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The Contested Removal Power

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The current expansion of the administrative state demands a thorough reconsideration of the executive removal power, which has never been definitively settled. Despite popular expectations of the executive branch's power and reach, U.S. Presidents find their capacity to govern frustrated by the limitations imposed by independent regulatory agencies (IRCs) over whom they have very limited removal power. A creation of the Progressive era, IRCs were originally conceived as a means of introducing non-political expertise into the administration of law. Soon, however, these agencies became a favorite tool by which Congress could siphon executive power from the President without correspondingly increasing its own responsibilities. The end result has been the creation of agencies existing in a gray zone between the legislative and executive branches, without proper constitutional legitimacy and responsiveness to elected officials. IRCs all too often obscure accountability and undermine popular sovereignty. Returning a broad removal power to the President would place culpability on the shoulders of the executive branch, making Presidents answerable to citizens for IRC actions under their control. It would further resolve constitutional impasses by placing IRCs within a tradition of constitutional interpretation and precedent dating back to James Madison.

U.S. Presidents today have more institutional resources at their disposal than ever before, yet they seem to find it harder and harder to use those powers. The growth of the bureaucratic state has undoubtedly created an

entrenched network of parties and interests that are often hurdles rather than levers for policymaking. One of the most stubborn limitations on the power of the President lies in the proliferation of independent agencies—so-called independent regulatory commissions (IRCs)—over whose powers the President has little control or influence. Because their chief officers are shielded from removal by statutorily assigned terms of office, the most that a President can hope to do is to appoint a new head or member to the IRC's leadership. In the end, Presidents have very little ability to determine the course of an IRC's regulatory behavior.[1]

In part, IRCs were inspired by Progressive-era reformers who aimed to secure a regulatory state free of political influence. As Woodrow Wilson explained: "The field of administration is a field of business. It is removed from the hurry and strife of politics.... Administrative questions are not political questions."[2] Progressive reformers argued that liberalism's fundamental premise that society should be governed by the rule of law had become antiquated in light of the complex and dynamic economic and social developments taking place in America since the beginning of the industrial revolution. In lieu of the political process of legislation, they envisioned a large network of apolitical experts armed with broad discretionary powers who would do the bulk of governing in the 20th century. The Progressives' theoretical ideas about an independent regulatory state would also prove to be attractive to more politically minded Members of Congress who wanted to limit the influence of the executive branch. In an age where the regulatory duties of the executive were growing exponentially more expansive, Congress could create a rival administrative body that would check the discretion of the President.

Over the next century, these independent regulatory agencies multiplied across the federal government's bureaucratic landscape. Presidents who have sought to institute significant regulatory changes routinely find their agendas thwarted by agencies over which they have little control, thereby frustrating their efforts to fulfill what they regard as their public mandate. Perhaps those checks on executive power might make some sense if there

1. Elena Kagan, "Presidential Administration," *Harvard Law Review*, Vol. 114, No. 8 (2001), p. 2245.
2. Woodrow Wilson, "The Study of Administration," Political Science Quarterly, Vol. 2, No. 2 (1887), pp. 209 and 210.
3. In *Humphrey's Executor v. United States*, the Court did define the duties of the independent regulatory officers as quasi-legislative and quasi-judicial, but, as I argue in this essay, that definition has proved to be unworkable, so much so that the obiter dicta has almost entirely disappeared from the Court's administrative law cases since 1977. In *Nixon v. General Services Administration*, Justice Jackson concluded: "Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution...'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." *Nixon v. General Services Administration*, 433 U.S 425 (1977).

were a logical distinction between an independent agency and an executive one. But the current definition of an independent agency and a classical executive office is neither defined by particular duties nor by the purposes that the agency serves.[3] In the end, the only defining difference between an IRC and an executive branch office is merely one determined by congressional fiat.[4]

Scholars remain divided over both the constitutionality of IRCs and their desirability as regulatory institutions. In the absence of a clear constitutional answer, the most useful way to understand the issue is to examine the historical evolution of the controversy over the removal power. The history of the debate demonstrates that the independent regulatory agencies were not conceived as a solution to the problems of modern governance. Rather, they have assumed their current form as a result of a political struggle between Congress and the President for control of the Administration. It is undeniably true that the arguments of the Progressives made independent regulatory agencies acceptable to mainstream American politics, but the driving force behind their creation lies in Congress's ambition to limit executive power. In the end, the outcome of this struggle has not made for a fruitful equilibrium between the two branches, and has distorted the lines of accountability, leaving neither legislation nor execution of the law better off. As Franklin Roosevelt's Brownlow Committee nicely summarized the problem: "No administrative reorganization worthy of the name can leave hanging in the air more than a dozen powerful, irresponsible agencies free to determine policy and administer law."[5]

Today, Presidents have more levels of discretion than ever before because Congress legislates policy goals in broad strokes with little administrative guidance for implementation. Consequently, the debate over the removal power has become one of the most contentious institutional debates in Washington, because at stake is the question of who will control the vast powers of the bureaucracy. One possible solution would be to make very specific laws, but this is easier said than done. Given that laws do not execute themselves, administration always requires some level of discretionary choice. The most viable solution is the one that best complements the design of the Constitution. Article II vests the executive power in the President of the United States. It is the President who takes an oath to "faithfully execute" the laws of the country, and it is the President who will

4. Marshall J. Breger and Gary J. Edles, Independent Agencies in the United States: Law, Structure, and Politics (Oxford: Oxford University Press, 2015).
5. Government Printing Office, "The President's Committee on Administrative Management Report with Special Studies," 1937, pp. 40 and 41.

be held accountable for the administration of law. In so far as Congress places obstacles to that accountability, it jeopardizes the expectations of the people and the proper balance of powers under the Constitution.

The Removal Power in the 18th Century: The Decision of 1789

The removal power has never been definitively settled in American politics because the text of the Constitution does not provide a straightforward answer to the question. Article II, Section 2 of the Constitution does contain a very detailed procedure for appointment. 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.

Article II, however, says nothing about the removal of officers. In fact, there was no discussion of the removal of executive officers in the debates of the Constitutional Convention of 1787.[6] If the appointment of an officer were vital to the task of administration, it would seem that the power of removing an officer who fails to perform in the expected way is no less important.

Despite the silence of Article II on the removal power, there is, in fact, a very substantial historical record of opinions that goes all the way back to 1789, when Congress first began constructing the executive cabinet. Congress was confronted with this constitutional lacuna in its very first session when the House proposed to create its initial executive departments (the Departments of the Treasury, War, and Foreign Affairs) to attend to the critical business facing the infant nation. With the Department of Foreign Affairs (later the Department of State) on the table first, James Madison offered a motion that would prove to be the keystone for the discussion:

6. In *Federalist* No. 77, Hamilton does argue that the removal of an executive officer by the President should require the advice and consent of the Senate. However, this position was *sui generis* and neither he nor anyone else offered an opinion on the matter at the Convention in Philadelphia. For a thoughtful account of Hamilton's reasoning, see Jeremy D. Bailey, "The Traditional View of Hamilton's Federalist No. 77 and an Unexpected Challenge: A Response to Seth Barrett Tillman," *Harvard Journal of Law and Public Policy*, Vol. 33 (2010), pp. 169–184.

> [T]hat there shall be established an executive department, to be denominated the Department of Foreign Affairs; at the head of which there shall be an officer, to be called, the Secretary to the Department of Foreign Affairs, who shall be appointed by the president, by and with the advice and consent of the senate; *and to be removable by the President*.[7]

For the next six days, the First Congress would undertake one of the nation's most sophisticated and informative constitutional debates over the organization of the executive branch in American history. During the course of their discussion, a total of four different positions on the issue of removal emerged:

> (1) *The Impeachment Theory*: Impeachment is the only mode of removal of executive officers recognized by the Constitution, and Congress cannot confer any other mode;
>
> (2) *The Advice and Consent Theory*: The Constitution vests the removal power jointly in the President and the Senate, and Congress cannot confer any other mode;
>
> (3) *The Congressional Delegation Theory*: The Constitution is silent or ambiguous about where it vests the removal power, so:
>
> > (a) Congress is free to decide, but prudently it ought to vest it in the President, or
> >
> > (b) Congress has some latitude, but ought not vest it in the President alone; or
>
> (4) *The Executive Power Theory*: The Constitution vests the removal power in the President alone.[8]

Before discussing the conclusion of the First Congress's deliberations, it is important to note what was at stake in each position for the Members of

7. Linda Grant De Pauw, ed., *Documentary History of the First Federal Congress of the United States of America, March 4, 1789–March 3, 1791* (Baltimore, MD: Johns Hopkins University Press, 1972), p. 726. (Emphasis added.)
8. See Saikrishna Prakash, "New Light on the Decision of 1789," *Cornell Law Review*, Vol. 91, No. 5 (July 2006), p. 1,021. Most scholars agree that these were the four principal positions taken during the debate. Fisher identifies two more, "judicial review" and "procedural due process," which, in my judgment, are ancillary to the debate, or corollaries to one of the four main schools. See also Louis Fisher, *Constitutional Conflicts Between Congress and the President* (Lawrence, KS: University Press of Kansas, 2014), pp. 49 and 50.

Congress. Within each position above lies a particular interpretation of the balance of power between the legislative and executive branch that could have fateful consequences for constitutional government in the United States. In fact, the debate is probably one of the most informative in American history on the subject because the Members clearly understood the ramifications of their respective positions. They were not just deciding the level of accountability for the Secretary of Foreign Affairs; they were determining whether executive power would lie squarely within the President's authority or if Congress would control it, completely, or in part.

The Impeachment Theory

According to the first position, impeachment was the only mode of removal recognized by the Constitution. This position ostensibly rested on a literal construction of the Constitution. Since the Constitution does not mention anything about removal, there is no removal power. Impeachment, however, *is* mentioned in the Constitution. Consequently, impeachment is the only means by which the removal of an executive officer could be undertaken. While this argument seems plausible on the surface, the consequences of this position would have dramatically altered the institutional development of the American presidency. As one scholar put it:

> To have declared the magistracy permanent except for the right of removal by impeachment would necessarily have made the department heads the real executive. An incoming President would have found in office [individuals] whose position, so far as he was concerned, was assured. They would have ideas of their own and connections of their own. Since he could not control them, they would very naturally act in accordance with these ideas in carrying out their duties.[9]

The original proponents of this view clearly understood this. They were not just strict constructionists; they had an underlying motive: They feared the concentration or expansion of executive power at the expense of the other branches. As Senator James Jackson of Georgia noted:

> If he [the President] has the power of removing and controlling the Treasury Department, he has the purse strings in his hand; and you only fill the string

9. Charles C. Thach Jr., *The Creation of the Presidency, 1775–1789* (Baltimore, MD: Johns Hopkins University Press, 1969).

> box, and collect the money of the empire, for his use. The purse and sword will enable him to lay prostrate the liberties of America.[10]

If removal of executive officers were limited to impeachment by Congress, the President would have very little control or influence over the executive branch.

The Advice and Consent Theory

Proponents of the second position contended that the Constitution vested removal power jointly in the President and the Senate. The removal process would follow the same procedure as that explicitly described in the appointment process under Article II. If appointing an officer of the Administration requires the consent of the Senate, so should the removal of an executive officer. As Congressman Theodorick Bland of Virginia put it on the first day of the debate, "The Constitution declares that the President and the Senate shall appoint, and it naturally follows, that the power which appoints shall remove also."[11] After all, the powers of appointing and removing are related, just like hiring and firing. Like the impeachment position, proponents of this position also had a particular view of the balance of powers between Congress and the President.[12] The President and Congress share in the duty of administration because the execution of law is ministerial to the process of law making. Congressman Elbridge Gerry of Massachusetts elaborated this view for the benefit of other Members:

> We [Congress] have the power to establish offices by law; we can declare the duties of the officer; these duties are what the legislature directs, not the President; the officer is bound by law to perform these duties.... Suppose an officer discharges his duty as the law directs, yet the President will remove him; he will be guided by some other criterion; perhaps the officer is not good natured

10. Ibid., 1002.

11. De Pauw, ed., *Documentary History of the First Federal Congress of the United States of America, March 4, 1789–March 3, 1791—Debates II*, p. 737. Congressman Bland made a motion on May 19 to add "by and with the advice and consent of the Senate," which was defeated. (*Debates II*, p. 738).

12. His position was also supported by Alexander Hamilton in the *Federalist* No. 77: "The consent of that body [the Senate] would be necessary to displace as well as to appoint." Hamilton had a different reason for including the Senate in the removal. Rather than facilitate a sharing of power between the branches, Hamilton hoped that the Senate's participation in removal would promote a long-term bureaucracy that would be insulated from the changes incurred by popular elections of the executive. "To reverse and undo what has been done by a predecessor, is very often considered by a successor as the best proof he can give of his own capacity and desert.... These considerations...would be likely to induce every new President to promote a change of men to fill the subordinate stations; and these causes together could not fail to occasion a disgraceful and ruinous mutability in the administration of the government." See also Jeremy D. Bailey, "The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton," *The American Political Science Review*, Vol. 102, No. 4 (2008), pp. 453–456.

> enough…because he is so unfortunate as not to be so good a dancer, as he is a worthy officer, he must be removed.[13]

For Gerry and others, this arrangement made sense in light of their view that the administration of the law is inseparable from the creation of law. Administering the law is really a joint responsibility of the President and Congress since it is the President's task to execute the law, and the legislature's responsibility to see that its laws are faithfully executed. Consequently, administrators should be removed in the same way they are appointed—with congressional approval.

The Congressional Delegation Theory

Other Members of the First Congress agreed that the legislature ought to play a central role when it comes to the administration of law, but they took a different position over the removal power process. Known as the "congressional delegation position," this group argued that the Constitution's silence over the vesting of the removal power was really an invitation to give Congress a discretionary authority over the removal power. Congress could either retain the removal authority solely for itself, or it could vest this power wherever it pleased. Congressman Roger Sherman of Connecticut explained the rationale behind this position:

> As the officer is the mere creature of the legislature, we may form it under such regulations as we please, with such powers and duration as we think good policy require; we may say he shall hold his office during good behavior, or that he shall be annually elected; we may say he shall be displaced for neglect of duty, and point out how he should be convicted of it—without calling upon the President or Senate.[14]

What Congress creates, Congress can take away. Administering the law, moreover, is not really a shared responsibility with the President; it is ultimately the responsibility of Congress. Proponents of this position were divided into two groups when it came to deciding where to vest the removal power over the Secretary of Foreign Affairs. Some thought Congress should retain the power, while others thought it would be more convenient to

13. De Pauw, ed., *Documentary History of the First Federal Congress of the United States of America, March 4, 1789–March 3, 1791—Debates II*, pp. 1022 and 1023.
14. Ibid., p. 917.

permit the President to exercise the power in this particular situation. In either case, however, their fundamental assumption was the same: The power of removal fundamentally belongs to Congress.

The Executive Power Theory

Finally, one group of representatives argued that the Constitution vested the removal power in the President alone. This position is often labeled "the executive power theory."[15] Elected by the people, the President is alone accountable to the public for the execution of the law. As James Madison, among the main proponents of this position, put it,

> If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community. The chain of dependence therefore terminates in the supreme body, namely, in the people.[16]

According to this view, Congress has the power to make law, but it does not have the authority to interfere with the execution of law. If Congress participated in the removal process either by exercising the removal power itself or by requiring its advice and consent, the legislature would have overstepped its bounds within the separation of powers. As the vesting clause of Article II states: "The executive power shall be vested in a President of the United States of America." True, as the proponents of the advice and consent position would maintain, the Constitution does occasionally vest some executive power in the Senate, as in the case of the appointment process where the Senate advises and consents in the appointment of principal officers. But those occasions are exceptions to the rule. The vesting clause in Article II vests all executive power in the President and, consequently, those provisions like the one described above ought to be construed narrowly.[17] Asked in the House whether he thought removal was executive "by nature," Madison responded:

15. Prakash, "New Light on the Decision of 1789."
16. Ibid., p. 925.
17. De Pauw, ed., *Documentary History of the First Federal Congress of the United States of America, March 4, 1789–March 3, 1791—Debates II*, p. 869.

> I conceive that if any power whatsoever is in its nature executive it is the power of appointing, overseeing and controlling those who execute the laws. If the Constitution had not qualified the power of the President in appointing to office, by associating the Senate with him in that business, would it not be clear that he would have the right by virtue of his executive power to make such appointment?[18]

Because the Constitution is silent on the removal power, it should be assumed that this power belongs to the President alone.

While the First Congress clearly laid out the alternatives for structuring the removal power, as well as the implications for each position in terms of the balance of powers, the debate did not provide a conclusive answer to the question with which it began. In order to win enough votes to place the removal power in the hands of the executive, House Members carefully developed a compromise in the language of the statute that would give the President power to remove in effect, while technically avoiding the fundamental question of whether the removal power was an inherently executive power or a power that in this case had been delegated to the President by Congress.[19] This clever parliamentary maneuver successfully garnered enough votes to get the bill through Congress, but it also left the issue of the removal power unresolved.[20] On the other hand, the final vote did eliminate at least two positions: impeachment as the sole means of removal, and the advice and consent provision. Clearly, impeachment would simply be too cumbersome as a method of removal both for Congress and the executive, and its adherents were few. Having the President's removal power depend in every case on the advice and consent of the Senate would have been equally cumbersome (though under the congressional delegation doctrine, one could implement this requirement in individual cases, which Congress did in 1867 with the Tenure in Office Act). What remained to be determined in

18. Ibid., p. 868.

19. On June 22, 1789, Representative Egbert Benson overcame the deadlock in the House with a carefully crafted proposal to amend the original language of the bill in a manner that would advance the case for executive power theory while avoiding alienating at least some of the congressional delegation proponents. His proposed solution involved two steps. First, he moved to amend the current language in the bill that entirely revised the bill's implications for the removal power. The new language would be inserted into a clause related to a chief clerk appointed by the Secretary of Foreign Affairs. This clerk would be responsible for the records and papers "whenever the said principal officer [the secretary] shall be removed from office by the President of the United States." If this were agreed to, Benson would then move that the old language—in particular the phrase "to be removable by the President"—would be taken out. De Pauw, ed., *Documentary History of the First Federal Congress of the United States of America, March 4, 1789–March 3, 1791—Debates II*, p. 1028. In Charles Thach's view, "This was excellent tactics. By moving the amendment while the original clause was in the bill, a way was left open for the proponents of the legislative grant idea [congressional delegation] to support the amendment without formal abandonment of their position." Thach, *The Creation of the Presidency*, p. 138.

20. Prakash, "New Light on the Decision of 1789," pp. 1021–1077.

the future was whether the terms for removal would be set by individual statutes passed by Congress or whether the power inherently belonged to the executive under Article II of the Constitution.

The Removal Power in the 19th Century: The Rise of Political Parties and Spoils

While the removal power remained almost exclusively in the hands of the executive after 1789, the debate over the President's authority to remove subordinate officers re-emerged in an explosive contest between the executive and legislative branches during the controversial tenure of President Andrew Jackson. Confident that he was armed with a mandate to completely restructure the Washington establishment, Jackson was responsible for some of the strongest assertions of presidential power ever witnessed heretofore in American politics.

In particular, Jackson wanted to transform the very notion of office holding in the executive branch. Prior to his Administration, officeholders were individuals who were chosen because they possessed distinguished national reputations. Vacancies, for the most part, only came about by death or gross malfeasance in office. Thomas Jefferson, of course, did remove officeholders because of their political views, but he was very reluctant to openly defend partisanship as legitimate grounds for removal.[21] John Quincy Adams and later Presidents were even less willing to embrace the removal power as a way to make room for political allies. Under Jackson, all this changed.

Jackson defended this policy of making political appointments to office as "the rotative principle," an approach that he described as a "fundamental" principle of his presidency:[22]

> There are, perhaps, few men who can for any great length of time enjoy office and power without being more or less under the influence of feelings unfavorable to the faithful discharge of their public duties.... The duties of all public officers are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance; and I cannot but believe that more is lost by the long continuance of men in office than is

21. Jeremy D. Bailey, *Thomas Jefferson and Executive Power* (Cambridge: Cambridge University Press, 2007), pp. 153 and 154. For example, as Bailey explains, John Adams "balked from appointing his own cabinet, retaining instead those serving at the end of Washington's administration." While Adams would eventually dismiss the members of his War Department, his reluctance to do so led to a protracted war with his own cabinet who preferred the unofficial leadership of Alexander Hamilton to the official leadership of the President.
22. Andrew Jackson, "Memorandum on Appointments," February 23, 1829, in Daniel Feller et al., eds., *The Papers of Andrew Jackson*, Vol. 7 (Knoxville, TN: University of Tennessee Press, 2007), pp. 60 and 61.

> generally to be gained by their experience. I submit, therefore, to your consideration whether the efficiency of the Government would not be promoted and official industry and integrity better secured by a general extension of the law which limits appointments to four years.[23]

This is now called "the spoils system." For Jackson, however, the rotation system was critical to the full realization of the executive's responsibility to the people. Administrators are the instruments by which the President achieves his political agenda; loyalty over expertise is the administrator's most desirable trait. Not only then must the president be free to appoint such people, but the president must also be able to get rid of those who are disloyal.

Jackson's controversial understanding of executive administration came to a climax in the controversy over the National Bank. As is well known, Jackson argued that the National Bank was unconstitutional despite a Supreme Court decision to the contrary. Rather than defer to the expertise of the Court on constitutional questions or to Congress's law-making authority, Jackson argued that each department should be guided by its own opinion of the Constitution. "The opinion of the judges," declared Jackson, "has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both."[24] Naturally, Jackson's opponents thought the veto message offered proof that the President meant to transform separation of powers with a new understanding of executive power that placed the President above the legislature and the Courts. The debate over the bank veto was not just about the veto power. As the Whigs knew, the heart of the question "Who controls the Bank?" was "who controls the administration of government?"

Vetoing the National Bank's renewed charter was not enough for Jackson, and he escalated the conflict with his opponents in Congress by ordering Treasury Secretary Louis McLane to remove the deposits from the existing Bank of the United States and to distribute them among friendly state banks (or "pet banks"). McLane refused, and Jackson replaced him at Treasury with William Duane. Eventually Duane came to the same reservations as his predecessor, and Jackson removed him as well. Jackson eventually found a henchman for his project in Roger Taney, who later became the

23. Andrew Jackson, "First Annual Message to Congress," December 8, 1829, https://millercenter.org/the-presidency/presidential-speeches/december-8-1829-first-annual-message-congress (accessed May 20, 2019). By "a general extension of the law which limits appointments to four years," Jackson is suggesting that the appointed officers in the Administration should serve no longer than the term of the President who appointed them.
24. Ibid.

Supreme Court Justice who authored the majority opinion in the infamous *Dred Scott* case.

Jackson's removal of the Secretary of the Treasury was the subject of months of debate, and the question of the removal power was central to the controversy. Whig politician and Speaker of the House Henry Clay was among the first to give a forceful critique of Jackson's removals at a public dinner in 1829. Clay charged Jackson with subverting the purpose of the removal power:

> The President is invested with the tremendous power of dismission, to be exercised for the public good, and not to gratify any private passions or purposes. It was conferred to prevent the public from suffering through faithless or incompetent officers. It never was in the contemplation of Congress, that the power would or could be applied to the removal of competent, diligent and faithful officers. Such an application of it is an act of arbitrary power, and a great abuse.[25]

Though it is not clear exactly what precise form the removal power ought to take for Clay, he does assume that it is a power Congress delegates to or "invests" in the President (regardless of whatever the statutory language for the department's enabling act might have provided for). Having ordered the Secretary of the Treasury to contravene the will of Congress by withdrawing duly enacted appropriations from the deposits of the Bank of the United States, and then firing the Secretary for refusing to do so, the president had abused the removal power entrusted to him by Congress. For Clay, the Treasury Secretary is not an arm of the executive but a servant of the law. As such, Congress is at least equal, if not superior, to the President in deciding how those laws are to be properly enforced. Now that the executive was leading the Treasury Secretary astray, it was up to Congress to take that power back and correct the abuse. Clay's argument in the House became the basis for the Senate's censure of Jackson on March 28, 1834.[26] While the censure was directed at Jackson's removal of the deposits, the language of the resolution was broad enough to indict Jackson's entire understanding of his executive authority and his use of the removal power: "[Jackson had] assumed upon himself authority and power not conferred by the Constitution and laws,

25. Henry Clay, "Fowler's Garden Speech," May 16, 1829, in Robert Seager II and Melba Porter Hay, eds., *The Papers of Henry Clay*, Vol. 8: *Candidate, Compromiser, Whig* (Lexington, KY: University Press of Kentucky, 1984), p. 44.
26. While of dubious constitutionality, a censure is a concurrent resolution in the legislature for the purpose of reprimanding the executive— an action perceived to be something just short of impeachment.

but in derogation of both."[27] Once Jackson accepted his censure, Congress believed its authority over the removal power would be practically codified.

Jackson did not accept the censure from the Senate. In his protest to the Senate's resolution, Jackson restated the principles that had informed his entire understanding of the Administration from the beginning of his presidency:

> The President is the direct representative of the American people, but the Secretaries are not. If the Secretary of the Treasury be independent of the President in the execution of the laws, then is there no direct responsibility to the people in that important branch of this Government to which is committed the care of the national finances.[28]

In the end, Jackson not only defeated the Bank, he steadfastly resisted any challenge to his constitutional understanding of the executive office. The power to remove subordinate executive officers is the exclusive domain of the President because administering the law is entirely entrusted to the executive by virtue of Article II, not Congress.

Jackson's fierce determination and shrewd political calculations helped him to prevail in this political contest. However, one may suspect that the merits of his argument actually made a substantial contribution to Congress's retreat. In the end, the Secretary of the Treasury serves the President, not Congress. If Congress really believed that Jackson's decision to remove the deposits from the Bank was in contravention of the statute's purpose, then Congress should have either clarified the ambiguous wording in the statue with a subsequent amendment specifying exactly what circumstances could trigger a removal of funds by the Secretary, or Congress could have moved to impeach the President for failing to faithfully execute the law.

27. Register of Debates in Congress, 23rd Cong., 1st Sess. (December 23, 1833–March 28, 1834), pp. 58–1187, https://memory.loc.gov/ammem/amlaw/lwrdlink.html (accessed May 20, 2019).

28. Andrew Jackson, "Message to the Senate Protesting the Censure Resolution," in James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents*, 1789–1897, Vol. 3 (Washington, DC: U.S. Government Printing Office, 1897), pp. 69–95, https://teachingamericanhistory.org/library/document/message-to-the-senate-protesting-the-censure-resolution/ (accessed May 20, 2019). Jackson's Protest Message was well versed in the debates of 1789. In his written Protest to the Senate he explained: "The power of removal was a topic of solemn debate in the Congress of 1789 while organizing the administrative departments of the Government, and it was finally decided that the President derived from the Constitution the power of removal so far as it regards that department for whose acts he is responsible.... With the avowed object of preventing any future inference that this power was exercised by the President in virtue of a grant from Congress, when in fact that body considered it as derived from the Constitution, the words which had been the subject of debate were struck out, and in lieu thereof a clause was inserted in a provision concerning the chief clerk of the department, which declared that 'whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy,' the chief clerk should during such vacancy have charge of the papers of the office. This change having been made for the express purpose of declaring the sense of Congress that the President derived the power of removal from the Constitution, the act as it passed has always been considered as a full expression of the sense of the legislature on this important part of the American Constitution."

Claiming some share of the removal power would have only set Congress on a further collision course with the executive.

Though the Whig effort to gain control over the removal power during Jackson's presidency had initially failed, it was picked up and made more successful by Republican opponents of Andrew Johnson, President from 1865 to 1869. Having discovered a vast reserve of power within Article II during his presidency, Johnson used "imperial proclamations" (so dubbed by his critics) to extend amnesty to former Confederates, and he quadrupled Jackson's veto rate (29 in four years). Johnson's use of the removal power was no different. By controlling who ran the military and who held certain administrative offices, Johnson tried to obstruct Republican reconstruction policy.[29] But this time Congress fought back against the President and with greater success. During the Jacksonian era, Congress had also developed a thorough system of patronage and, measured by the control of the "spoils," could reasonably claim to have as much access to the people as the President did. In an era where popular authority was judged by party strength, party leaders in Congress felt they should be at least equal to the President in the choice of both whom to hire and who to fire in the Administration. Johnson's greatest offense, according to Congress, consisted in the fact that he appointed individuals to office without regard to their political affiliation and, oftentimes, for the very purpose of undermining the Republican Party's public policy. While there was little hope that they could control Johnson's appointment of new officers, Members of Congress did imagine that they could find a way to stop his removal of officers whom they preferred.

In 1867, Congress officially responded with the Tenure in Office Act, which passed over Johnson's veto. The Tenure in Office Act (in force from 1867 to 1887) restricted the power of the President of the United States to remove certain office holders without the approval of the Senate. In form, the act was modeled on what the proponents of the advice and consent position in 1789 had argued when the statute declared that every officer appointed by the President and confirmed by the Senate would hold office until the President "by and with the advice and consent of the Senate" appointed a successor.[30] In effect, the Senate had conditioned removal,

29. Johnson used the removal power to displace military officers who administered the Reconstruction policies that had been enacted by Congress. See Michael Les Benedict, *The Impeachment and Trial of Andrew Johnson* (New York: Norton, 1973), p. 88.

30. Statutes at Large, Chapter 154, 39th Congress, 2nd Sess., as reproduced in David O. Stewart, *Impeached: The Trial of President Andrew Johnson and the Fight for Lincoln's Legacy* (New York: Simon & Schuster, 2009), p. 329. It is not quite clear from the congressional debates why the Tenure in Office Act employed the advice and consent model for the removal process, since most proponents of the act in the House and Senate articulated the congressional delegation position. It appears that many thought that this model was simply the most convenient means by which Congress could oversee removals, unlike the Members of the First Congress, who thought that this method of removal was constitutionally required.

albeit indirectly, on its advice and consent. The Tenure in Office Act did not claim that the Senate could check executive removals in this way, by virtue of the Constitution, as the members of the advice and consent school in the First Congress did. Rather, most Members of Congress in 1867 accepted the congressional delegation doctrine: Congress may either give the President the sole authority to remove, retain that authority for himself, or qualify the President's removal power in some way—in this case, by requiring the advice and consent of the Senate for a successor.

Johnson remained defiant in the face of Congress's bold assertion of authority over removals. In terms reminiscent of Madison in 1789 and Jackson in 1828, Johnson defended the President's unilateral authority of removal:

> The forced retention in office of a single dishonest person may work great injury to the public interests. The danger to the public service comes not from the power to remove, but from the power to appoint. Therefore it was that the framers of the Constitution left the power of removal unrestricted, while they gave the Senate a right to reject all appointments which in its opinion were not fit to be made. A little reflection on this subject will probably satisfy all who have the good of the country at heart that our best course is to take the Constitution for our guide, walk in the path marked out by the founders of the Republic, and obey the rules made sacred by the observance of our great predecessors.[31]

For Johnson, the removal power argument here was part of his broader case for executive power in the face of repeated challenges to his authority by Congress. Johnson claimed the right to refuse to execute unconstitutional laws regardless of whether Congress dutifully enacted them over his veto.

With the Tenure in Office Act as well as the effort to impeach Johnson, Congress was attempting to assert its own views on the proper distribution of power between the branches. According to Professor Keith Whittington:

> Johnson had to be removed not simply because he violated a law, but because in doing so he had been defiant toward the expressed will of Congress.... Johnson's persistent use of the veto power, his reluctant execution of Congressional Reconstruction, and his public speeches were all equally dangerous and equally indicative of his unwillingness to recognize the paramount authority of Congress.[32]

31. Andrew Johnson, "Third Annual Message to Congress," December 3, 1867, https://millercenter.org/the-presidency/presidential-speeches/december-3-1867-third-annual-message-congress (accessed May 20, 2019).
32. Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge: Harvard University Press, 1999), p. 137.

Echoing Eldridge Gerry's argument in 1789, congressional Republicans defended the Tenure in Office Act on the grounds that the execution of law is really a species of the lawmaking authority. In the end, Congress hoped to reduce the executive to a "ministerial function."[33]

There were many good reasons for Congress to passionately dislike President Johnson, and perhaps some might have justified their attempt to subvert his presidency. But impeaching Johnson for having violated the Tenure in Office Act was not one of them. Johnson was indeed brash and heavy-handed in wielding the powers of the office, but Congress should have distinguished its contempt for the man in the office from the office itself. In the end, the attempt to impeach Johnson failed because many of the President's most vociferous critics realized their failure to make such a distinction. As Senator Edmund Ross of Kansas concluded years later, "the impeachment of the President, was an assault upon the principle of coordination that underlies our political system and thus a menace to our established political forms, as, if successful, it would, logically have been the practical destruction of the Executive department."[34] In the end, Johnson's defiance of the law was not as bad as the law's own dubious constitutional propriety.

The Removal Power in the 20th Century: The Rise of the Modern Regulatory State

The Tenure in Office Act was repealed in 1887, but Congress continued to limit the removal power of the President for certain administrative offices until a landmark decision on the issue in 1926: *Myers v. United States*. For a brief moment in the early 20th century, the Supreme Court seemed to have offered a decisive answer to the removal power controversy in favor of the position held by the proponents of the executive power theory in 1789. For advocates of the executive power theory today (more commonly known now as the "unitary executive theory"), Chief Justice William Howard Taft's opinion in *Myers* has come to be regarded as the definitive statement on the removal power question. While the decision was, in fact, the most thorough analysis of the issue since the debate of 1789, Taft's opinion did not decisively settle the question.

In brief, the facts of the case were: Frank Myers, a postmaster of the first class, had been serving a four-year term until he was removed by the Postmaster General, acting on the order of President Woodrow Wilson. Myers

33. Ibid., p. 138.
34. Quoted in Hans L. Trefousse, *Andrew Johnson: A Biography* (New York: W.W. Norton Company, 1989), p. 330.

argued that his removal was in violation of the 1876 postal statute, which stated: "Postmasters of the first, second, and third classes 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."[35] Chief Justice Taft, writing for the Court, decided against Myers, holding that the 1876 statute restrictions on executive removal were unconstitutional.

In his decision for the Court, the Chief Justice explained that the removal power was the President's alone by "the well approved principle of constitutional and statutory construction that the power of removal of executive officers was incident to the power of appointment."[36] In other words, while the Constitution obviously provided an important role for Congress in the appointment of executive officers, the appointment power was inherently an executive power that the Constitution only partly qualified by giving the Senate a limited role. Taft thus reasoned: "The power of removal is incident to the power of appointment, not to the power of advising and consenting to the appointment."[37] Thus the Senate's limited participation in the appointment process cannot serve as a basis for participating in the removal. As an inherently executive power, removal belongs to the President alone.

Taft's opinion included a lengthy and impressive analysis of the debates in the First Congress over the removal power. After carefully cataloguing the various positions among the representatives, Taft ultimately sided with Madison's argument for executive accountability in 1789:

> [A] fundamental misconception that the President's attitude in his exercise of power is one of opposition to the people, while Congress is their only defender in the Government... The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of each body of the legislature, whose constituencies are local, and not countrywide; and, as the President is elected for four years, with the mandate of the people to exercise his executive power under the Constitution, there would seem to be no reason for construing that instrument in such a way as to limit and hamper that power beyond the limitations of it, expressed or fairly implied.[38]

35. *Myers v. United States*, 272 U.S. 119 (1925). (Emphasis added.)
36. Ibid.
37. Ibid., p. 122.
38. Ibid., p. 123.

Taft's thoughts echoed the arguments not only of Madison but Presidents like Jackson and Johnson. In particular, the Chief Justice emphasized the chain of accountability between the President and the people carried out through the chief executive's subordinates: "In all such cases, the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it. In this field, his cabinet officers must do his will."[39] The removal power, according to Taft, must be understood in terms of the President's authority to superintend the construction of the statutes to be executed by his administrators. "The moment that he loses confidence in the intelligence, ability, judgment or loyalty of anyone of them, he must have the power to remove him without delay."[40] Because these subordinates acted in the President's stead—the "unitary and uniform" execution of the law demanded he be able to judge their conduct and take action accordingly.

The Court's decision in *Myers* would seem to have definitively settled the removal power issue at least in terms of superior officers, but in reality, it only set the stage for another dramatic showdown between Congress and the President. As the regulatory powers of the national government were expanding into new economic and social domains during the Progressive era and the New Deal, Congress was busy finding an alternative way to limit executive power over the Administration. This new form of control emerged in the creation of independent regulatory commissions (IRCs).

IRCs were born from the marriage of two sources, one academic, the other political. On the academic side, Progressive intellectuals like James Landis, Frank Goodnow, Herbert Croly, and Woodrow Wilson were leading the case for a new science of administration where experts, insulated from elections, would conduct day-to-day affairs. The industrial revolution, so their argument went, had produced a host of complicated regulatory issues that seemed to require the knowledge and abilities of experts specialized in the subjects they would supervise.[41] But democratic politics in America were not entirely conducive to scientific administration. The most prominent offices of government were elective, and most administrative posts continued to be distributed according to the political interests of the parties. Progressive intellectuals at the time argued that the country would only be

39. Ibid., p. 134.

40. Ibid.

41. Adolph A. Berle, "The Expansion of American Administrative Law," *Harvard Law Review*, Vol. 30, No. 5 (1917), pp. 430–448. See also Charles Merriam, *A History of American Political Theories* (New York: Macmillan, 1903), chapter 8, "Recent Tendencies"; Woodrow Wilson, *The State: Elements of Historical and Practical Politics* (Washington, DC: Heath & Co., 1918), p. 598; and Herbert David Croly, *The Promise of American Life* (New York: Macmillan, 1911), pp. 24 and 25.

prepared to meet the challenges of the new century if the nation were willing to rethink its previous assumptions about democratic politics, including such traditional limits on power as the Constitution's separation of powers, and such doctrines as the rule of law. In a landmark article advancing the cause of IRCs as the form of government best suited to meet these challenges, Adolph Berle explained:

> The primary distinction is a simple one. Much of the governmental machinery is of general importance; it serves to transmit the will of the state upon the great majority of questions. Most statutes, for example, are enacted by Congress—the general medium for expressing popular will. They are enforced by the executive authorities—the department of justice, the local police, and the like, who normally enforce all laws. They are interpreted by the courts whose regular function is to interpret such laws as Congress may enact. That is the usual, normal course of procedure; it is the general method of administration. But there arise problems which require peculiar and expert handling; a striking example is that of railway regulation. The popular will cannot be expressed by Congress, because the popular will does not discover a method. A result is wanted—better service and rates, freedom from discrimination and tyranny. No general body can reach that result: it takes an expert economist to formulate a rule. Accordingly we construct a *special* administrative body—a commission.... The only expression of the popular will by Congress was the utterance of a desire to have an expert body solve a problem.[42]

IRCs offered a pathway for this kind of reform because, here, one could carve out a space in government for non-political, scientifically trained experts who would be free from the ebb and flow of popular opinion. The Progressives began by drawing a novel distinction between political power and what they termed "administration." "Administration," explained Woodrow Wilson "lies outside the proper sphere of *politics*. Administrative questions are not political questions."[43] In the past, the primary concern of democratic countries consisted of finding intricately designed limitations on political power. Today, argued Wilson, "the weightier debates of constitutional principle are...no longer of more immediate practical moment than questions of administration. It is getting to be harder to *run* a constitution than to frame one."[44]

42. Ibid.
43. Woodrow Wilson, "The Study of Administration," Political Science Quarterly, Vol. 2, No. 2 (June 1887), pp. 197–222. Emphasis in original.
44. Ibid.

Politically, the IRCs also provided a convenient way for Congress to limit the executive power in an era where more and more policymaking was being conducted by the Administration rather than the legislature. Since *Myers* had stripped the Senate of its ability to control the removal power, Congress began to gravitate toward administrative agencies where policymakers could be shielded from executive removal. The IRC model resembled something like the impeachment theory of removal debated in 1789. The President, subject to the advice and consent of the Senate, would nominate commissioners for the IRCs, and they could only be removed during their tenure for "good cause"—a provision that is generally limited to removal for the gross abuse of power or malfeasance in office.[45] While these limits on removal were sometimes defended as a means of promoting technical expertise and non-political administration of executive agencies, the IRCs provided an opportunity for the legislature to further check administrative authority in the executive. As Professors Lawrence Lessig and Cass Sunstein argue:

> [Agency] independence can be understood as a form of legislative aggrandizement. Congress might make agencies independent not to create real independence, but in order to diminish Presidential authority over their operations precisely in the interest of subjecting those agencies to the control of Congressional committees.[46]

There were only a few IRCs prior to the inception of the New Deal. Two years after Franklin Roosevelt's election, Congress created the Federal Communications Commission (FCC), the National Labor Relations Board (NLRB), and the Securities and Exchange Commission (SEC), all in one year with more soon to follow. With the explosion of regulatory programs under Roosevelt, the constitutional status of IRCs took on a new sense of urgency among their critics, given the prominent role that these regulatory agencies would play under the New Deal. Until 1935, the constitutionality of these independent agencies had been unclear, particularly since the *Myers* decision seemed to imply that any removal limitations on superior officers were constitutionally suspect. In 1937, Roosevelt would commission a famous study on executive reorganization (the Brownlow Committee report) to advance his case for restructuring the executive office along the reasoning

45. The difference, of course, rests in the fact that "good cause" would be determined by the review of the Courts rather than an impeachment process in Congress.

46. Cass R. Sunstein and Lawrence Lessig, "The President and the Administration," *Columbia Law Review*, Vol. 94, No. 1 (1994), p. 115.

of *Myers*. The report was direct about the constitutional issue at stake in the IRCs for the presidency:

> The removal from the Executive of the final authority to determine the uses of appropriations, conditions of employment, the letting of contracts, and the control over administrative decisions, as well as the prescribing of accounting procedures and the vesting of such authority in an officer independent of direct responsibility to the President for his acts, is clearly in violation of the constitutional principle of the division of authority between the Legislative and Executive Branches of the Government. It is contrary to article II, section 3, of the Constitution, which provides that the President "shall take Care that the Laws be faithfully executed."[47]

In its final form, the Brownlow report recommended abolishing the limitations on the President's removal power over the IRCs (a "headless fourth branch," according to the authors of the report), thereby making them directly accountable to the President.[48]

While FDR hoped to persuade Congress to eliminate the IRCs, as well as any other obstacle to the President's direct control over the Administration, a decision by the Supreme Court left the President in a weaker position for prevailing over the potential objections of Congress. In the case of *Humphrey's Executor v. U.S.* (1935), Roosevelt had attempted to remove Federal Trade Commissioner William Humphrey from his office. When Roosevelt fired Humphrey, he sued on the grounds that his dismissal violated the protected tenure provisions for Federal Trade Commission (FTC) commissioners. Roosevelt initially regarded the FTC as a critical agency for the implementation of his signature economic program—the National Industrial Recovery Act (NIRA).[49] Under the NIRA, competitors, along with consumers and labor, would meet and propose industrial codes of fair competition. The FTC would be tasked with the duty of helping to both craft and administer the codes. Roosevelt needed a staff in the agency that shared his vision of the program, and Humphrey posed a problem having been notorious for his opposition to the federal regulation of the economy

47. Report of the Presidents' Committee: Administrative Management in the Government of the United States, submitted to the President and to the Congress in accordance with. Public Law No. 739, 74th Congress, 2nd Session (Washington, DC: U.S. Government Printing Office, 1937), p. 21, https://babel.hathitrust.org/cgi/pt?id=mdp.39015030482726;view=1up;seq=30 (accessed May 20 2019).

48. The report did make an exception for the quasi-judicial powers of the FTC though it is not clear why the Court accepted this part of the reasoning in *Humphrey's Executor*. Ibid., p. 10.

49. The National Industrial Recovery Act, Public Law No. 73–67, 48 Stat. 195, enacted June 16, 1933, codified at 15 U.S. Code § 703.

and outspoken in his criticism of the New Deal.[50] The kind of innovation represented by the NIRA was precisely the type of activity that the conservative William Humphrey would have resisted. For Roosevelt, Humphrey was not just a lingering embarrassment from a former Administration, but an impediment to his overall political objectives.

In *Humphrey's Executor*, the Court rejected FDR's assertion of executive removal power over the commissioners and sided with the statute's limitations on the President. In the opinion, Justice George Sutherland concluded that the members of the FTC, though appointed by the President, actually exercised powers that were "quasi-legislative" and "quasi-judicial," *not* executive.[51]

> The commission is to be nonpartisan, and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly *quasi*-judicial and *quasi*-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts appointed by law and informed by experience.[52]

The Court's decision brought together both the political and academic ambitions behind the IRCs. For those in Congress who wanted to limit the executive's power in an ever-expanding regulatory government, the decision provided the legal cover for constructing powerful regulatory agencies exempt from executive control. For proponents of the modern administrative state, the "quasi-judicial/quasi-legislative" designation of the independent regulatory commissioners opened a new space that could be shielded from ordinary democratic politics to be staffed by technocrats and public policy experts.

Sutherland's attempt to distinguish independent regulators from executive officers was problematic from the beginning. In his attempt to distinguish the FTC from other executive offices, he explained: "The Federal Trade Commission is an administrative body created by Congress to *carry into effect legislative policies* embodied in the statute in accordance with the legislative standard therein prescribed."[53] Sutherland's description of

50. William E. Leuchtenburg, "The Case of the Contentious Commissioner: *Humphrey's Executor v. U.S.*," in Harold M. Hyman and Leonard W. Levy, eds., *Freedom and Reform: Essays in Honor of Henry Steele Commager* (New York: Harper & Row, 1967), pp. 287–298.
51. *Humphrey's Executor v. United States*, 295 U.S. 495 (1935).
52. *Humphrey's Executor*, p. 628.
53. Ibid. (Emphasis added.)

what constitutes quasi-legislative/judicial responsibilities is virtually indistinguishable from the ordinary administration of law.[54] As Justice Robert Jackson concluded many years later:

> Administrative agencies have been called *quasi*-legislative, *quasi*-executive, or *quasi*-judicial, as the occasion required, in order to validate their functions within the separation of powers scheme of the Constitution. The mere retreat to the qualifying "quasi" is implicit with confession that all recognized classifications have broken down, and "quasi" is a smooth cover which we draw over our confusion, as we might use a counterpane to conceal a disordered bed.[55]

To Justice Jackson, the unsound reasoning supporting the administrative state in *Humphrey's Executor* explained the problems with the administrative state itself: "They [the IRCs] have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking."[56]

When Roosevelt submitted the recommendations of the Brownlow Committee for giving the President control over the IRCs a few years later, Congress demurred. Congress did eventually approve a bill for the reorganization of the executive branch in 1939, but it rejected FDR's petition to make the independent regulatory commissioners subject to executive removal. For many, the Court's decision had been critical to putting the brakes on FDR's political ambition. The "headless fourth branch" would remain a permanent feature of the federal government's landscape.

Ironically, at the moment when the New Deal coalition had seemingly fractured beyond repair, Ronald Reagan took up the case for executive power where Franklin Roosevelt left off. As Reagan's Solicitor General Charles Fried has written,

> the Reagan administration had a vision about the arrangement of government power: the authority and responsibility of the president should be clear and unitary. The Reagan years were distinguished by the fact that that vision was made the subject of legal, rather than simply political dispute.[57]

54. Even scholars critical of the Court's decision in *Myers*, like Edward Corwin, found Sutherland's designation of quasi-legislative and quasi-judicial power in *Humphrey's* puzzling: "The dictum seems to have been the product of hasty composition.... If a Federal Trade Commissioner is not in the executive department, where is he? In the legislative department, or is he forsooth in the uncomfortable halfway situation of Mahomet's coffin, suspended 'twixt Heaven and Earth?" Edward S. Corwin, *The President: Office and Powers, 1787–1957* (New York: New York University Press, 1957), p. 93.
55. *FTC v. Ruberoid*, 343 U. S. 488 (1952).
56. Ibid.
57. Charles Fried, *Order and Law: Arguing the Reagan Revolution–A Firsthand Account* (New York: Simon & Schuster, 1991), p. 133.

Recalling his time as Director of the Office of Legal Counsel, then-Supreme Court nominee Samuel Alito told the Senate Judiciary Committee: "We were strong proponents of the theory of the unitary executive, that all federal executive power is vested by the Constitution in the President. And I thought then, and I still think, that this theory best captures the meaning of the Constitution's text and structure."[58] The unitary executive that Alito speaks of is often treated as some kind of theoretical innovation of the Reagan Administration. On the contrary, FDR's Brownlow report made exactly the same claim as the one advanced here, as did Andrew Johnson in the face of the Tenure in Office Act, as did Jackson in the Bank War, as did James Madison in the debates over the removal power in the First Congress.

The tension between the Reagan Administration and Congress over the control of the executive branch came to a head in the case of *Morrison v. Olson*, a case that emerged from one of the many quarrels between the Administration's use of discretionary law enforcement powers and Congress's desire to constrain the President's executive authority.[59] The legal issue arose from an acrimonious dispute between Congress and the President over the Environmental Protection Agency's (EPA's) enforcement of the "Superfund" law that dealt with the clean-up of toxic-waste sites. After the Reagan Administration's Office of Legal Counsel invoked executive privilege in response to Congress's request for documentation of EPA enforcement, the legislature eventually requested the Attorney General to appoint an independent prosecutor to investigate the same issue. Under Title VI of the Ethics in Government Act, the Attorney General, upon receipt of information that he finds to be in potential violation of federal criminal law, is required to conduct a preliminary investigation. Following the preliminary investigation, he reports to a special court, "the special division," to whom he either reports a finding that there are no reasonable grounds for further investigation, or, if there are reasonable grounds, to apply to the special division of the court for the appointment of an independent counsel.[60]

The Reagan Administration's chances of prevailing in court over the independent counsel law seemed good at the time, particularly since the DC Circuit Court had found the independent prosecutor statute to be

58. Committee on the Judiciary, U.S. Senate, "Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States," 109th Cong., 2nd Sess. (2006), https://www.judiciary.senate.gov/imo/media/doc/GPO-CHRG-ALITO.pdf (accessed May 2, 2019).

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

60. Public Law No. 95–521, §§ 601–04, 92 Stat. 1867–1875.

unconstitutional. Employing the term "unitary executive" throughout the decision, the Court of Appeals explained:

> Central to the government instituted by the Constitution are the doctrines of separation of powers and a unitary executive…and yet the independent counsel interprets the appointments clause as if those doctrines were nonexistent. Understanding that the President could not fulfill his constitutional role by himself, the Framers envisioned that the Executive Branch would be divided into departments whose officers would be appointed by the President and who could be removed by Congress only through the impeachment process.[61]

Confident that the Court might finally deliver the blow to the law that the Administration's lawyers had long desired, President Reagan prepared the way with a signing statement to the 1987 reauthorization of the statute that created the position of special prosecutor—later renamed independent counsel.[62] Reagan stated:

> Continuance of these independent counsel investigations was deemed important to public confidence in our government. Nevertheless, this goal, however sound, may not justify disregard for the carefully crafted restraints spelled out in the Constitution. An officer of the United States exercising executive authority in the core area of law enforcement necessarily, under our constitutional scheme, must be subject to executive branch appointment, review, and removal. There is no other constitutionally permissible alternative, and I regret that the Congress and the President have been unable to agree under that framework on a procedure to ensure impartial, forthright, and unimpeded criminal law investigations of high-level executive branch officials.[63]

Unfortunately for Reagan, the Court rejected the arguments challenging the constitutionality of the independent counsel with only one justice dissenting.

In *Morrison*, the main issue the Court addressed was whether the provision for the independent counsel in the Ethics in Government Act violated the separation of powers by interfering with the President's duty to faithfully enforce the laws. Under the independent prosecutor statute, the

61. *In re Sealed Case*, *838 F.2d 476* (1988).
62. Ethics in Government Act Amendments of 1982, Public Law No. 97–409, § 2(a)(1)(A), 96 Stat. 2039.
63. "President Ronald Reagan, Statement on Signing the Independent Counsel Reauthorization Act of 1987, Independent Reauthorization Act of 1987," *The Public Papers of the Presidents of the United States*, Vol. 2, December 15, 1987, p. 1524.

Attorney General's power to remove the officer was limited by the statute's "good cause" restriction despite the fact that the independent prosecutor clearly wielded executive power.[64] Initially, Chief Justice William Rehnquist seemed to follow the Appointments Clause distinction between principal and inferior officers, finding that the independent counsel belonged to the latter.[65] It seemed then that Justice Rehnquist would find that the removal power limitations were justified by the fact that the independent prosecutor was an inferior officer. But the principal/inferior distinction in the opinion turned out to be a minor prelude to Rehnquist's more fundamental distinction. In reviewing the legal issue raised in that case, Rehnquist drew a line between executive officers who wielded *essential* versus *non-essential* executive functions. The Chief Justice concluded that because the independent counsel had a narrow jurisdiction assigned by the special division and no influence on policymaking, the office posed no significant obstacle to the President's "constitutionally assigned duties." The independent prosecutor's powers were non-essential and therefore posed no threat to the President's responsibility to enforce the law. In other words, Congress could limit the President's control over his subordinates as long as it did not limit his power *too much*. The Court avoided tethering itself to any specific legal or constitutional argument for reviewing removal power cases and instead adopted a flexible approach by which it could approach future cases like this on an individual basis. As Rehnquist explained: "The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President," but those past precedents were merely a warning that future courts must prevent Congress from "*unduly* trammel[ing] on executive authority."[66]

Whatever criticism one might have about *Humphrey's Executor*'s distinction between executive and quasi-legislative/quasi-judicial officers, the virtue of that distinction in contrast to the one made in *Morrison* is that the Court's opinion in *Humphrey's Executor* at least paid lip service to the doctrine of the separation of powers by distinguishing the independent regulatory officers from executive ones. The Court's new criteria simply substituted the will of the justices (and Congress) for any principled distinction. Reflecting on the Court's naked departure from that doctrine in *Morrison*, Justice Antonin Scalia (the lone dissenter in *Morrison*) explained in a later case:

64. Ethics in Government Act of 1978, Public Law No. 95–521, §§ 601–04, 92 Stat. 1824, 1867–1875.

65. *Morrison*, p. 703.

66. *Morrison*, p. 691. (Emphasis added.)

> In *Humphrey's Executor v. United States*, we approved the concept of an agency that was controlled by (and thus within) none of the Branches. We seem to have assumed, however, that that agency (the old Federal Trade Commission, before it acquired many of its current functions) exercised no governmental power whatever, but merely assisted Congress and the courts in the performance of their functions.... Over the years, however, *Humphrey's Executor* has come in general contemplation to stand for something quite different—not an "independent agency" in the sense of an agency independent of all three Branches, but an "independent agency" in the sense of an agency *within* the Executive Branch (and thus authorized to exercise executive powers) independent of the control of the President. We approved that concept last Term in *Morrison*.[67]

Scalia was certainly right to note that between *Humphrey's Executor* and *Morrison* there had been a change in the Court's deference to the principle of the separation of powers. However, it is possible to see Rehnquist's argument in *Morrison* as the logical extension of the Court's reasoning all along regarding the IRCs. The IRCs have always been an independent executive in the executive branch. *Morrison* simply made it explicit.

Removal Power in the 21st Century: The Future of the Regulatory State?

Following the Kenneth Starr investigation of President Bill Clinton, Congress finally shelved the independent counsel statute by letting the re-authorization of this provision of the Ethics in Government Act expire in 1999. The Starr investigation proved to many that Rehnquist's distinction between essential and non-essential executive officers was, indeed, naïve. As Justice Scalia predicted in his dissent in *Morrison*, the independent prosecutor provision of the Ethics in Government Act ultimately became a political tool of partisan opposition by which Congress could harass the executive branch. Since then, the Court has been more circumspect about congressional limitations on executive removal power.

In fall 2010, the Supreme Court delivered what appeared to be a major blow to an independent regulatory agency in the case of *Free Enterprise Fund v. Public Company Accounting Oversight Board* (PCAOB).[68] Created under the Sarbanes–Oxley Act of 2002 to oversee the audits of public

67. *Mistretta v. United States*, 488 U.S. 361, 388 (1989).
68. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010).

companies, the PCAOB's five-member panel was appointed by the SEC and could only be removed for "good cause."[69] The petitioners in the case challenged the constitutionality of the PCAOB's structure on the grounds that its board members were insulated from presidential control by two layers of tenure protection: Board members could only be removed by the SEC for good cause, and the commissioners could, in turn, only be removed by the President for good cause.

In an opinion written by Chief Justice John Roberts, the Court held that the PCAOB violated the separation of powers doctrine because the board exercised executive powers without direct accountability to the President: "Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'"[70] Justice Roberts clearly grasped the problem that the commission's structure posed to the balance of powers among the branches: "In a system of checks and balances, power abhors a vacuum, and one branch's handicap is another's strength. Even when a branch does not arrogate power to itself, therefore, it must not impair another in the performance of its constitutional duties."[71]

Surprisingly, the Court did not conclude that the political appointees to the PCAOB actually had to be under the direct control of the President. Rather, Roberts argued that the problem with the PCAOB were the "multilayers of protection"—the fact that it was not *one* but *two* steps removed from the President. Yet, one wonders: If two layers of protection from the President's removal power are unconstitutional, why is one layer any more constitutional? The majority clearly thought that the absence of accountability to the President undermined the President's ability to faithfully enforce the law. However, the Court stopped short of the drastic step of calling for the entire dismantlement of the independent regulatory framework.

In 2016, the federal judiciary grappled again in *PHH Corporation v. CFPB* with the constitutionality of an IRC in a case dealing with the controversial Consumer Finance Protection Board (CFPB). In that case, a three-judge panel for the DC Circuit Court found the limits on the executive removal power over the agency's director to be unconstitutional. But then-judge (now Justice) Brett Kavanaugh's majority opinion for the court engaged in as much trimming as Chief Justice Roberts's opinion for the Supreme Court

69. Public Law No. 107–204, 116 Stat. 745.

70. *Free Enterprise Fund*, p. 498.

71. Ibid., p. 500.

in the PCAOB case.[72] Like Roberts, Judge Kavanaugh found that the removal limitations on the agency's director undermined the separation of powers, but he then concluded that the constitutional problem could be resolved by restructuring the agency with a multi-member body of officers. He stated:

> The overarching constitutional concern with independent agencies is that the agencies are unchecked by the President, the official who is accountable to the people and who is responsible under Article II for the exercise of executive power. Recognizing the broad and unaccountable power wielded by independent agencies, Congresses and Presidents of both political parties have therefore long endeavored to keep independent agencies in check through other statutory means. In particular, to check independent agencies, Congress has traditionally required multi-member bodies at the helm of every independent agency. In lieu of Presidential control, the multi-member structure of independent agencies acts as a critical substitute check on the excesses of any individual independent agency head—a check that helps to prevent arbitrary decision-making and thereby to protect individual liberty.[73]

Given that Kavanaugh's chief criticism of the CFPB was the director's lack of accountability to the President, the remedy here does not really answer the constitutional objection. Just as there is essentially no difference between being one step or two steps removed from presidential control, there is really no difference between a multi-member board and an agency staffed by an individual director when the constitutional issue is political accountability.[74] Both Kavanaugh and Roberts clearly see the problem that independent regulatory commissioners pose to executive branch accountability (if not, why be concerned at all with their relationship to the President?) and neither has any illusion that these regulatory officers are, in fact, wielding anything other than executive power. But in both *PHH* and *PCAOB*, they avoided reaching the necessary conclusion of their reasoning. If indeed the CFPB director and the PCAOB commissioners exercise

72. *PHH Corporation v. CFPB*, No. 15-1177 (DC Cir. 2016). The three-judge panel decision was vacated following a rehearing of the case *en banc* where the DC Circuit concluded 7–3 that there is "no constitutional defect" in the unusual independence that lawmakers granted to the bureau's director: "Congress's decision to provide the CFPB director a degree of insulation reflects its permissible judgment that civil regulation of consumer financial protection should be kept one step removed from political winds and presidential will." *PHH Corporation v. CFPB*, No. 15-1177 (DC Cir. 2018).

73. Ibid.

74. As Justice Breyer wrote in his dissent in the *PCAOB* decision: "But so long as the President is legitimately foreclosed from removing the Commissioners except for cause, nullifying the Commission's power to remove Board members only for cause will not resolve the problem the Court has identified: The President will still be 'powerless to intervene' by removing the Board members if the Commission reasonably decides not to do so." (Breyer dissenting, p. 12.)

executive powers, do they not have to be accountable to the President? In the end, courts ought to conclude by virtue of this reasoning that these limits on the removal power are, in fact, unconstitutional.

Where Do We Go from Here?

Neither Roberts' opinion for the Supreme Court in *PCAOB* nor Kavanaugh's opinion (later dissent, in the *en banc* decision) for the DC Circuit in *PHH* answer the constitutional objection they propose to remedy because there really is no middle ground here. As Scalia explained in his dissent in *Morrison*: "How much power belongs to the executive under Article II? Not some of the executive power, but *all* of the executive power."[75] The President will always be accountable for the enforcement of law because it is the executive alone whose duty it is to see to it that the laws are faithfully executed. As former Director of the Office of Information and Regulatory Affairs, Neomi Rao (now a DC Circuit judge), explains:

> When statutory duties involve a discretionary choice, that choice squarely falls within the execution of the law. Congress can create a statutory duty and assign it to a particular officer; however, the choice of how to execute the law within a range of legally permissible options is part of the executive power, not the legislative power. Discretion is an essential aspect of the executive power and therefore must be amenable to control by the President.[76]

Not every officer in the Administration exercise these discretionary powers. Outside the Senior Executive Service, there are many Civil Service employees who perform ministerial tasks that involve almost no discretion at all. Under the federal Civil Service system, the removal power is significantly limited by certain procedural protections under the Civil Service Reform Act of 1978. It seems that these regulations do not pose a threat to executive accountability (though their contribution to efficient public administration is debatable) because they are confined to employees with ministerial tasks. But the discretionary duties of a political appointee and some career employees do, in fact, pose a serious threat to executive accountability, particularly when their decisions set policy. When Congress delegates these discretionary tasks to the executive, it has determined that

75. 487 U.S. 70.

76. Neomi Rao, "Removal: Necessary and Sufficient for Presidential Control," Alabama Law Review, Vol. 65, No. 5 (July 2014), p. 1213.

the task is an executive one, not legislative.[77] At that point, Congress must relinquish control. By attempting to maintain a foothold in the executive branch vis-a-vis the independent regulatory agencies, Congress ultimately undermines the accountability that defines the separation of powers system.

Today, the independent regulatory framework reaches across a vast portion of the Administration. A sample of the IRCs:

- Interstate Commerce Commission (1887)
- Federal Trade Commission (1914)
- U.S. International Trade Commission (1916)
- Federal Deposit Insurance Corporation (1933)
- Federal Communications Commission (1934)
- Securities and Exchange Commission (1934)
- National Labor Relations Board (1935)
- Social Security Administration (1935)
- National Transportation Safety Board (1967)
- Occupational Safety and Health Review Commission (1970)
- Postal Regulatory Commission (1970)
- Consumer Product Safety Commission (1972)
- Nuclear Regulatory Commission (1974)
- Federal Energy Regulatory Commission (1977)
- Federal Labor Relations Authority (1978)
- Merit Systems Protection Board (1978)
- National Indian Gaming Commission (1988)
- Surface Transportation Board (1995)
- Independent Payment Advisory Board (2010)
- Consumer Financial Protection Bureau (2010)

While some of these IRCs, such as the Social Security Administration and the Indian Gaming Commission, have very narrow jurisdictions, most of the regulatory agencies are responsible for formulating policies whose consequences extend throughout the political and economic landscape of the country. The National Labor Relations Board has immense powers to

77. It would be naive to ignore the fact that Congress delegates many tasks to the executive because it does not want to suffer political accountability for some of the hard choices that must be made in legislation. The challenge today is to find a way to restrain Congress from escaping its duty to make responsible policy decisions, while acknowledging that some tasks are better performed by the executive. The answer does not lie in the creation of IRCs or placing other limits on the President's removal influence over the Administration. In fact, IRCs will only encourage Congress to shirk its duties, and it will exacerbate the problem of the lack of political accountability. Placing these agencies under the removal authority of the President, on the other hand, would improve the process of legislation by giving Congress the proper incentive to assume its constitutional responsibility under the country's separation of powers rather than delegate that power to another agency.

determine hiring practices throughout the nation under its authority to set policy in labor law; the FCC sets policy for radio, television, and wireless communications; the Consumer Product Safety Commission regulates the manufacture and sale of thousands of consumer products. The CFPB's jurisdiction includes a vast array of financial institutions, including credit unions, credit card companies, securities firms, and mortgage-servicing operations. Regardless of whether these agencies are headed by one director or a multi-member commission, they exercise policymaking powers with substantial repercussions for the nation's political and economic future.

Charged with the responsibility of carrying out duties statutorily assigned by Congress, these IRCs are performing an executive function. The Framers determined that the execution of law should be performed by someone accountable to the people who are affected by those decisions. In performing the duties of the executive office, the President depends on a body of subordinates to carry out the duties for which he was elected. As noted earlier, James Madison explained in the First Congress:

> If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community. The chain of dependence therefore terminates in the supreme body, namely, in the people.[78]

As governing becomes an increasingly complex task in the 21st century, it is more important than ever that the executive be directly accountable to the people. Our political institutions need such accountability, and the American people should demand it.

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78. De Pauw, ed., *Documentary History of the First Federal Congress of the United States of America, March 4, 1789–March 3, 1791—Debates II*, p. 925.