owners of people, to societal as well as legal dictates, and to racial systems of capture." TIYA MILES, *ALL THAT SHE CARRIED: THE JOURNEY OF ASHLEY'S SACK, A BLACK FAMILY KEEPSAKE* 287–89 (2021). Professor Miles explains that she reserves the use of terms such as "enslaved" or "unfree" to "designate a person from their perspective, the perspective of their community, or our perspective as researchers and readers," *id.*, while Professor Penningroth notes that the idea that the use of such terms "restores enslaved people to their full humanity" is rooted in problematic notions of liberal individualism. Dylan C. Penningroth, *Race in Contract Law*, 170 PENN. L. REV. 1128, 1205 n.13 (2022). Here, the use of "slave" and "slave trade"—the words of the 1794 act—underscores law's role in hardening the legal categories essential to the "racial systems of capture" that Congress sought to regulate. *Id.*

17. See Pfander, *supra* note 6, at 469–70.

18. Act of March 22, 1794, ch. 11, § 4, 1 Stat. 349.

19. See Pfander, *supra* note 6, at 474–75.

20. See *id.* at 473–76.

21. See *id.* at 475–76.

22. Slave Trade Prohibition Act, ch. 22, 2 Stat. 426 (1807).

attorneys—the government lawyers whom we today call U.S. Attorneys—did not answer to the U.S. Attorney General until 1870, when the U.S. Department of Justice was created, and were paid on a fee rather than salary basis.²³ The evidence strongly suggests that founding era Presidents exercised precious little oversight over federal prosecutions and that nobody seemed to think that this was a problem.

Why might this have been the case? Professor Pfander explains the 1794 law's reliance on public actions as an effort to circumvent local hostility to the law.²⁴ Drawing on Professor Nicholas R. Parillo's work on "alien impositions"—Parillo's term for laws imposed by external sovereigns whose enforcement requires coercion to overcome local resistance—Professor Pfander notes that a jury ruled against the Providence Society in its suit against John Brown for fines and fees, despite the fact that a federal judge had already issued an order for the condemnation and sale of his ship for violation of the 1794 law.²⁵ Later, Rhode Island voters elected the same John Brown to Congress. The evidence strongly suggests that the residents of Providence were, at best, ambivalent about the federal prohibition. In such a climate, bounty-incentivized popular actions were a clever work-around in the face of local opposition.

Such work-arounds were critical for another reason as well: to overcome the central importance of merchants' import duties to the nation's revenue. This economic reality may have made the district attorney reluctant to prosecute violators of the slave trade ban, many of whom, like John Brown, were the selfsame merchants whose overdue duty bonds may have lain unpaid. In 1794, customs duties supplied 88 percent of the nation's revenue, which meant that merchant shippers were a population whose compliance the new federal government sorely needed.²⁶ Moreover, as a correspondent to the *Gazette of the United States* noted in 1789, "It is well known that our merchants were formerly celebrated for their skill in smuggling. They have

23. See Pfander, *supra* note 6, at 477; see also Shugerman, *supra* note 11, at 131–32. As Professors Pfander and Jed Handelsman Shugerman both note, the U.S. Department of the Treasury was far more involved in the work of district attorneys because of district attorneys' role in prosecuting overdue duty bonds. See *id.* at 132. However, even the Treasury did not exercise much control over district attorneys until 1830, when Congress created the position of Treasury Solicitor to provide closer supervision. See *id.*

24. See, Pfander, *supra* note 6, at 475.

25. See *id.* at 476–77; see also NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940*, at 25 (2013).

26. See BUREAU OF THE CENSUS, *HISTORICAL STATISTICS OF THE UNITED STATES, 1789–1945: A SUPPLEMENT TO THE STATISTICAL ABSTRACT OF THE UNITED STATES 298* (1949), <http://www2.census.gov/prod2/statcomp/documents/HistoricalStatisticsoftheUnitedStates1789-1945.pdf> [<https://perma.cc/J4EM-9UZV>]. On the influence and importance of merchants in the early federal government and the lengths to which early officers went to accommodate them, see generally GAUTHAM RAO, *NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE AMERICAN STATE* (2016). On the role of merchants in early Providence in particular, see generally Frederick Dalzell, *Prudence and the Golden Egg: Establishing the Federal Government in Providence, Rhode Island*, 65 *NEW ENG. Q.* 355 (1992).

not totally forgot the sweets of their former practice.”²⁷ To preserve the Providence customhouse as a key supplier of federal treasure, officials had to step gingerly.

Complicating matters still further was the fact that the port’s customs collector, Jeremiah Olney, was extremely punctilious—several merchants used the word “martial”—in his collection of the merchants’ import duties, rarely allowing them any grace period in his zeal to collect the nation’s revenue.²⁸ The merchants were angry, and the angriest among them was none other than John Brown. In 1796, a year before his prosecution commenced,²⁹ Brown wrote to Olney that “the Merchants will support the Government as long as the Government will support them but the Dutys are Resiprocal and both parteys must have Accommodations or the Whole Fabrick will fall to the Ground.”³⁰ Was this a threat? Perhaps. Another merchant had already sued Olney for erroneously assessing his duties³¹—Olney ultimately prevailed³²—and a few years before Brown’s letter, a group of twenty-five merchants had written up a petition calling for Olney’s removal before deciding not to send it.³³ Olney had kept Treasury Secretary Alexander Hamilton in the loop about his disagreements with Brown, likely thinking that Hamilton would approve of his rectitude.³⁴ But Hamilton did not,³⁵ explaining to Olney that that “the merchants formed ‘too important an organ of the general weal not to claim every practicable and reasonable exemption and indulgence.’”³⁶ To bring in the nation’s duties, the collector had to placate the merchants. He should not put their bonds into suit the moment they came due. He should extend them some grace.³⁷

What’s striking about this state of relations is the utter precarity of federal officers’ position, thanks to the collectors’ dependence on merchants’ import duties for the bulk of the nation’s revenue. It was not just that Providence residents were wary of the federal government’s alien impositions; it was that the federal government was wary of alienating Providence merchants. This precarity, as the legal historian Professor Gautham Rao has explained, meant that collectors often declined to sue merchants for unpaid duties.³⁸ It may well have meant that the district attorney—the same district attorney charged with suing merchants for unpaid duty bonds—would also have been reluctant

27. See Dalzell, *supra* note 26, at 357 (quoting 4 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788–1790, at 390 (Gordon DenBoer, Lucy Trumbull Brown & Charles D. Hagerman eds., 1990)).

28. *Id.*

29. See CHARLES RAPPLEYE, *SONS OF PROVIDENCE: THE BROWN BROTHERS, THE SLAVE TRADE, AND THE AMERICAN REVOLUTION* 310 (2006).

30. See Dalzell, *supra* note 26, at 386.

31. See *id.* at 363.

32. See *id.* at 367.

33. See *id.* at 368–70.

34. See *id.* at 378–79.

35. See *id.* at 379.

36. See *id.* at 380.

37. See generally *id.*

38. See generally RAO, *supra* note 26.

to prosecute violators of the slave trade ban, many of whom, like John Brown, were the selfsame merchants whose overdue duty bonds lay unpaid. The mercantile world of Providence, Rhode Island, like those of other major port cities, was close-knit and influential. It is this political reality, in combination with the long history of *qui tam* actions, that helps to explain the reliance of the 1794 international slave trade ban on popular actions. The parallels to contemporary conflicts of interest, especially regulatory capture, seem clear, as does the appeal of the founders' "private informer" solution to compromised prosecutors.

The founding generation cared a great deal about the law's execution, and removal was one tool with which to effect it—but not the only tool. Regardless of whether the President's power to remove was constitutional or statutory, that power did not come with all of the supervisory authority that some contemporary accounts suggest. Our current-day focus on removal tends both to obscure the many other ways in which Presidents can influence the actions of their subordinates, as Professors Lawson and Chabot show, and to overlook the ways in which Congress delegated power broadly—even to private individuals—to minimize the problem of fickle or compromised executive officers, or even fickle or compromised Presidents.³⁹ From this set of essays, a picture emerges of a world in which the law's execution was too important to leave to the disciplinary oversight of one individual. Instead, multiple creative incentives and failsafe measures ensured that the nation's laws would be put into effect, even in the absence of the Presidential oversight that so much of today's debate assumes is essential.

39. See generally Lawson, *supra* note 6; Chabot, *supra* note 6.