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ESSAY

HOW TO THINK ABOUT THE REMOVAL POWER

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In an earlier article titled The Executive Power of Removal*, we contended that Article II gives the President a constitutional power to remove executive officers, at least those who are presidentially appointed. In this Essay, we expand on, and reply to a critique of, that article. We discuss the meaning of the clause vesting "executive Power" in the President and the clause authorizing Congress to make laws "necessary and proper for carrying into Execution" the powers of the federal government. We contend that the former vests authority to remove in the President and the latter does not allow Congress to treat that allocation of authority as a default. We discuss how constitutional developments in the Commonwealth of Pennsylvania—specifically, a 1784 report authored by the Council of Censors—support our understanding of the federal Constitution's text and structure. We also discuss early practice under the federal Constitution—specifically, high-profile instances where presidents removed executive subordinates without Senate participation. These sources and episodes, along with those we discussed in our previous article, support the*

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conclusion that the Constitution confers on the President the authority to remove presidentially appointed executive officers.

INTRODUCTION

Does the President have a constitutional power to remove executive branch subordinates? In a recent article entitled *The Executive Power of Removal*,[1] we joined the Supreme Court[2] in defending the proposition that Article II of the Constitution gives the President authority to remove executive officers, at least those who are presidentially appointed.[3] Without such a power, it is hard to see how the President could exert control—on behalf of an electoral coalition—over the vast American bureaucracy. Without such a power, it is easy to see how a temporary coalition could entrench long-term control over the bureaucracy by creating an officer insulated from presidential control through, for example, the conferral of statutory life tenure with removal only by impeachment. The Constitution's conferral of removal authority on the President thus has a deep and important connection to the concept that electoral majorities should be able to control the executive branch. In our previous article, we focused on historical sources that had embraced the perspective that the President has just such a power of removal.

In this Essay, we reply to a critique of that article—*Removal Rehashed* by Professors Andrea Katz and Noah Rosenblum.[4] We part ways with their analysis in several significant respects. But despite our disagreements, we are grateful for the chance to sharpen our own thinking on these issues. Just as the hammer and the anvil forge the metal, so too in the realm of intellectual discovery the critic forces the author to refine

[1] See Aditya Bamzai & Saikrishna Bangalore Prakash, The Executive Power of Removal, 136 Harv. L. Rev. 1756 (2023).

[2] For recent cases, see Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010); Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020); Collins v. Yellen, 141 S. Ct. 1761 (2021).

[3] See Myers v. United States, 272 U.S. 52 (1926). As explained, we did not address those officials performing functions for the territories and the District of Columbia—where Congress might have greater authority to structure administration. See Bamzai & Prakash, supra note 1, at 1802–18. Moreover, we did not dispute that a non-executive institution, like Congress, can initiate "removal" of an executive officer, say, by impeachment. See U.S. Const. art. II, § 4. And we bracketed the question of whether the President has similar removal authority over inferior officers appointed by others. See Bamzai & Prakash, supra note 1, at 1830–35.

[4] See Andrea Scoseria Katz & Noah A. Rosenblum, Removal Rehashed, 136 Harv. L. Rev. F. 404 (2023).

arguments that would otherwise remain untested. In that spirit, we offer this reply. We continue to believe that, although our theory is not the only one possible, it best fits text, structure, history, and early practice, and is therefore preferable to the alternatives.

In contrast to our views, Katz and Rosenblum reject altogether the notion that the Constitution confers a removal power on the President.[5] Starting from that perspective, they advise that readers "will find little new" in our article[6]—a refrain they repeat so many times and so fixatedly that it takes on the air of a government official advising a passerby to "move on; nothing to see here!"[7] To be sure, if one starts from the premise, as Katz and Rosenblum do, that it is "intellectually indefensible" to believe that Article II grants a presidential removal authority,[8] then we agree: there is nothing to see here. But for those who are more open-minded about one of the most significant (and historically, most debated) questions of the separation of powers, read on.[9] For as we explain below, Katz and Rosenblum misdescribe several of our arguments and several of the underlying sources. The case for a presidential removal power is stronger than they are willing to acknowledge.

Consider, for example, one of Katz and Rosenblum's claims about the historical pedigree of the President's removal authority. They contend that "[t]he historian might wonder why th[e] argument [for an executive power of removal,] if once so widespread, disappeared so quickly."[10] To

[5] As best we can tell, Katz and Rosenblum do not concede that the President has a removal authority that Congress can regulate using the Necessary and Proper Clause. Thus, it appears to us that their view departs from the perspective of those, like Justice Kagan, who believe that the President possesses an indefeasible constitutional power to remove close military or diplomatic advisors, because the absence of such power would impede the President's performance of his constitutional duties. See, e.g., *Seila Law*, 140 S. Ct. at 2233 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

[6] Katz & Rosenblum, supra note 4, at 425.

[7] See id. at 404 ("We are not convinced that the Article says much that is new."); id. ("[I]t was unclear to us which materials were new or what the new materials added."); id. at 406 (arguing that "Bamzai and Prakash's argument is not new"); id. at 416 (claiming that our argument "largely rehashes old arguments with old sources"); id. at 417 ("We are unsure what Bamzai and Prakash believe is new about their argument.").

[8] Id. at 405.

[9] Of course, feel free to read *The Executive Power of Removal* too.

[10] Katz & Rosenblum, supra note 4, at 416. Parenthetically, as anyone familiar with history knows, arguments can come and go, such that even if an argument disappeared at some point, it would not necessarily dispose of a claim that the argument existed in, for example, the eighteenth and early nineteenth centuries. At any rate, Katz and Rosenblum's assertion that our claim "disappeared" is contradicted by the very source that they cite.

support their claim that the argument for a removal power "disappeared so quickly," Katz and Rosenblum rely on a quotation from a 1916 book by Frank Goodnow providing that courts "have held that [the Vesting Clause] has little if any legal effect, and that for the most part it is to be explained by the powers which are later specifically mentioned."[11] But Katz and Rosenblum's use of this quotation does not properly characterize Goodnow. Two pages after the quoted language, Goodnow explained that the "practice" with respect to removal is "that the President has the power to remove arbitrarily almost all civil officers of the United States, not judges. This power has been recognized as belonging to the President as a part of the executive power granted to him."[12] Rather than demonstrating the "disappearance" of an "executive power of removal," Goodnow's 1916 book demonstrates how into the twentieth century, it was widely recognized that Article II conferred removal power on the President.[13] Professor Goodnow once remembered what some modern historians have forgotten.

[11] Id. at 416 n.94 (quoting Frank J. Goodnow, Principles of Constitutional Government 88–89 (1916)).

[12] Here is Goodnow's paragraph, which we quote in its entirety to allow readers to assess the relevant context:

> The United States Constitution, as we have seen, vests the executive power in a President. The meaning of the power thus granted is, however, to be obtained from the powers subsequently specifically enumerated. These are:
>
> 1. The power to appoint all officers of the government except inferior officers, who, if so provided by law, may be appointed by their superiors or by the courts. This power, where not otherwise provided by law, is to be exercised with the approval of the Senate. No mention is made in the Constitution of any power of removal from office. All that is said with regard to the termination of office is contained in the provision with regard to impeachment, which is applicable to all civil officers, and that giving the judges a term of office during good behavior. The practice is, however, that the President has the power to remove arbitrarily almost all civil officers of the United States, not judges. This power has been recognized as belonging to the President as a part of the executive power granted to him.

Frank J. Goodnow, Principles of Constitutional Government 91 (1916). As this language makes clear, Katz and Rosenblum simply misinterpret Goodnow. Even while questioning whether other presidential powers derived from the Vesting Clause, Goodnow plainly acknowledged that the executive power was thought to encompass removal. (We leave to one side the question of whether a 1916 disappearance would count as "quickly" following the Constitution's adoption.)

[13] In a 1905 book, Goodnow foreshadowed the perspective that he explicitly articulated in 1916. See Frank J. Goodnow, The Principles of the Administrative Law of the United States (1905). There, Goodnow described "the interpretation of the constitution made by the first Congress relative to the President's power of removing officers" as having been "that the power of removal was a part of the executive power, and therefore belonged to the President." Id. at 76. He claimed that this was "the recognized construction of the constitution" until the

As we discuss below, this is not the only occasion where we part ways with Katz and Rosenblum's characterization of our article or the underlying sources. Specifically, they spend a significant portion of their response on the question of removal under the Pennsylvania Constitution—claiming, for example, that "Pennsylvania's charter made no mention of executive removal"[14] and that a 1784 report by Pennsylvania's Council of Censors "probably means nearly the opposite" of our characterization of it.[15] Respectfully, we disagree. Katz and Rosenblum fail to recognize that the Pennsylvania Supreme Court explained at an early date that, despite the Pennsylvania Constitution's silence, "it has been generally supposed, that the power of removal rested with the Governor, except in those cases where the tenure, was during good behavior."[16] And they bury in a footnote a concession that a passage in the Censors' Report "might be read to suggest that the Censors believed removal was 'an executive power' and so support Bamzai and Prakash's argument."[17] As we explain at length below, their concession is appropriate; the Censors' Report supports our position. And the early history of gubernatorial removal in Pennsylvania is itself a fascinating case study with parallels to federal removal practice.

In addition, Katz and Rosenblum claim we were mistaken to rely on data from a study by the political scientist Carl Fish to show how often presidents removed executive subordinates in the early Republic. They claim that many such removals occurred on appointment of a successor, because for positions requiring Senate advice and consent, "removal was incident to appointment: the appointment and confirmation of someone new removed the previous officeholder."[18] But leaving to one side that

Civil War. Id.; see also id. at 77 (remarking that, after the repeal of the limits on presidential removal imposed by the Tenure of Office Act, "the early interpretation of the constitution must be regarded as the correct one at the present time" and describing the conferral of removal authority on the President as having "been of incalculable advantage in producing an efficient and harmonious national administration"). We might part ways with some of the details in Goodnow's account, and we take no position on whether Goodnow expressed different views in other writings that we have not mentioned. At a minimum, however, these discussions from Goodnow's 1905 and 1916 books flatly contradict Katz and Rosenblum's assertion that the concept of an executive power of removal "disappeared . . . quickly." Katz & Rosenblum, supra note 4, at 416.

[14] Katz & Rosenblum, supra note 4, at 407 (citing Pa. Const. of 1776, §§ 20, 22–23, 30, 34).

[15] Id. at 417–18.

[16] Commonwealth ex rel. Lehman v. Sutherland, 3 Serg. & Rawle 145, 149 (Pa. 1817).

[17] Katz & Rosenblum, supra note 4, at 420 n.111.

[18] Id. at 421. As an initial matter, Katz and Rosenblum suggest that removals that occurred upon the appointment of a successor did not happen "in the way Bamzai and Prakash use the

nothing in our claim turns on Fish's precise number of removals (which we did not even cite), we explain below that, in high-profile instances, presidents removed executive subordinates without Senate participation. Katz and Rosenblum's theory of removal-by-appointment fails to explain such removals. And as demonstrated by the at-pleasure commissions conferred on executive branch officials, along with statements by executive branch officers, it was certainly the view of many that presidents could unilaterally remove.

Our Essay proceeds as follows. In Part I, we set forth the analytical framework for a presidential removal power. At the risk of "rehashing"—which we now understand to be strictly *verboten*—we rely upon some of the same material we previously surfaced in *The Executive Power of Removal*. In Part II, we turn to a significant state-law antecedent to the federal Constitution—removal in the context of the Pennsylvania Constitution. This portion of the Essay introduces "new" sources and arguments from one State that might have played a role in the drafting of the federal Constitution.[19] In Part III, we address the role of early federal practice. Finally, in Part IV, we address some overarching methodological points.

I. AN ANALYTICAL FRAMEWORK FOR THE REMOVAL POWER

Authors of legal text often borrow terminology and concepts to convey legal meaning. The drafters of Article II were no different. They borrowed terms that had been elsewhere used, thereby copying preexisting conceptions of the executive in some ways. But they also departed from preexisting conceptions of the executive in other ways. The final text that they adopted gives rise to a series of questions: Did the conferral of "executive power" grant the President substantive authority or merely convey a title to a single official? If some substantive authority was conferred, did that include the authority to remove subordinates in the executive branch? And if the President had a removal power, could Congress encumber it? We address these three questions.

term in their Article." Id. at 422. But that misdescribes our article, which purposefully did not take a position on how removal had to be accomplished. Cf. Bamzai & Prakash, supra note 1, at 1787 (discussing issues that might arise due to a dispute over the timing of a removal).

[19] We use the word "new" with some trepidation, given how hawkishly it appears some of our interlocutors police that language.

A. "Executive Power"

Did the conferral of "executive power" grant the President substantive authority?

Article II begins with the following language: "The executive Power shall be vested in a President of the United States of America."[20] The question of whether this provision—the Vesting Clause—confers substantive powers beyond those specifically listed in Article II is a significant one.

As we discussed in our article,[21] there is ample evidence that the use of the term "executive Power" in this provision was intended to confer specific substantive powers. Consider, first, the implications from founding-era state constitutions. Some state constitutions expressly granted certain powers to their executives, then "other executive powers"—thereby indicating that a broader category of executive powers, in addition to those specifically listed, had been conveyed. For example, Delaware granted the power to appoint, pardon, and lay embargoes *and* "all the other executive powers of government."[22] Other state constitutions granted "executive powers" with exceptions. For instance, the Georgia Constitution of 1776 said that the governor "shall . . . exercise the executive powers of government . . . save only in the case of pardons and remission of fines."[23] The exception for "pardons" was necessary because the Georgia Constitution's drafters evidently believed that the pardon power would otherwise be included in the grant of "executive powers." The Virginia Constitution also granted "executive powers of government" to the governor and executive council of state.[24]

Consider, next, the drafting of the Constitution. At the Constitutional Convention, the Virginia Plan sought to grant the "[e]xecutive rights" of

[20] U.S. Const. art. II, § 1.

[21] Bamzai & Prakash, supra note 1, at 1764–65.

[22] Del. Const. of 1776, art. VII; see also Md. Const. of 1776, art. XXXIII (similar); N.C. Const. of 1776, art. XIX (similar).

[23] Ga. Const. of 1777, art. XIX.

[24] Va. Const. of 1776, ch. II, § 9. A broad carveout denied the governor "any power or prerogative" that derived from "any law, statute, or custom," of England. But this carveout had its own exception. "But he shall [with the consent of the council of state] have the power of granting reprieves and pardons." Again, the pardon power was perceived to be part of the package of "executive powers of government." The 1776 South Carolina Constitution had a similar grant, but different carveouts. The "president and commander in chief" had "executive authority." S.C. Const. of 1776, art. XXX. But the president and commander in chief could not "make war or peace or enter into any final treaty." If the executive authority did not normally include such powers, there was no need to impose the constraint.

the Continental Congress to the proposed national executive—thereby indicating that the Plan's authors understood that some of the Continental Congress's powers were executive and proposed transferring them to the President.[25] The proposal made sense only if "executive powers" had some content. Many others spoke of "executive power" in this fashion.[26]

Consider, specifically, a particular authority widely understood to be an "executive power": appointments. While discussing a plan for the Constitution, James Madison said that it was not "absolutely necessary" to include an explicit appointment authority because a provision that "instituted" a "national Executive" "perhaps included" "certain powers [that] were in their nature Executive"—such as appointments.[27] This observation made sense only if Madison—as well as his listeners—believed that the creation of an executive implicitly conferred certain powers, including appointment, on the persons designated the "executive."

Against this backdrop, Katz and Rosenblum have three principal responses. First, they claim that, although "[s]tate constitutions did often give the head of the executive some powers of appointment," "they exhibited wide variation there."[28] That is true, but misses the mark. To say that appointment authority is part of the "executive power" does not mean that *all* the "executives" with which the authors of the Constitution were familiar possessed the right to appoint *all* officers. As we explained in our article, state constitutions frequently lodged appointment authority outside the executive branch or created elected subordinate executives.[29] Such variation, however, does not refute the claim that appointment, and other authorities, were considered part of the "executive power." The critical point is that these administrative schemes were widely understood as vesting "executive power"—in the form of the appointing function—in entities that were not perceived as executive. Thus, a legislature could have some share of the executive power of appointing. Many raised this

[25] 1 The Records of the Federal Convention of 1787, at 21 (Max Farrand ed., 1966).
[26] See Bamzai & Prakash, supra note 1, at 1764–68.
[27] See 1 The Records of the Federal Convention of 1787, supra note 25, at 67.
[28] Katz & Rosenblum, supra note 4, at 407.
[29] See Bamzai & Prakash, supra note 1, at 1769.

point in the ratification debates.[30] Various state constitutional drafters and state officials echoed the point.[31]

Under this conception, appointment remained an "executive power" even when state constitutions lodged a portion of that power in the legislature (through legislative appointments), in the people (through elections), or in a plural executive. To illustrate this point, we will discuss constitutional debates from one relevant state—Pennsylvania—below.[32] But for present purposes, it suffices to note that examples of the vesting of an "executive power" of appointment in a non-executive do not—without more—alter or disprove the background understanding that appointments were an "executive power."

Second, Katz and Rosenblum *appear* to suggest that the Executive Power Vesting Clause does not confer substantive authority. We say "appear" because they are inconsistent on this point. On the one hand, they claim that "a veritable library of sources" supports the proposition that the "executive Power" was an "Empty Vessel" with no substantive component whatsoever.[33] Thus, they claim that "executive power was not understood to have positive subject-matter content," was "a substantively empty vessel," and "has no substantive content."[34] On the other hand, they concede that the concept of "executive power" might have included law execution and "the power to appoint assistants to help with implementation, although this implication was contested."[35]

In straddling this chasm, Katz and Rosenblum borrow from the work of Professor Julian Davis Mortenson.[36] Although Mortenson has never

[30] See, e.g., Federal Farmer No. 14 (arguing that legislatures should have a share of "executive power" by being able to appoint to some offices); Hampden, Pittsburgh Gazette, (Feb. 16, 1788), *reprinted in* 2 Documentary History of the Ratification of the Constitution 663, 667 (John P. Kaminski et al. eds., 1976) (arguing that the most important executive power—appointment—was shared with the Senate).

[31] See, e.g., Committee Report, Pennsylvania Council of Censors (Aug. 11, 1784) ("[T]he appointment of officers is an executive prerogative . . . .").

[32] See infra Part II.

[33] Katz & Rosenblum, supra note 4, at 423–24 (quoting Julian Davis Mortenson, The Executive Power Clause, 168 U. Pa. L. Rev. 1269, 1334 (2020)).

[34] Id.

[35] Id.

[36] Katz and Rosenblum chide us for "fail[ing] to engage with [Professor Mortenson's] central argument" that the "executive power" is an "empty vessel." Id. But their criticism misdescribes our article, which devotes a section to citing sources saying that the executive power had a substantive component. In that section, we did not repeatedly mention Professor Mortenson by name, but our sources addressed his "empty vessel" theory. Katz and

discussed removal in his articles,[37] he has similarly argued, on the one hand, that the "executive power" was an "empty vessel" and, on the other, that it included "law execution"; might have included "appointments"; and embraced a set of "disaggregated" powers.[38]

But it does not take great brilliance to identify the deep tension in the twin claims that the "executive power" was an "empty vessel" and, at the same time, might have included "law execution," the "power to appoint assistants," or other "disaggregated" powers. One claim or the other must give way. Either the "executive power" is an empty vessel, or it includes the power to appoint. Both claims cannot be true.

Which one is true? Contrary to Katz and Rosenblum's characterization that "a veritable library of sources" supports the claim that "executive power" is an "empty vessel," no sources contemporaneous with the Constitution's adoption use that terminology.[39] Instead, the "empty vessel" characterization is an erroneous gloss on certain sources that describe executive power as including "law execution," or not being dangerous, or being generally subject to legislative control.[40] But none of those assertions contradict our claim that the term "executive power" was used in a manner indicating it had substantive content. For instance, as we have already noted, many state constitutions expressly vested "other executive powers," a usage contrary to a claim that executive power was an empty vessel or merely covered law execution.

Third, Katz and Rosenblum focus on the timeline of various alterations to Article II during the Constitution's drafting,[41] noting that "not until the Electoral College was invented were delegates comfortable defining the

Rosenblum do not acknowledge any of the sources that we cited, even while claiming that we "have offered no response." Id. at 425.

[37] Despite Mortenson's silence on the topic, Katz and Rosenblum do not point out that Mortenson's articles never once mention removal. Instead, they contend that Mortenson "finds that executive power has no substantive content" and the "implication is that Congress can . . . restrict[] the President's power of removal." Katz & Rosenblum, supra note 4, at 424. But as we discuss immediately below, Mortenson concedes that, despite supposedly having "no substantive content," the "executive power" might include, for example, a power to appoint. Given this concession, it is by no means a fair "implication" from his argumentation that the President lacks a power to remove.

[38] Mortenson, supra note 33, at 1271, 1273, 1278, 1325, 1329–33, 1364–65; see Bamzai & Prakash, supra note 1, at 1765 n.56 (highlighting this tension).

[39] At least Mortenson does not cite any. See generally Mortenson, supra note 33.

[40] See id. at 1334–45.

[41] Katz & Rosenblum, supra note 4, at 408 (claiming that an executive power of removal "is inconsistent with what [they] know of how the Philadelphia Convention unfolded"). As explained in the text, Katz and Rosenblum make no showing of any such "inconsistency."

President's powers, and even these underwent some alterations in the final stretch."[42] We do not see why this claim unsettles our argument.

Katz and Rosenblum's argument relies on two premises: (1) that "[i]n designing the presidency, the Framers did not assume a set of powers that were fixed and known in advance"; and (2) that "[t]he Constitution's eventual distribution of authorities depended . . . also on practical give-and-take during the negotiations" and the Framers thus "mixed and matched powers to achieve their governance aims" and "tweaked past arrangements into something new."[43]

We agree that the Convention's allocations of powers were not "fixed and known in advance," that the Framers "mixed and matched" executive powers, and that the Constitution "tweaked past arrangements into something new." The Convention drafted a new constitution, rather than simply ratifying a preexisting order. Of course, politics played a sizable role. But theory informed which allocations were ideal and which were pernicious. And theory informed how the Constitution would be received by the public outside the Convention. For instance, the Constitution split the executive power of appointment between the President and the Senate—giving the former the power to nominate and appoint and the latter the power of "[a]dvice and [c]onsent" to the nomination.[44] But the Framers' discussion of the Appointments Clause during the ratification debates makes abundantly clear that this approach was understood to lodge a portion of the "executive power" in the Senate.[45] That understanding was possible only if the participants to the debate had some preexisting notion of "executive power" that included appointments.

If what Katz and Rosenblum mean is that executive power had no content or no assumptions about its shared meaning, the usage proves otherwise—and the timeline does not advance their cause. The mere fact that certain bargains about the presidency might have been struck late in the Convention says nothing about the set of understandings the drafters shared on the meaning of terms like vetoes, pardons, treaties, and appointments. Indeed, only with a shared understanding could any sensible discussion of allocation of power occur. Even though the margins

[42] Id. at 409.

[43] Id.

[44] U.S. Const. art. II, § 2, cl. 2.

[45] The Federalist No. 47, at 305 (James Madison) (Clinton Rossiter ed., 1961) (remarking that "the appointment to offices . . . is in its nature an executive function"); see Mortenson, supra note 33, at 1325–32.

might be disputed, contemporaries understood the existence of a category of powers long associated with executives. As Madison's remarks during the Convention made clear, the Framers started from a conception of the cluster of powers—including appointments—that they characterized as "executive." The Virginia Plan likewise assumed that certain powers were "executive" because it proposed transferring the Continental Congress's "executive rights"—executive powers by another name—to the new executive.

B. Removal

Did the Executive Power Vesting Clause convey authority to *remove* executive officers? In our view, and the views of many around the time of the Constitution's adoption, it did. That conception derived from an abstracted notion of the "executive power" that included a power to remove executive officers based on practices with which the Constitution's authors were familiar, such as the British Crown's issuance of at-pleasure commissions to many officers and state constitutional practice.[46] Take, for example, the views of Virginia Governor Thomas Jefferson, who wrote that the "power of appointing and removing executive officers [is] inherent in [the] Executive."[47] That did not mean that every executive had a power of removal. As with appointments, a constitutional framework *could* depart from the backdrop understanding by allocating an "executive power" like removal elsewhere, such as to the legislature.

During ratification, many assumed that the Constitution authorized removal. Some believed that the Senate and the President together possessed that power, on the theory that the Constitution transferred "executive power" to the Senate, which jointly appointed to office along with the President. For example, as we described in our article, Federalist No. 66 adopted the approach that those who appoint may also remove. Publius wrote of a "practice, which is to be seen in all the State governments, if not in all the governments with which we are acquainted: [the practice] of rendering those who hold offices during pleasure,

[46] Bamzai & Prakash, supra note 1, at 1764–70; see Kenton J. Skarin, Our Captain General and Governor in Chief: Executive Power over Lower Officials in Colonial America 131, 135, 154, 178–80 (unpublished manuscript) (on file with authors).

[47] Notes Concerning the Right of Removal from Office (1780), *in* 4 The Papers of Thomas Jefferson: Main Series 281, 281 (Julian P. Boyd ed., 1951).

dependent on the pleasure of those who appoint them."[48] Katz and Rosenblum respond that Publius's statement does not encompass "all officers" and assume that we meant it to cover all officers.[49] But we never said that Publius described at-pleasure removal as applying to "all officers";[50] after all, many officers enjoy good behavior tenure.[51]

Others said that the President could remove alone. Consider a source we cited, Luther Martin's *Genuine Information*, a speech delivered to the legislature of the State of Maryland.[52] Martin's remarks on removal appeared in a long discussion about the perils of the Presidency. According to the *Genuine Information*, Martin said the following:

> In fine, it was urged [at the Constitutional Convention], that the President, as here constituted, was a king, in every thing but the name; that, though he was to be chosen but for a limited time, yet at the expiration of that time, if he is not re-elected, it will depend entirely upon his own moderation whether he will resign that authority with which he has once been invested; that, from his having the appointment of all the variety of officers, in every part of the civil department for the Union, who will be very numerous, in them and their connexions, relations, friends, and dependents, he will have a formidable host, devoted to his interest, and ready to support his ambitious views. That the army and navy, which may be increased without restraint as to numbers, the officers of which, from the highest to the lowest, are all to be appointed by him, and dependent on his will and pleasure, and commanded by him in person, will, of course, be subservient to his

[48] See The Federalist No. 66, at 404 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also The Federalist No. 77, at 459 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It has been mentioned as one of the advantages to be expected from the co-operation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint.").

[49] Katz & Rosenblum, supra note 4, at 422.

[50] Bamzai & Prakash, supra note 1, at 1771–72.

[51] See, e.g., id. at 1769.

[52] Luther Martin, Genuine Information, Md. Gazette & Balt. Advertiser (Dec. 28, 1787), *reprinted in* 3 The Records of the Federal Convention of 1787, at 172, 172 (Max Farrand ed., 1966). Martin was the Attorney General of Maryland at the time and served as a delegate to the Philadelphia Convention. Bamzai & Prakash, supra note 1, at 1772. He did not sign the Constitution, however, and became a leading Anti-Federalist. Id. He was a significant lawyer of the Founding generation, who decades later argued *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), on behalf of Maryland.

> wishes, and ready to execute his commands; in addition to which, the militia also are entirely subjected to his orders.[53]

Martin's remarks are illustrative of the views of many of the generation that adopted the federal Constitution.[54] Yet Katz and Rosenblum have nothing to say about Martin's remarks—which are directly on point, were made by a prominent lawyer of the Founding generation, and were widely circulated at a moment when the Constitution was being considered.[55]

Instead, Katz and Rosenblum stress that the Constitution does not contain an express provision addressing presidential removal. That is true. But it also is not dispositive. If a conferral of "executive power" included removal authority, then the Executive Vesting Clause granted a power of presidential removal. Demanding an express provision on removal is much the same as demanding an express provision about establishing corporations: no such provision was necessary if the Constitution elsewhere granted authority.[56]

We agree entirely with Katz and Rosenblum that the authors of the Constitution *could* have lodged the power to remove executive officers in other hands, say with the President and the Senate concurrently, just as they lodged the power to appoint.[57] But the fact that they *could have* lodged removal elsewhere does not mean that they *did*. As Madison observed, the Constitution created certain exceptions to the executive

[53] 3 Farrand, supra note 52, at 218.

[54] Although Martin did not tie his point about removal to any particular clause, he likely derived his principle from the Vesting Clause or the Appointments Clause. He elsewhere spoke of a power to remove that was not limited to military officers. Luther Martin, Number III. To the Citizens of Maryland, Md. J. (Mar. 28, 1788), *reprinted in* 3 Farrand, supra note 52, at 295, 296. Moreover, the discussion quoted above followed several sentences about appointments, thus suggesting that Martin was not relying on the Commander-in-Chief Clause. And in discussing the Commander-in-Chief Clause, Martin did not address appointments or removal, which he turned to only after discussing the Appointments Clause and the pardon power. In any event, the most prominent Commander in Chief lacked authority, *ex officio*, to remove officers. See Bamzai & Prakash, supra note 1, at 1824–26; Saikrishna Bangalore Prakash, Deciphering the Commander-in-Chief Clause, 133 Yale L.J. 1, 32 n.143, 58–59, 74 (2023).

[55] We might also add that the remarks from Martin that we have highlighted are "new" in that they had not been cited in the context of removal debates in prior scholarship.

[56] See, e.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[57] See Katz & Rosenblum, supra note 4, at 410 (noting that the fact that "removal was understood to be an executive power tells us nothing about whether the Framers intended to lodge it in the President, Congress, or a combination thereof"). Indeed, we have previously noted that "[t]he content of 'executive power' was conceptually distinct from who wielded it." Bamzai & Prakash, supra note 1, at 1767.

power—such as the Senate's check on appointments.[58] But they did not create such a check on removals and, hence, the President enjoyed such power under the Constitution itself.

Katz and Rosenblum also emphasize that it was "simply not the case that, as a group, state constitutions specified that the executive enjoyed the power of removal."[59] But, again, that claim is not dispositive if removal was considered an "executive power," with state constitutional departures from that intellectual framework understood to vest the executive power of removal in another entity. Put slightly differently, the authors of the federal Constitution borrowed and relied upon a conception of "executive power" from existing usage. In allocating that power, they granted some power to the executive and required the Senate's consent. They allocated certain executive powers to Congress, to be exercised by ordinary legislation. And they left some such power solely with the President.

The federal Constitution created a stronger President than existing state executives. Katz and Rosenblum acknowledge this point,[60] but claim that "[t]his self-conscious break offers reason to suspect that Article II would not simply import state constitutional ideas about the content of executive power."[61] Here, we disagree. The authors of the federal Constitution borrowed "state constitutional ideas about the content of executive power," and more general ideas about the meaning of executive power, including British concepts. The fact that they departed from existing frameworks on the question of where to *allocate* those executive powers does not mean that they departed from the existing understanding of the *content* of the power.

As a result, when Congress debated removal in 1789, it did not write on a blank slate or discuss a theretofore unexplored issue. Madison's famous remarks on removal during the First Congress drew upon this wealth of materials and practices. As he put it: "Is the power of displacing an executive power? I conceive that if any power whatsoever is in its

[58] Congressional Intelligence. House of Representatives, Daily Advertiser (N.Y.C.), June 18, 1789, *reprinted in* 12 The Papers of James Madison: Congressional Series 225, 228 (Charles F. Hobson & Robert A. Rutland eds., 1979).

[59] Katz & Rosenblum, supra note 4, at 408.

[60] They note that "[t]he new Federal Constitution redressed this imbalance by explicitly departing from state constitutions to create a stronger President." Katz & Rosenblum, supra note 4, at 408; see Gordon S. Wood, The Creation of the American Republic, 1776–1787, at 467 (1998).

[61] Katz & Rosenblum, supra note 4, at 408.

nature executive it is the power of appointing, overseeing, and controlling those who execute the laws."[62] On this view, the executive power was about appointing, supervising, and removing those who execute the law. Without these authorities, the President's power to execute the law did not exist. That is why Madison, and many others, believed that the Constitution granted the President the power to remove officers.

C. The Necessary and Proper Clause

Does the Constitution authorize Congress to divest or limit the President's removal power?

Unlike several state constitutions of the founding era, Article II does not specify or suggest that appointment or removal are default allocations from which Congress can depart. By contrast, as we pointed out,[63] several state constitutions conferred a removal authority on the executive, but made clear that such conferral was a default from which the legislature could depart. For example, the Delaware Constitution of 1776 provided that Delaware's "president" could "appoint, during pleasure, until *otherwise directed by the legislature*, all necessary civil officers not hereinbefore mentioned."[64] Similarly, the South Carolina Constitution of 1778 said that "the governor and commander-in-chief, with the advice and consent of the privy council, may appoint during pleasure, until *otherwise directed by law*, all other necessary officers, except such as are now by law directed to be otherwise chosen."[65]

Katz and Rosenblum respond that "neither constitution actually assigned the executive the power of removal."[66] But this misconstrues both (1) the relevant constitutional provisions and (2) our argument. True, the two constitutions do not say who may remove at pleasure. But the context signals that it was the executive who could remove at pleasure.[67]

[62] Congressional Register (June 16, 1789), *reprinted in* 11 Documentary History of the First Federal Congress 868 (Charlene Bangs Bickford et al. eds., 1992) (statement of Rep. Madison); see also Daily Advertiser (N.Y.C.), June 18, 1789, *reprinted in* 11 Documentary History of the First Federal Congress 846 (Charlene Bangs Bickford et al. eds., 1992) (providing a similar account of Madison's remarks).

[63] See Bamzai & Prakash, supra note 1, at 1784.

[64] Del. Const. of 1776, art. XVI (emphasis added).

[65] S.C. Const. of 1778, art. XXXII (emphasis added).

[66] Katz & Rosenblum, supra note 1, at 407.

[67] Although we cannot fully analyze the practices within the states, we note that Delaware's executive granted at-pleasure commissions to officers. See, e.g., 2 Delaware Archives:

Moreover, the use of the terminology "at pleasure" established the removal rule that the executive would follow as a *default*—"until otherwise directed by" the law or legislature.

Katz and Rosenblum also misunderstand our reason for citing these provisions. The section of our article that they cite did not rely on those provisions as models for a presidential removal power, but rather to *contrast* the structure of the federal Constitution with the Delaware and South Carolina provisions. As we put it, "[c]onsider the *stark contrast* with some state constitutions and their treatment of removal"—pointing to Delaware and South Carolina.[68] As suggested by our use of the phrase "stark contrast," our point was that the Delaware and South Carolina provisions were relevantly *different* from the federal Constitution. The provisions made clear that the state legislature could "direct" by law a different allocation of the removal authority. The federal Constitution does not contain similar language authorizing Congress to depart from the Constitution's allocation of the removal power. Katz and Rosenblum simply misunderstand our reason for citing these provisions.[69]

The only Clause that could possibly be read to grant Congress authority to treat allocations of powers as defaults is the Necessary and Proper Clause. It is the provision that many have relied on to argue that, even if Article II confers a removal power on the President, Article I allows Congress to regulate the removal power. But as we argued, the Necessary and Proper Clause does not allow Congress to treat allocations of authority as defaults.[70]

Military and Naval Records 991, 992 (1912) (Gov. John McKinly granting at-pleasure commission); id. at 1005 (Gov. Caesar Rodney granting at-pleasure commission).

[68] See Bamzai & Prakash, supra note 1, at 1784 (emphasis added).

[69] Katz and Rosenblum further claim that our "argument is perplexing in light of Prakash's own earlier work" indicating that "many delegates at Philadelphia were quite critical of state arrangements" and "thought the existing state constitutions had overly empowered legislatures at the expense of the executive." Katz & Rosenblum, supra note 4, at 408. But there is no warrant whatsoever to find our argument "perplexing" in this respect. Again, Katz and Rosenblum misunderstand that we were "contrast[ing]" the federal Constitution with state provisions that empowered legislatures to depart from a default allocation of removal. Bamzai & Prakash, supra note 1, at 1784.

[70] Consider the following hypothetical: What if the Constitution contained the same provisions, but without a Necessary and Proper Clause? Would the arguments for the allocation of the removal power change in any meaningful respect? As we discuss below, Pennsylvania's 1790 Constitution had this basic structure—and the prevailing perspective in that Commonwealth was that the Governor possessed a removal power. Our argument is that the addition of a "necessary and proper" provision would not have changed the Pennsylvania Constitution's allocation of executive power.

Our argument with respect to removal parallels the argument of the Supreme Court with respect to judgments and Article III's "judicial Power." Consider Article III's conferral of the authority to issue final judgments on Article III courts. In *Plaut v. Spendthrift Farm, Inc.*,[71] the Court held that a statutory provision that "require[d] federal courts to reopen final judgments in private civil actions" violated the "judicial Power" vesting clause in Article III.[72] Somewhat similar to the "executive Power" vesting clause of Article II, Article III's vesting clause provides that "[t]he judicial Power of the United States, shall be vested" in courts established under Article III.[73] In general, as the Court has explained, "the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts."[74] In *Plaut*, the United States' brief, defending the statute, cited the Necessary and Proper Clause to justify the reopening of the judgment.[75] But the Court held that Congress could not use the Necessary and Proper Clause to divest Article III courts of the power to issue binding judgments. In a nutshell, Congress cannot change some constitutional allocations of the separation of powers—including the President's power to remove executive officials.

II. THE VIEW FROM ONE STATE—PENNSYLVANIA

Katz and Rosenblum spend a fair amount of space addressing removal in the context of the Pennsylvania Constitution.[76] They observe that "Pennsylvania's charter made no mention of executive removal and instead specified multiple times that the Assembly enjoyed removal power over certain officers."[77] But their account does not reflect the reality of removal in the Commonwealth. For instance, in 1817, the Pennsylvania Supreme Court explained that despite this silence, "it has been generally supposed, that the power of removal rested with the

[71] 514 U.S. 211 (1995).
[72] See id. at 213.
[73] U.S. Const. art. III, § 1.
[74] Hanna v. Plumer, 380 U.S. 460, 472 (1964).
[75] See Brief for United States as Amicus Curiae at 24, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) (No. 93-1121).
[76] See Katz & Rosenblum, supra note 4, at 407, 417–20.
[77] Id. at 407 n.24 (citing Pa. Const. of 1776, §§ 20, 22–23, 30, 34).

Governor, except in those cases where the tenure, was during good behaviour."[78]

Katz and Rosenblum take particular issue with a sentence in our article observing that Pennsylvania's Council of Censors, in a 1784 report, noted "that removal was an 'executive power' and that many officers served 'at pleasure.'"[79] They claim that "the Censors' report probably means nearly the opposite" of our claim, because "the full passage in question recognizes the existence of officers who do not serve at the executive's pleasure."[80] But buried deep in a page-long footnote in Katz and Rosenblum's response, one learns that the Report says *exactly* what we said it did. As they put it, the passage in the Censors' Report on which we relied "might be read to suggest that the Censors believed removal was 'an executive power' and so support Bamzai and Prakash's argument."[81] Their footnote correctly quotes the Report as saying the following: "Resting therefore, on our [namely, the Censors'] principle that this [namely, the general assembly's authority to remove justices of the peace] is an executive power, put out of its proper place, we construe it literally, and carry it not beyond the words."[82] After an extended discussion, Katz and Rosenblum effectively concede they have no sound explanation for the Censors' language. As they put it—again, buried in the same footnote—"perhaps the whole thing [i.e., the Censors' reasoning] is confused."[83] Thus, in the space of a few paragraphs, Katz and Rosenblum

[78] Commonwealth ex rel. Lehman v. Sutherland, 3 Serg. & Rawle 145, 149 (Pa. 1817).

[79] Katz & Rosenblum, supra note 4, at 417 (quoting Bamzai & Prakash, supra note 1, at 1769–70).

[80] Id. at 417–18. As an initial matter, Katz and Rosenblum's characterization is mistaken in two ways. First, the relevant passage from the Censors' Report does not quite recognize that the executive may not remove some executive officers. It merely discusses the circumstances under which the legislature may remove justices of the peace. See A Report of the Committee of the Council of Censors 60–61 (Philadelphia, Francis Bailey 1784). We have never claimed that only the executive could remove executive officers. For instance, Congress, via impeachment, can remove civil executive officers. See U.S. Const. art. II, § 4. Second, even if the passage is best read as saying that the executive may not remove justices of the peace, that hardly establishes "nearly the opposite" of our claim—which was limited to the point that the executive power was understood to encompass the authority to remove executive officers at pleasure, not that every executive had authority to remove every officer. For instance, the President cannot remove Article III judges. See U.S. Const. art. III, § 1. At any rate, the Censors' Report is fully consistent with the claim that the President has constitutional authority to remove executive officers.

[81] See Katz & Rosenblum, supra note 4, at 419 n.111.

[82] See id.

[83] See id.

move from (1) a charge that a particular source says "the opposite" of our description to (2) a concession that the source says what we said and they cannot explain why.

So what is going on here? Contra Katz and Rosenblum, the Censors' Report is not "confused," but rather explainable so long as one understands the following: the Censors were operating on a theory that removal of executive officers was an executive power from which the Pennsylvania Constitution of 1776 occasionally departed by allocating "executive power" to other entities. The Pennsylvania Constitution, and the Report, are worth greater exploration. They helpfully illustrate our view of how removal and appointment were generally understood.

A. The Pennsylvania Censors' Report of 1784

The Pennsylvania Constitution of 1776 established a plural executive. Rather than vesting the "executive power" in a single individual, it provided that "[t]he supreme executive power shall be vested in a president and council."[84] Section 20 of the Constitution conferred on the president and council "power to appoint and commissionate judges, naval officers, judge of the admiralty, attorney general and all other officers, civil and military, except such as are chosen by the general assembly or the people, agreeable to this frame of government, and the laws that may be made hereafter."[85] Section 20 further declared that the president and council would "take care that the laws be faithfully executed" and "expedite the execution of such measures as may be resolved upon by the general assembly."[86] Section 22 provided that "[e]very officer of state, whether judicial or executive, shall be liable to be impeached by the general assembly, either when in office, or after his resignation or removal for mal-administration."[87] The Constitution also included special appointment and removal provisions for certain officers. For example,

[84] Pa. Const. of 1776, § 3.

[85] Id. § 20.

[86] Id.

[87] Id. § 22. Cf. A Report of the Committee of the Council of Censors, supra note 80, at 43 (noting that a former secretary of the supreme executive confidence "was a public officer, holding at the pleasure of the president and council").

provisions addressed sheriffs and coroners[88] and registers of wills.[89] Finally, a provision declared that a "Council of Censors" would be elected to meet in 1783 and every seven years thereafter to determine "whether the constitution has been preserved inviolate in every part."[90] Consistent with this provision, a Council of Censors was elected in 1783.[91]

Their 1784 Report was well known. James Madison discussed the Report in Federalist No. 48, observing that the Censors concluded that "[e]xecutive powers had been usurped" by the state legislature.[92] The Censors discussed numerous constitutional questions, one of which was whether the Assembly could remove justices of the peace. Section 30 of the Pennsylvania Constitution of 1776 provided that "Justices of the peace shall be elected by the freeholders of each city and county . . . for seven years, removable for misconduct by the general assembly."[93] Could the Assembly exercise a kind of "judicial authority" and decide whether justices were guilty of misconduct?[94] The Censors concluded that, under this provision, "the misconduct of justices of peace ought to be established elsewhere, before the general assembly can proceed to remove them."[95] In other words, the Assembly could remove a justice for misconduct only after another body found the existence of such misconduct.

The Censors relied on two grounds. First, the Censors reasoned that "the legislative branch can exercise no judicial authority, that is not expressly given to it."[96] The Censors viewed the determination of misconduct as a "judicial" task that should be determined through means

[88] Pa. Const. of 1776, § 31 ("Sheriffs and coroners shall be elected annually in each city and county . . . . No person shall continue in the office of sheriff more than three successive years, or be capable of being again elected during four years afterwards . . . .").

[89] Id. § 34 ("A register's office for the probate of wills and granting letters of administration, and an office for the recording of deeds, shall by kept in each city and county: The officers to be appointed by the general assembly, removable at their pleasure, and to be commissioned by the president in council.").

[90] Id. § 47.

[91] A Report of the Committee of the Council of Censors, supra note 80, at 34–36.

[92] The Federalist No. 48, at 312 (James Madison) (Clinton Rossiter ed., 1961); see also The Federalist No. 50 (discussing the Report). Notably, contra Katz and Rosenblum, Madison did not characterize the Report as "confused."

[93] Pa. Const. of 1776, § 30.

[94] A Report of the Committee of the Council of Censors, supra note 80, at 60.

[95] Id.

[96] Id.

other than legislative action.[97] Second, the Censors reasoned that removal was an executive power. The "principle, that this [the general assembly's authority to remove justices of the peace] is an executive power, put out of its proper place" meant that one ought to construe "it literally, and carry it not beyond the words."[98] The Censors thus viewed the removal of the justices by the assembly as an "executive power, put out of its proper place." The assembly could remove them, upon a finding of misbehavior made elsewhere, but the assembly's ability to remove was an exception to a more general rule of removal being an executive power.

In construing the provision, the Censors also discussed Section 22, which provided that "[e]very officer of state, whether judicial or executive, shall be liable to be impeached by the general assembly, either when in office, or after his resignation or removal for mal-administration."[99] According to the Censors, others had argued that, under the language in this provision authorizing "removal for mal-administration," the "General Assembly may remove justices of the peace, in order to impeach them."[100] The Censors disagreed: "there is nothing in this section to give any [removal] power to the house."[101] Rather, the Censors concluded that "[i]f such power"—i.e., the power to remove justices—"were indeed designed at all, the council would take it, because it is executive business."[102]

The Censors repeatedly relied on the principle that power lodged outside its usual hands was to be construed narrowly. Recall that section 20 of the Constitution gave the president and council "power to appoint and commissionate" various officials "except such as are chosen by the general assembly or the people, agreeable to this frame of government,

[97] See id. (reasoning that conferring "[s]uch authority [on the legislature] would contradict the first principles of the constitution, and assign to the general assembly a jurisdiction, for which they are wholly incompetent, and would soon dishonor the house" because "large bodies of men are so liable to be tainted by prejudice, favor and party, when employed in personal discussions, that justice is rarely attained by them").

[98] Id.; see Journal of the Council of Censors 142 (Phila., Hall & Sellers 1784).

[99] Pa. Const. of 1776, § 22.

[100] A Report of the Committee of the Council of Censors, supra note 80, at 60.

[101] Id.

[102] Id. More broadly, the Censors reasoned that "the difficulty here arises from the omission of a comma before mal-administration," which, if restored, would limit impeachment, "as it ought, to officers in their public capacity; and removal will apply to such civil officers as hold at pleasure, and who may be superseded; and also to others, whose times expire, as councilors and sheriffs, who upon the erroneous construction which we reprobate, would not be liable to impeachment, if the malfeasances charged upon them should happen not to be prosecuted, till after they were out of place." Id. at 60–61.

and the laws that may be made hereafter."[103] The Censors interpreted this provision against the backdrop principle that "[a]ll power . . . *not placed out of its proper hands*, belongs to the legislative, or the executive, according to its nature."[104] The use of the phrase "not placed out of its proper hands" with respect to Section 20 was much like the phrase "out of its proper place" in the reasoning regarding Section 30. The Censors further reasoned that "the appointment of officers is an executive prerogative, and belongs to the council in all cases, if it be not in express terms vested in the assembly or in the people."[105] Again, in this passage, the Censors understood that executive powers should be granted to executive institutions and that deviations from the principle should be construed narrowly.[106]

In a nutshell, much like with its narrowing construction of Section 30 (to avoid expanding the general assembly's control over removal, which the Censors described as "an executive power, put out of its proper place"[107]), the Censors adopted a narrowing construction of any appointment authority placed outside the council. Both Sections of the Censors' Report depend on a similar theory about the definition and allocation of "executive powers."

As noted earlier, Katz and Rosenblum recognize that the Censors' reasoning on this issue poses a problem for them. They observe that this portion of the Report "might be read to suggest that the Censors believed removal was 'an executive power' and so support Bamzai and Prakash's construction."[108] But they try to explain the reasoning away by observing that the Censors' Report discussed the legislature's "power to remove after a finding of misconduct," which "would be an act of 'executive power, put out of its proper place,' since it was assigned to the General

[103] Pa. Const. of 1776, § 20.

[104] A Report of the Committee of the Council of Censors, supra note 80, at 53 (emphasis added).

[105] Id.

[106] The Censors had a similar view of the pardon power. In Section 20, the Constitution provided that the President and Council "shall have power to grant pardons and remit fines, in all cases whatsoever, except in cases of impeachment . . . ." Pa. Const. of 1776, § 20. The Censors commented that "[t]he very strong and extensive words by which this executive authority is secured to the council, exclude all interference therein, unless in the case excepted, viz. that of conviction on impeachment." A Report of the Committee of the Council of Censors, supra note 80, at 55 (emphasis added).

[107] Id. at 60.

[108] Katz & Rosenblum, supra note 4, at 419 n.111.

Assembly, which does not usually execute judicial determinations."[109] They then state in conclusory fashion that "[t]his would go against Bamzai and Prakash's argument."[110] But it plainly does not "go against" our argument. The critical point is that the Censors were operating from the perspective that the Pennsylvania Constitution placed "executive powers" with the legislature in certain narrow areas, including removal. When they placed "executive powers" with a non-executive, it was "out of its proper place." That perspective necessarily depended on a shared understanding that removal was an "executive power" that could be placed with either the Pennsylvania executive council or the legislature or elsewhere. The federal Constitution's drafters, using the same shared understanding of removal as an "executive power," placed the removal power with the President.

Another portion of the Censors' Report further bolsters our interpretation. The Censors criticized several occasions when the legislature had made "appoint[ments] to offices . . . in other instances than those expressly assigned to the House by the constitution."[111] Thus, the Censors concluded that "the power of appointing revenue and other officers, not expressly assigned to the House or Assembly or to the people by the Constitution, which has been exercised by the General Assembly, is a deviation from the Constitution."[112] Following the report, the

[109] Id.

[110] Id.

[111] A Report of the Committee of the Council of Censors, supra note 80, at 62. In doing so, the Censors interpreted the phrase "except such as are chosen by the general assembly, or by the people" in Section 20 to "refer[] to the officers assigned to the Assembly, or the people in other sections of the Constitution, of whom there are several." Id. at 53. The Censors also gave a narrowing construction to the phrase "agreeable to this frame of government, and the laws that may be made hereafter" in Section 20, interpreting it to "define the manner in which the appointments of council shall be made." Id. at 53; cf. id. at 62 (remarking on the "mischiefs" that "would probably follow from the appointing to offices by the Assembly, in other cases than those expressly assigned to the House by the Constitution").

[112] Id. at 53. To be sure, several Censors dissented from this reasoning regarding appointments. They reasoned that the executive's appointments should "be strictly confined to those expressly assigned to them" and that "[t]he legislative body is the proper depository of all power not expressly placed elsewhere" because they represented "every man in the community." Journal of the Council of Censors, supra note 98, at 144. The minority believed that the specific language in Section 20 did not permit a narrowing construction. See id. ("What follows is a limitation of [the executive's] general power [of appointment]. 'Except such as are chosen by the general assembly or the people, agreeably to the frame of government and the laws hereafter to be made.' It requires indeed some ingenuity to mistake the sense and design of it . . . ."); cf. id. at 144 (reasoning that "every power . . . not placed somewhere by the constitution, is vested in the Assembly, as the representatives of the

Assembly passed a statute regularizing the appointment of the revenue officers as the Censors had recommended, thereby concurring in the Censors' views.[113]

More broadly, the Censors criticized "[t]he assumption of the judicial and executive into the hands of the legislative branch," which would "produce instances of bad government as any other unwarrantable accumulation of authority."[114] This reasoning, too, was evidently premised on a conception of the separation of powers that cohered with those who believed that certain powers were properly exercised by certain branches of government.

The practices of the Pennsylvania executive bear our reading out. For instance, in late 1787, the Supreme Executive Council resolved to "annually examine into the conduct of all officers of Government whose appointments are in the power of Council . . . in order to remove those officers who may appear negligent or unfaithful in the discharge of their duty."[115] The Council also would receive complaints about officers and consider whether to remove them,[116] thereby indicating a belief that it

people"). The minority's specific interpretation of Section 20 of the Constitution of 1776 is, of course, now no longer relevant. But at any rate, the minority's views did not prevail, and the entire general assembly ratified the majority's perspective by enacting a statute to regularize appointments.

[113] See An Act to Declare and Establish the Right of the Executive Council of this Commonwealth to Appoint All Officers (Apr. 4, 1785), Ch. 1158, *reprinted in* 11 The Statutes at Large of Pennsylvania from 1682 to 1801, at 556–60 (1906).

The preamble to this statute made clear that it was responsive to the Censors' Report by reciting the text of Section 20 and the constitutional opinion of the Council of Censors that we have just discussed. While reserving certain offices for appointment by the legislature—the speaker and clerks of the general assembly, the delegates to represent Pennsylvania in the Continental Congress, the treasurer, the register of wills, the recorders and the trustees of the loan office—the statute provided for appointment of all other officers by the executive council. And the act stated that the legislature's prior acts appointing officers were in derogation of the rights of the executive council. See id. (repealing the Act of Apr. 13, 1782, to the extent it appointed John Nicholson to the office of comptroller general; the Act of Dec. 9, 1783, to the extent it authorized the assembly to appoint the auctioneers of Philadelphia; the Act of Apr. 1, 1784, to the extent it provided for the appointment of the wardens and collector; and the Act of Mar. 15, 1784, to the extent it appointed Charp Delaney collector).

[114] Journal of the Council of Censors, supra note 98, at 146; see id. ("It is only whilst these are distributed, and kept separate from each other, that liberty and safety can be expected.").

[115] Meeting of Nov. 14, 1787, *in* 15 Minutes of the Supreme Executive Council of Pennsylvania 321 (1853).

[116] See, e.g., Meeting of Aug. 15, 1789, *in* 16 Minutes of the Supreme Executive Council of Pennsylvania 133–34, 173 (1853) (receiving a memorial to remove John Jones, a "Health Officer," and voting to displace him); Meeting of Mar. 9, 1786, *in* 14 id. at 653 (removing James Dickinson).

could remove officers despite the absence of any specific language in the Pennsylvania Constitution authorizing as much.

B. The Governor's Removal Power Under the Pennsylvania Constitution of 1790

The Pennsylvania Censors' Report of 1784 was the last one that would be filed. Six years later—shortly after the federal Constitution's ratification—Pennsylvania adopted a Constitution of 1790. This Constitution made several changes consistent with the Censors' Report.[117]

For example, the Constitution of 1790 provided that "[t]he supreme executive power of this commonwealth shall be vested in a governor,"[118] separately elected by the Commonwealth's citizens,[119] thereby dropping the executive council. The Censors had recommended as much.[120] Among other powers, the governor was authorized to "appoint all officers, whose offices are established by this constitution, or shall be established by law, and whose appointments are not herein otherwise provided for."[121] Like the federal Constitution, the Pennsylvania Constitution of 1790 contained provisions authorizing the governor to obtain the opinions of executive officers[122] and to "take care that the laws be faithfully executed."[123] Unlike the federal Constitution, the Pennsylvania Constitution of 1790 provided for the separate appointment of several executive offices—a Secretary of the Commonwealth, who would "be appointed and

[117] To be sure, the Censors themselves had not called for a convention. See Journal of the Council of Censors, supra note 98, at 177 (noting that the report has "determined not to hazard the calling of a convention, for the purpose of effecting any change in the frame of government, or bill of rights").

[118] Pa. Const. of 1790, art. II, § 1.

[119] Id. § 2.

[120] See supra note 114 and accompanying text.

[121] Pa. Const. of 1790, art. II, § 8.

[122] See id. § 10 (providing that the governor "may require information, in writing, from the officers in the executive department, upon any subject relating to the duties of their respective offices"); see also U.S. Const. art. II, § 2, cl. 1 (providing that the President "may require the Opinion, in writing, of the principal officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices").

[123] Pa. Const. of 1790, art. II, § 13; see also U.S. Const. art. II, § 3 (providing that the President "shall take Care that the Laws be faithfully executed"). Pennsylvania's 1776 Constitution had included similar language declaring that the president and council jointly would "take care that the laws be faithfully executed." Pa. Const. of 1776, § 20. In addition, like the federal Constitution, Pennsylvania's 1790 Constitution contained an impeachment mechanism in the House with trial in the Senate. See Pa. Const. of 1790, art. IV, §§ 1–3; see U.S. Const. art. I, § 2, cl. 5; id. § 3, cl. 6.

commissioned during the Governor's continuance in office, if he shall so long behave himself well";[124] the state treasurer, who would be elected annually by the legislature;[125] "[a]ll other officers in the treasury department, attornies at law [sic], election officers, officers relating to taxes, to the poor and highways, constables, and other township officers," who would be "appointed in such manner as is or shall be directed by law";[126] and militia officers, who were "appointed in such manner and for such time as shall be directed by law."[127]

The new Pennsylvania Constitution lacked a specific reference to removal by the executive, save for one narrow clause. The governor could remove various judges, but only after receiving an address from both branches of the legislature.[128] Another provision said that justices of the peace could be removed via impeachment, on a conviction for misbehavior, or after an address from both legislative chambers.[129]

Nonetheless, lawyers, politicians, and courts recognized that the governor could remove. Consider a series of episodes and cases that arose concerning this question.

In 1794, William Bradford, serving as counsel for John Nicholson, an accused in an impeachment proceeding, said that if the "conduct of any officer is in the opinion of the Executive manifestly improper though not illegal, the remedy is removal not by impeachment."[130] Bradford, who was the sitting Attorney General of the United States, was referring to executive removal and basically arguing that if the conduct was legal but improper, *only* the executive could remove. Later, the state House and the Senate wrote to the Pennsylvania governor to ask for Nicholson's removal.[131] The address said Nicholson was "unfit" for office and "earnestly recommend[ed] to you [the governor], that the said John

[124] Pa. Const. of 1790, art. II, § 15.

[125] Id. art. VI, § 5.

[126] Id.

[127] Id. § 2. In addition, the Constitution provided for separately elected sheriffs and coroners chosen by the citizens of each county. Id. § 1.

[128] Id. art. V, § 2.

[129] Id. § 10.

[130] Fourteenth Day of the Trial (n.d.), *reprinted in* 1 The Pennsylvania State Trials: Containing the Impeachment Trial, and Acquittal of Francis Hopkinson and John Nicholson 468, 480 (1794) (speech of William Bradford).

[131] To Thomas Mifflin, Governor of the Commonwealth of Pennsylvania (Apr. 9, 1794), *reprinted in* 1 The Pennsylvania State Trials: Containing the Impeachment Trial, and Acquittal of Francis Hopkinson and John Nicholson 761, 761–62 (1794).

Nicholson be removed from office."[132] The governor responded that removal was unnecessary as Nicholson had resigned.[133] Several legislators protested, believing it was inappropriate for the House to request that the governor unilaterally remove while an impeachment process was pending.[134] Whatever the merits of this protest, the House and the Senate asked for a removal because they understood that the governor could unilaterally remove. In sum, notwithstanding the provisions related to impeachment and removal and despite the fact that the Pennsylvania Constitution contained no specific clause authorizing executive removal, many understood that the governor could remove. Even the lawmakers protesting the legislative request did not dispute that the executive might remove and merely questioned the timing of the request to fire Nicholson.

In 1807, Governor Thomas McKean, one of the authors of the Pennsylvania Constitution of 1790 and a former Chief Justice of the Pennsylvania Supreme Court, fired a member of the board of health before the expiration of the member's one-year term. The House charged McKean in impeachment proceedings, and McKean filed an answer to the charge. Among other points,[135] he reasoned that "[i]t is an axiom of political law, that the power of appointing to office, carries with it as an incident, the power of removing, in all cases not expressly excepted."[136]

[132] Id.

[133] Id. at 764.

[134] Id. at 766–69.

[135] McKean also argued that "[w]hen the Legislature declared, that a member of the board of health should continue in office for one year, it was not meant to *enlarge* the tenure of the appointment; but to *limit* its duration; it was not meant to impair the executive authority, in making appointments or removals, but to introduce a principle of rotation." Journal of the Eighteenth House of Representatives of the Commonwealth of Pennsylvania 424 (Lancaster, Benjamin Grimler 1807). Put differently, McKean argued that a term of years limited the duration of an office, rather than limiting the ability of the governor to remove the official during the period of the term. As we have previously explained, "[s]tatutes creating offices with fixed terms were not uniformly understood to bar removals." Bamzai & Prakash, supra note 1, at 1802; contra Jane Manners & Lev Menand, The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence, 121 Colum. L. Rev. 1, 25 (2021) ("At the time of the Founding and for at least several decades thereafter, [the] understanding—that absent statutory or constitutional language to the contrary, a term-of-years office foreclosed executive removal—was uncontroversial and widely accepted."). McKean's argument is an example of a term of years being construed not to limit executive removal.

[136] Journal of the Eighteenth House of Representatives of the Commonwealth of Pennsylvania, supra note 135, at 424.

A decade later, in *Commonwealth ex rel. Lehman v. Sutherland*,[137] Chief Justice William Tilghman—who had previously served as one of President John Adams' infamous midnight judges[138]—explained for the Pennsylvania Supreme Court that despite the Pennsylvania Constitution's silence, "it has been generally supposed, that the power of removal rested with the Governor, except in those cases where the tenure, was during good behaviour."[139] But the court held that a restriction on gubernatorial removal at issue in that case was lawful for the particular office.[140] The case arose when the governor gave a commission to an officer for a position as a local physician held by another whose term had yet to expire.[141] The statute creating the office provided that such physicians "shall be under the direction and control of the board of health, and may be removed from office by the governor, at the request of a majority of the members of the board of health."[142] The question was whether the governor could fire the existing physician without the board's request.

In the arguments in *Sutherland*, Thomas Sergeant—later the attorney general of Pennsylvania and a justice on Pennsylvania's Supreme Court—explained that the case turned on "the constitutional powers of the Governor to remove an officer at his discretion, where the law prescribes a particular mode of removal."[143] He argued that "the Governor's power of removal is not impaired by the modifications to which it is subjected in this law," meaning that the Governor could remove Sutherland "and appoint another, although there has been no request of the board of health to remove him."[144] Sergeant relied on the Pennsylvania Constitution of 1790's appointment provision,[145] which said that the Governor would "appoint all officers, whose offices are established by this Constitution, or shall be established by law, and whose

[137] 3 Serg. & Rawle 145 (Pa. 1817).
[138] See infra note 212 and accompanying text.
[139] *Sutherland*, 3 Serg. & Rawle at 149.
[140] Id. at 156.
[141] See id. at 148.
[142] Act of Mar. 17, 1806, ch. 2682, 1806 Pa. Laws 180, 182 (establishing a Health Office, and to secure the city and port of Philadelphia from the introduction of pestilential and contagious diseases); see also Act of Mar. 13, 1817, ch. 96, 1817 Pa. Laws 119, 119 (amending and continuing "An act for establishing a Health Office, and to secure the city and port of Philadelphia from the introduction of pestilential and contagious diseases," and the supplements thereto).
[143] *Sutherland*, 3 Serg. & Rawle at 145 (argument of counsel).
[144] Id. at 146.
[145] See id. (quoting Pa. Const. of 1790, art. II, § 8).

appointments are not herein otherwise provided for."[146] Citing the reasoning of Governor McKean, Sergeant concluded that "the power of appointment vests in the Governor" and, so too, the power of removal.[147] As he explained, "[i]t has been the received construction of the constitution in this State, that the power of appointment carried with it the power of removal, in offices whose duration was not limited by the constitution."[148]

The Pennsylvania Supreme Court agreed with these removal claims, to a point. Chief Justice Tilghman's opinion for the court observed that "[t]he constitution is silent as to the *removal* of officers, yet it has been generally supposed, that the power of removal rested with the Governor, except in those cases where the tenure, was during good behaviour."[149] Nonetheless, the court concluded that the particular *office* was not the kind to which the general removal rule applied, because it was not the kind to which the governor's appointment authority applied. In doing so, the court acknowledged that it was not "easy to ascertain, to what offices" the constitution's "power of appointment extends."[150] In other words, the court concluded that the governor's appointment power (and, hence, removal power) under the constitution applied to *some* offices created by the legislature, but not to others.[151] The appointment provision applied to every office "concerning the administration of justice, or the *general interests of society*."[152] But "there are matters of temporary and local concern, which, although comprehended in the term *office*, have not been thought to be embraced by the constitution,"[153] thereby allowing the legislature to establish some other method of appointment.[154] Tilghman's

[146] Pa. Const. of 1790, art. II, § 8.

[147] *Sutherland*, 3 Serg. & Rawle at 146 (argument of counsel).

[148] Id.

[149] Id. at 149. A concurring opinion by one of the justices acknowledged that the governor possessed a power of removal but suggested that the legislature could limit it in certain ways. See id. at 155 (Duncan, J., concurring) ("[W]here the duration of the office is fixed by the law creating it, and where there is a provision for removal during the time limited for the continuance in office, it would seem to me that the officer is not removable, except in the manner prescribed by the law.").

[150] Id. at 149.

[151] As the court put it, "[t]he word office, is of very vague and indefinite import." Id.

[152] Id.

[153] Id.

[154] See id. (observing that for such cases "the legislature ha[s] sometimes made the appointment in the law which created them, sometimes given the appointment to others than the Governor, and sometimes given the power of removal to others, although the appointment was left to the Governor"); see id. at 150 (tracing the board of health statutes to conclude that

reasoning thus accepted a general gubernatorial removal authority, but held that it did not apply to "temporary" and "local" posts.[155]

Two years later, the Pennsylvania Supreme Court again confronted the governor's removal authority in *Commonwealth ex rel. Reynolds v. Bussier*.[156] The court held that the governor had the power to appoint, and hence the power to remove, the office of inspector of salt provisions for Philadelphia. Thomas Sergeant again represented an individual seeking to establish the removal of a predecessor officeholder.[157] Sergeant contended that *Sutherland* "appl[ied] only to local trusts or stations" and did "not embrace those which are properly offices, within the meaning of the constitution, and concern the public at large."[158] Indeed, Sergeant cited the Report of the Council of Censors, observing that it had criticized the legislature "for usurping appointments," which prompted the legislature to declare that the supreme executive council under the 1776 Constitution appointed everyone other than those specified in the Constitution.[159] Sergeant argued that the Constitution of 1790 "did not

the local physician was "an office under the controul [sic] of the legislature, and subject to their modification, as to appointment, duration, and removal").

[155] In a sense, Tilghman distinguished between "offices" within the scope of the Pennsylvania appointment provision and mere "employment." That is how many subsequent interpreters have understood *Sutherland*. For example, Attorney General Henry Stanbery cited *Sutherland* in an 1867 U.S. Attorney General opinion to support the proposition that the "distinction between office and employment, and between an officer of a State and an agent of a State, is well established." The Reconstruction Acts, 12 Op. Att'ys Gen. 141, 155–56 (1867); Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 105–06 (2007) (discussing *Sutherland*). In this sense, *Sutherland* can be understood as drawing a line comparable to the one the Supreme Court has drawn between "officers" and "employees" under the Appointments Clause. See, e.g., Lucia v. SEC, 138 S. Ct. 2044 (2018). To be sure, in *Myers v. United States*, 272 U.S. 52 (1926), Justice Brandeis appeared to suggest in passing and without analysis that *Sutherland* could be understood generally to support legislative restrictions upon the power of removal. See id. at 243 n.5, 247–48 nn.8–9 (Brandeis, J., dissenting). But Justice Brandeis did not engage in any significant analysis of *Sutherland* or the other Pennsylvania cases and, at any rate, identified Pennsylvania as a State where the chief executive might possess an "uncontrollable power of removal," except as to employees and legislative officials. Id. at 247–48, 248–49 n.10 (Brandeis, J., dissenting) (citing Pa. Const. of 1873, art. 6, § 4 (providing that "appointed officers . . . may be removed at the pleasure of the power by which they shall have been appointed"), and Commonwealth ex rel. Haymaker v. Black, 201 Pa. 433, 436 (Pa. 1902) (holding that a policeman "is a subordinate ministerial agent or employ[ee]" rather than an officer subject to the provision in the Pennsylvania Constitution)).

[156] 5 Serg. & Rawle 451 (Pa. 1820).

[157] Id. at 453–56 (argument of counsel).

[158] Id. at 453–54 (argument of counsel).

[159] Id. at 454 (argument of counsel); see also id. at 459 (opinion) (noting that the council of censors "were of opinion that according to the true intent of the Constitution of 1776, the

intend, that the legislative branch should make any appointments to office but those which were expressly given to it."[160] In reliance on Madison's speeches during the Decision of 1789—which he described as a "luminous exposition"[161]—Sergeant claimed that "[a]s the Governor appoints, so he has the power to remove at pleasure,"[162] because "[i]t is of the essence of an executive power that it should possess the power of appointing, controuling [sic], and removing those entrusted with the execution of the laws."[163]

Again, Chief Justice Tilghman agreed with Sergeant's argument.[164] The court reasoned that, in general, an executive officer in the Pennsylvania government held office "during pleasure, unless the law by which the office is established order it otherwise."[165] While that latter clause might be thought to suggest that the legislature could "order . . . otherwise" than at pleasure or good behavior tenure, the remainder of the opinion indicated that these were the two available options.[166] First, the court observed that, in the Decision of 1789, the First Congress "determined with general approbation, that the pleasure of the President was the tenure of office" and claimed that "[e]very argument in favor of the President's power of removal, applies a fortiori to the Governor of Pennsylvania."[167] Second, the court reasoned that an officer "must either be removable at the pleasure of the Governor, or hold during

supreme executive council had the right of appointing to all offices not plainly given by that Constitution to the general assembly or the people" and the "Legislature acquiesced" to this view).

[160] Id. at 455 (argument of counsel).

[161] Id. at 456 (argument of counsel).

[162] Id. at 455 (argument of counsel). To be sure, Sergeant went on to note that "[a]ll ministerial offices are held during pleasure, unless otherwise ordered in the constitution, or the law creating them." Id. In isolation, that sentence might be read to suggest that the legislature could impose restrictions on the governor's removal authority. But the very next sentence provides that "[w]hen the constitution intended an office to be for good behavior or a less time, it says so." Id. (emphasis added). In this manner, Sergeant appeared to be distinguishing between an indefinite term, during pleasure, and a term, also during pleasure.

[163] Id. at 456 (argument of counsel).

[164] Consistent with his opinion in *Sutherland*, Tilghman also noted that he excluded "certain offices (so called, when that word is taken in its largest sense), of a local, limited or a corporate nature, which have not been supposed to be comprehended in the governor's power of appointment." Id. at 457. By contrast, Tilghman reasoned, "the office of inspector of salted provisions is of a general and important nature," thus bringing it within the scope of the governor's appointment authority. Id. at 457–58.

[165] Id. at 461.

[166] Id.

[167] Id.

good behavior."[168] The court described the latter tenure as "extremely injurious to the country, and contrary to all our habits, customs, and manner of thinking," such that it was never supposed "that it was proper for ministerial officers to hold by any stronger tenure, than the pleasure of the persons from whom they receive their appointment, except in special cases where by law it was provided otherwise."[169]

In sum, the Pennsylvania Censors' Report, state practice, and subsequent case law support our view of the President's removal power. As at the federal level, the Pennsylvania Constitution was understood to authorize executive removal in the absence of a specific clause authorizing removal at pleasure. Other states, as we have discussed, had differently written constitutions that had to be taken on their own terms and read against their own historical backdrops. In a country with many polities at the state level, variations are inevitable. Nonetheless, a proper reading of the Censors' Report of 1784, as well as Pennsylvania practice and case law, demonstrates that Katz and Rosenblum were quite wrong to claim that "the Censors' report probably means nearly the opposite" of our claim.[170] The Censors' Report supports our perspective, as does subsequent Pennsylvania history.

III. EARLY FEDERAL PRACTICE AND RELATED DEVELOPMENTS

As we explained in *The Executive Power of Removal*, the First Congress engaged in an extensive debate over whether and where the Constitution lodged a power to remove executive officers—a debate that resulted in what came to be known as the Decision of 1789.[171] The debate

[168] Id.

[169] Id. In a treatise written two years later, Sergeant effectively equated federal and Pennsylvania practice on removal, citing *Bussier* and reasoning that the First Congress had determined "that the power of removal belonged to the President, by virtue of the clause in the Constitution vesting in him the executive power, and other parts of that instrument, and this construction has since prevailed." Thomas Sergeant, Constitutional Law: Being a Collection of Points Arising Upon the Constitution and Jurisprudence of the United States Which Have Been Settled by Judicial Decision and Practice 360 (Philadelphia, Abraham Small 1822). Moreover, years later, Sergeant—having become a Justice on the Supreme Court of Pennsylvania—confirmed that removal remained an executive function after the Commonwealth adopted a new constitution. See Commonwealth v. Swift, 4 Whart. 186, 199–203 (Pa. 1839) (opinion of Sergeant, J.).

[170] Katz & Rosenblum, supra note 4, at 417.

[171] See Bamzai & Prakash, supra note 1, at 1793–1802; see also Saikrishna Bangalore Prakash, New Light on the Decision of 1789, 91 Cornell L. Rev. 1021, 1021–22 (2006). Katz and Rosenblum do not discuss the Decision of 1789 in much detail. They contend that our

occurred over three statutes establishing the Departments of Foreign Affairs,[172] War,[173] and the Treasury.[174] In the context of our discussion, we observed that it was "[t]he long-held view—voiced by Madison, Hamilton, Marshall, Joseph Story, William Howard Taft, and many others—that the Decision of 1789 endorsed the position that Presidents enjoyed a *constitutional* power to remove executive officers."[175] Moreover, early presidents exercised a power of at-will removal that they believed derived from the Constitution.[176] The core of our reasoning on that point rested on (a) a trove of commissions specifying that executives held office during "the pleasure of the President of the United States for the time being";[177] and (b) statements expressing an at-pleasure rule by senior officials.[178] For example, in 1797, then-Secretary of State Timothy Pickering observed that "[i]n all cases except that of the Judges, it has been established from the time of organizing the Government, that removals from office should depend on the pleasure of the Executive

article "does show that New York Representative Egbert Benson believed in a constitutional removal power," but that "Benson was just one vote." Katz & Rosenblum, supra note 4, at 412. But as we observed in our article, "opponents of a presidential removal power" also agreed with Benson about the result of the Decision of 1789. Bamzai & Prakash, supra note 1, at 1795 (emphasis omitted). We will say more about the Decision of 1789 in another article.

[172] See Act of July 27, 1789, ch. 4, §§ 1–2, 1 Stat. 28, 28–29.

[173] See Act of Aug. 7, 1789, ch. 7, §§ 1–2, 1 Stat. 49, 49–50.

[174] See Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65, 65.

[175] See Bamzai & Prakash, supra note 1, at 1802. Katz and Rosenblum characterize this claim as seeking to "enlist Madison, Hamilton, Justice Story, and Justice Marshall as allies, although all four put sentiments in writing critical of the unitary executive theory." Katz & Rosenblum, supra note 4, at 422 (footnotes omitted) (citing Bamzai & Prakash, supra note 1, at 1802). Respectfully, Katz and Rosenblum misdescribe what we said. Our precise claim was that all four of them "voiced" the view that "the Decision of 1789 endorsed" a presidential constitutional power of removal. Bamzai & Prakash, supra note 1, at 1802. Katz and Rosenblum do not dispute that precise claim, and it is undeniable for all four. For Hamilton, see Alexander Hamilton, For the Gazette, 4 Gazette U.S. 450, 451 (1793), *reprinted in* 15 The Papers of Alexander Hamilton 33, 40 (Harold C. Syrett ed., 1969) (reasoning that, with certain exceptions, "the Executive Power of the [United States] is completely lodged in the President" and that "[t]his mode of construing the Constitution has indeed been recognized by Congress in formal acts, upon full consideration and debate," with "[t]he power of removal from office [being] an important instance"). For Story, see 3 Joseph Story, Commentaries on the Constitution of the United States §§ 1535–36, 393–94 (Bos., Hilliard, Gray & Co. 1833). And for Marshall, see 5 John Marshall, The Life of George Washington 199–200 (Phila., C.P. Wayne 1807). Indeed, elsewhere in our article, we discussed Justice Story's possible misgivings about the removal power. See Bamzai & Prakash, supra note 1, at 1830, 1833.

[176] See Bamzai & Prakash, supra note 1, at 1777–82.

[177] Id. at 1777 (citation omitted).

[178] See id. at 1778–82.

power" and that commissions to executives had reflected as much.[179] Similarly, a joint cabinet opinion of 1796—adopted by the Secretaries of War, Treasury, and State—said that "[t]o appoint to and remove from office are equally executive powers," such that "[i]t is with the President . . . that the *power of removal* is chiefly lodged."[180]

A. Removal and the Role of the Senate

Katz and Rosenblum have nothing to say about—and do not even acknowledge—the many at-pleasure commissions, the statements from Secretary Pickering, or the 1796 joint cabinet opinion. Rather, they focus on a single sentence from our article summarizing a study by the historian Carl Russell Fish that noted in passing that "Presidents John Adams and Thomas Jefferson both removed officers, with the former ousting over two dozen and the latter over one hundred."[181] They note that Fish cautioned against "'a too complete acceptance' of his figures."[182] For a variety of reasons, Fish admitted that his reported numbers might be higher or lower than the actual number of removals.[183] But with all respect, Katz and Rosenblum's stress on the imprecision in Fish's count of removals misses the forest for the trees. Nothing in our claim about early practice depends on Fish's *precise* numbers. That should have been clear because we did not cite those precise numbers but instead used approximations.[184]

[179] Letter from James Monroe to Timothy Pickering (July 31, 1797), *in* 3 The Writings of James Monroe 73, 75 n.1 (Stanislaus Murray Hamilton ed., 1969) (quoting a letter from Pickering to Monroe). For what it is worth, this is another "new" source that, to our knowledge, had not been quoted for this proposition prior to our article.

[180] Enclosure to Letter from James McHenry to George Washington (July 2, 1796), *in* 20 The Papers of George Washington: Presidential Series 355, 357 n.2 (Jennifer E. Steenshorne et al. eds., 2019).

[181] See Bamzai & Prakash, supra note 1, at 1780, 1780 n.184 (citing Carl Russell Fish, Removal of Officials by the Presidents of the United States, *in* 1 Annual Report of the American Historical Association for the Year 1899, at 65, 67, 70 (1900)).

[182] Katz & Rosenblum, supra note 4, at 421 (citing Fish, supra note 181, at 68).

[183] For example, Fish counted a failure to reappoint at the end of a term as a removal, but did not include resignations, which might be forced, or the "simple announcement of an appointment," which might "conceal a removal." Fish, supra note 181, at 67–68.

[184] See Fish, supra note 181, at 70 (listing 27 probable removals by Adams and 124 by Jefferson). Moreover, other scholars have also sought to quantify removals in early administrations. While they have reached somewhat different totals than Fish, their numbers are not wildly different. See, e.g., Leonard D. White, The Federalists: A Study in Administrative History 285 (1948) (reporting that Adams removed 21 civil officers and 6 army officers).

Katz and Rosenblum nevertheless believe that our reliance on Fish's figures was misguided because his totals mask a supposedly hidden phenomenon. They claim that for positions requiring Senate advice and consent, "removal was incident to appointment: the appointment and confirmation of someone new removed the previous officeholder."[185] They derive this supposed rule from language in the Executive Journal of the Senate observing that the President "nominate[d] . . . [a successor], to be [an officer], vice [a predecessor], superseded."[186] In a nutshell, Katz and Rosenblum suggest that removal was accomplished by appointment in early practice—and, therefore, that removal may *only* be accomplished by appointment following Senate advice and consent.[187]

There are multiple problems with this suggestion—each of which independently scuttles Katz and Rosenblum's criticisms. First, Katz and Rosenblum repeatedly conflate "nomination" with "appointment." Nomination is a unilateral action taken by the President, whereas appointment might require the Senate's "Advice and Consent."[188] Katz and Rosenblum claim that their "attempts to reconstruct Fish's data reveal many cases of officers who were not removed, but simply superseded when the President *nominated* their replacement."[189] Thus, they conclude that President Adams "nominated [a successor] to succeed [a predecessor

[185] Katz & Rosenblum, supra note 4, at 421. As an initial matter, Katz and Rosenblum suggest that removals that occurred upon the appointment of a successor did not happen "in the way Bamzai and Prakash use the term in their Article." Katz & Rosenblum, supra note 4, at 422. But that misdescribes our article, which purposefully did not take a position on how removal had to be accomplished. Cf. Bamzai & Prakash, supra note 1, at 1787 (discussing issues that might arise due to a dispute over the timing of a removal).

[186] See id. at 421–22. One of the examples cited by Katz and Rosenblum says: "I [i.e., President John Adams] nominate . . . Thomas Bulkely, to be Consul General in Portugal, vice Edward Church, superseded." 1 Journal of the Executive Proceedings of the Senate of the United States of America 248 (Washington, D.C., Duff Green 1828).

[187] To be sure, although Katz and Rosenblum seek to leave the reader with the impression that removal must be accomplished by appointing a successor, they perhaps equivocate on the question. They assert that removals that occur at the same time as the appointment of a successor "do not show an indefeasible executive power of removal," but rather "show, at most, that the President could displace a duly appointed officer by appointing his successor." Katz & Rosenblum, supra note 4, at 422. Yes, but removals at the time of appointment are consistent with a presidential removal power. As we explain below, Katz and Rosenblum do not acknowledge removals that occurred without appointing a successor, nor do they acknowledge statements by executive officials, legislators, and courts clarifying that removal could occur without Senate participation. Those practices and statements contradict the theory that removal can occur solely with Senate participation.

[188] U.S. Const. art. II, § 2, cl. 2.

[189] Katz & Rosenblum, supra note 4, at 421 (emphasis added).

officeholder], and [the predecessor] in turn was 'superseded.'"[190] They then jump to the conclusion that such a removal shows "at most, that the President could displace a duly appointed officer by *appointing* his successor."[191] But this assertion elides the distinction between "nomination" (a unilateral presidential action) and "appointment" (an action that might require the Senate's advice and consent). If the Senate Journal entries indicate that the President often "superseded" an officeholder by nominating another person, as Katz and Rosenblum sometimes assert,[192] those entries establish a unilateral presidential authority to remove. A president could remove an executive officer simply by nominating a successor.

Second, Katz and Rosenblum do not acknowledge high-profile and well-known instances where the President removed an executive officer before nominating or appointing a successor. These instances indicate that neither removal-by-nomination nor removal-by-appointment were understood to be constitutionally required. To the contrary, it was widely understood that removal could occur, either *expressly* or *implicitly*, without a role for the Senate.

Consider the following instances where the President *expressly* removed an executive officer before nominating or appointing a

[190] Id. at 422.

[191] Id. (emphasis added).

[192] Katz and Rosenblum assume that the Senate entries indicate that the nomination or appointment of the successor "superseded" the predecessor officeholder. But the entries are consistent with the position that the predecessor officeholder was "superseded" or dismissed through a presidential removal *before* the nomination. Many "superseded" officers certainly believed that the President was responsible for their removal. For example, on May 3, 1792, George Washington nominated "Edward Wigglesworth, to be Collector of the port of Newburyport, vice Stephen Cross superseded," Journal of the Executive Proceedings of the Senate of the United States of America, supra note 186, at 121, and the Senate advised and consented to Wigglesworth's appointment the next day, see id. at 122. In a letter to Washington the next year, Cross made clear that he perceived himself to have been removed by the President. See Letter from Stephen Cross to George Washington (Nov. 25, 1793), *in* 14 The Papers of George Washington: Presidential Series 434, 434 (Theodore J. Crackel et al. eds., 2008). Cross remarked that he was "not insencible [sic] that it is in your power to remove any Officer of the Customs or Revenue without giveing [sic] any reason" and proceeded to defend his conduct. Id. To be clear, under our theory, it is irrelevant whether earlier presidential action or the ultimate appointment removed the officer. As we explain below, the President has discretion to choose the mechanism for removal. But Katz and Rosenblum's claim about practice cannot be correct unless each occurrence of "superseded" in the Senate journal meant that removal occurred by either nomination or appointment. Katz and Rosenblum do not establish that understanding, nor do they cite any commentators who voiced this conception of the practice of presidential removal.

successor. After receiving a letter from members of his cabinet,[193] President John Adams removed Tench Coxe from the post of Commissioner of the Revenue on December 23, 1797.[194] Adams did not nominate Coxe's replacement, William Miller, until January 18, 1798,[195] and the Senate did not confirm Miller until January 23, 1798.[196] This episode illustrates removal by notification to the officer before nomination of a successor.

To take another example: A few years later, when Secretary of State Timothy Pickering refused to resign,[197] President Adams responded curtly that "[d]ivers causes and considerations, essential to the administration of the government, in my judgement, requiring a change in the department of State, you are hereby discharged from any further service as Secretary of State."[198] Adams' letter to Pickering was dated May 12, 1800, and on that same day, Adams submitted to the Senate the nomination of a certain John Marshall,[199] who was confirmed the next day.[200] This episode illustrates a unilateral removal of an officer by letter at approximately the same time as the nomination of a successor, but before the successor's confirmation and appointment.

A third example: President Washington unilaterally fired ambassador James Monroe, appointing Charles Cotesworth Pinckney during a Senate

[193] See Letter from Timothy Pickering, James McHenry, and Charles Lee to John Adams (Dec. 18, 1797) (listing the complaints of Secretary of the Treasury Oliver Wolcott against Coxe and concluding that there was "sufficient reason" to remove Coxe from office).

[194] See Jacob E. Cooke, Tench Coxe and the Early Republic 306–08 (1978); see also Letter from Thomas Jefferson to James Monroe (Dec. 27, 1797), *in* 29 The Papers of Thomas Jefferson 593, 593–94 (Barbara B. Oberg et al. eds., 2002) (noting that "[t]he dismission of Tenche Coxe from office without any reason assigned is considered as one of the bold acts of the President" and, thereby, showing that Jefferson knew of Coxe's removal by the date of the letter).

[195] 1 Journal of the Executive Proceedings of the Senate of the United States of America 259 (Washington, D.C., Duff Green 1828).

[196] See id. at 259–60.

[197] See David McCulloch, John Adams 539 (2001).

[198] Letter of John Adams to Timothy Pickering (May 12, 1800), *in* 9 The Works of John Adams 55, 55 (1854).

[199] Journal of the Executive Proceedings of the Senate of the United States of America, supra note 186, at 353.

[200] See id. at 354. At around the same time, Adams forced James McHenry to resign from his position as Secretary of War, which itself is a form of removal. See McCulloch, supra note 197, at 538.

recess in 1796.[201] Monroe received notice of his removal from a letter written by Timothy Pickering.[202] Although Monroe wrote a pamphlet defending himself and attacking the administration, he did not argue that the President lacked power to oust him, much less that removal had to wait for a formal nomination to the Senate.[203] The Senate consented to the Pinckney nomination long after Monroe's removal.[204]

The removals of Coxe, Pickering, and Monroe were each *express* in the sense that the President notified the officer of their removal from office. Each instance is inconsistent with the notion that the Constitution *requires* Senate participation for removal.

Removal did not have to be *express*. It could also be *implied*—occurring, for example, through the appointment of a successor. That was the view of then-Governor Thomas Jefferson, who explained in a 1779 letter that "offices held during will are determinable by the slightest acts *implying* only, without positively *expressing*, a change of will."[205] No particular words or formal actions were required. Similarly, the Constitution does not establish a single means of removal, but rather leaves the precise mechanism to the President as a matter of discretion.

As an example of an implied removal, consider President Jefferson's firing in 1801 of the justices of the peace appointed at "midnight" by the outgoing President John Adams.[206] Jefferson fired those justices by using the Recess Appointments Clause[207] to appoint a different group in their

[201] See U.S. Dep't of State, Off. of the Historian, Charles Cotesworth Pinckney, https://history.state.gov/departmenthistory/people/pinckney-charles-cotesworth [https://perma.cc/V8GU-BGW6] (last visited Feb. 13, 2024).

[202] See Letter from Timothy Pickering to James Monroe, *in* 1 American State Papers: Foreign Relations 741, 741–42 (1883).

[203] See generally James Monroe, A View of the Conduct of the Executive of the United States (Philadelphia, Benjamin Franklin Bache 1797) (defending Monroe's own conduct as Ambassador and noting that it would be for the public to decide whether they approved of the Administration's actions, but not insinuating that those actions were outside the scope of executive power).

[204] Pinckney was nominated on December 21, 1796, and the Senate gave its consent the next day. See Journal of the Executive Proceedings of the Senate of the United States of America, supra note 186, at 216–17.

[205] Letter from Thomas Jefferson to Unknown (Dec. 25, 1779), *in* 3 The Papers of Thomas Jefferson: Main Series 242, 242 (Julian P. Boyd ed., 1951). Jefferson further reasoned that "issuing a new commission of the peace determined the offices of those named in the former." Id.

[206] See Bamzai & Prakash, supra note 1, at 1802–10.

[207] U.S. Const. art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.").

place. His actions were effectively a mass implied removal via recess appointments of a new set of officeholders. Jefferson's actions demonstrate that—*even if* appointment were necessary for removal—a president could unilaterally remove through a recess appointment. The President can unilaterally appoint during a Senate recess,[208] which means that the President could likewise unilaterally remove during the recess.

Of course, a President could also impliedly remove an officer through a new appointment with the Senate's advice and consent. The fact that Presidents may have elected to pursue this approach—perhaps to avoid the inconvenience of an empty office during the confirmation process—is not surprising. Moreover, that fact does not contradict the President's authority to remove without Senate participation—as Presidents Washington and Adams did in the cases of Coxe, Pickering, and Monroe. Rather, it is consistent with our view that the Constitution does not establish a single mechanism by which the President must remove an officer. How the President chooses to exercise the removal power is a matter of presidential discretion.

Third, in addition to failing to acknowledge contrary practice, Katz and Rosenblum say nothing about statements that make clear that removal could occur without Senate advice and consent. We have already highlighted the various at-pleasure commissions, quotations from Secretary Pickering, and the 1796 joint cabinet opinion.[209] Indeed, the 1796 joint cabinet opinion is even clearer on the lack of a Senate consultation requirement: "The Senate cannot remove from office; they have a participative influence or check only in removals; but the President may remove without consulting the Senate."[210] Attorney General Charles Lee said the same in a letter to Washington: "As well during the session of the Senate as during its recess, the President alone has power to remove from Office; and the Senate is not authorised to give . . . their advice & Consent relative to a removal or dismission from office."[211]

In addition, early courts understood that removal by the President did not require an appointment. In 1801, Chief Judge Tilghman[212] reasoned

[208] See, e.g., NLRB v. Noel Canning, 573 U.S. 513, 518–19 (2014).

[209] See supra notes 178–80.

[210] Enclosure to Letter from James McHenry to George Washington (July 2, 1796), *in* 20 The Papers of George Washington: Presidential Series 355, 357 n.2 (Jennifer E. Steenshorne et al. eds., 2019).

[211] Letter from Charles Lee to George Washington (July 7, 1796), *in* id. at 394, 395–96.

[212] Yes, the same Tilghman who would later serve as Chief Justice of the Supreme Court of Pennsylvania. See supra note 138 and accompanying text.

that "[a] removal from office may be either express, that is, by a notification by order of the president of the United States that an officer is removed; or implied, by the appointment of another person to the same office."[213] In a separate opinion in the same case, Circuit Judge William Griffith observed that "[t]here can be no question . . . that the president may, by a proper act of office, remove a marshal, without a new appointment."[214]

Many (though not all) legislators took the same view. During the debates that culminated in the Decision of 1789, the notion that the Constitution *required* Senate participation in removal was rejected by legislators who believed that the President had a constitutional power to remove, as well as by those who believed that Congress could statutorily confer such authority on the President.[215] Nobody interprets the Decision of 1789 as endorsing the position that the removal power was jointly vested in the President and Senate. Later debates indicate that many Senators continued to understand that executive officers served at the pleasure of the President alone. For example, when President Washington nominated Chief Justice John Jay to negotiate a treaty with Britain, objecting Senators proposed a resolution with this language: "[T]o permit Judges of the Supreme Court to hold at the same time any other office . . . holden at the pleasure of the Executive, is contrary to the spirit of the Constitution."[216] The resolution made clear that the Senators believed the office was held at the *President's pleasure* and not the President-and-Senate's pleasure. Although the Senate voted down the resolution, that is likely because other Senators saw nothing unconstitutional about a justice simultaneously serving in the executive branch.

To be sure, there were some legislators who—like Katz and Rosenblum—tried to tie removal to Senate advice and consent. A minority of the House articulated the position during the Decision of

[213] Bowerbank v. Morris, 3 F. Cas. 1062, 1064 (C.C.D. Pa. 1801) (No. 1,726).

[214] See id. at 1065 (opinion of Griffith, J.) (noting possibility of "expiration of the office by death, or limitation of the term, or a direct notice of dismission," as well as "removal by the pleasure of the president, effected merely by a new appointment").

[215] See Bamzai & Prakash, supra note 1, at 1802.

[216] See Journal of the Executive Proceedings of the Senate of the United States of America, supra note 186, at 152.

1789,[217] as did Senator Daniel Webster in 1835.[218] And a century later, Justice Brandeis also advanced this perspective on removal in *Myers v. United States*.[219] Katz and Rosenblum thus are not the first to intimate that removal may be accomplished only by the appointment of a successor.[220]

Senator Webster's argument on the topic is representative. Webster seemed to think that as a matter of practice, removal by appointment was the sole means of removing officers. He contended that "[t]here is no such thing as any distinct official act of removal," relying on a claim that he had "looked into the practice."[221] But even Webster hedged on the practice, acknowledging that there were a "few" cases of removal without appointment or nomination.[222] As we have demonstrated, those cases, however few or many, contradict the proposition that removal must be accomplished, under the Constitution, by nomination or appointment. While removal might be accomplished that way, a president can remove executive officers by notice as well. That rule is not only consistent with the practice, but with the at-pleasure commissions given to executive officers.

All told, what this means is that presidents removed executive officers in a variety of ways—before the nomination of a successor or with an understanding that the officer would remain in place until the appointment of a successor. And removals could be express or implied. Contrary to Katz and Rosenblum's suggestion, the Constitution does not require the President to use a particular method to remove executive officers.

[217] See Daily Advertiser (June 17, 1789), *reprinted in* 11 Documentary History of the First Federal Congress 842, 842 (Charlene Bangs Bickford et al. eds., 2019) (noting the comments of Representative White advocating an advice-and-consent role for Congress in the removal of such officials); Daily Advertiser (June 22, 1789), *reprinted in* 11 Documentary History of the First Federal Congress 895, 900–02 (Charlene Bangs Bickford et al. eds., 2019) (noting the comments of Representative Gerry advocating a similar role for Congress).

[218] See 4 Daniel Webster, The Appointing and Removing Power (Feb. 16, 1835), *in* The Works of Daniel Webster 179, 189–90 (Boston, Little, Brown & Co. 1853).

[219] 272 U.S. 52, 259–61 (1926) (Brandeis, J., dissenting).

[220] Katz and Rosenblum do not cite any of these sources in support of their theory, and we do not mean to attribute the views of Webster or Brandeis to them. But we discuss those views for the benefit of the reader who wants to know those who have similarly argued that Senate participation is necessary for removal.

[221] See Webster, supra note 218, at 189.

[222] Id.

B. Other Points of Practice

In addition to claiming that removal was (and perhaps must be) accomplished with Senate participation, Katz and Rosenblum claim that "Congress could and did regularly define offices for a term of years, barring the Executive from removing officials during that term."[223] But with the exception of the statute at issue in *Marbury v. Madison*[224]—which involved judicial officers in the District of Columbia that the President, in fact, removed—they fail to cite a single federal example to support this claim, and the law review article on which they rely also does not cite a single federal statute where such a supposed limit on removal was imposed on an executive branch officer.[225] Katz and Rosenblum ignore our article's discussion of *Marbury* and this very topic, which both indicates that Chief Justice Marshall did not intend to make a sweeping claim about the constitutionality of removal restrictions for executive branch officers and discusses how President Jefferson removed the justices of the peace.[226]

Katz and Rosenblum also rely on two boards, the Sinking Fund and Mint, which they claim demonstrate that Congress created "'independent agencies,' staffed by agents immune from presidential removal."[227] But it is by no means clear that these entities can be read in the way that Katz and Rosenblum suggest.[228] Take the U.S. Mint. By law, an inspection board met once a year and assayed a handful of coins.[229] On the board were the Chief Justice, along with indisputably "executive" officers subject to presidential removal: the Secretary of State, the Secretary and

[223] Katz & Rosenblum, supra note 4, at 414 n.75.

[224] 5 U.S. (1 Cranch) 137, 156–57 (1803).

[225] See Katz & Rosenblum, supra note 4, at 413–14 nn.74–75 (citing Manners & Menand, supra note 135, at 3–4).

[226] Bamzai & Prakash, supra note 1, at 1802–18.

[227] Katz & Rosenblum, supra note 4, at 413. Here, too, we discussed these boards in our article, see Bamzai & Prakash, supra note 1, at 1842–43, though in candor, we perhaps did not spend as much time on them as we might have—a shortcoming that we hope to have rectified here. Katz and Rosenblum also mention a patent board, see Katz & Rosenblum, supra note 4, at 413, but as is well known that board "consist[ed] impressively of Secretary of State Thomas Jefferson, Secretary of War Henry Knox, and Attorney General Edmund Randolph." United States v. Arthrex, Inc., 141 S. Ct. 1970, 1976 (2021) (citing § 1, 1 Stat. 109–10 (1790)). All three of its members, thus, were removable by the President.

[228] For extended discussion, see Aditya Bamzai, Tenure of Office and the Treasury: The Constitution and Control over National Financial Policy, 1787–1867, 87 Geo. Wash. L. Rev. 1299, 1334–40 (2021).

[229] See Coinage Act of 1792, ch. 16, § 18, 1 Stat. 246, 250.

the Comptroller of the Treasury, and the Attorney General.[230] Even assuming that the Mint Board exercised the federal government's sovereign powers, it was clear under the statute that a bare majority of the five-person committee (which included at least four officials subject to presidential removal) could outvote the Chief Justice.[231] That gave the President effective control over the committee. The Sinking Fund Commission was similarly composed of three indisputably removable officers (the Secretaries of State and the Treasury and the Attorney General), along with the Chief Justice and the Vice President.[232] That, too, gave the President effective control.[233]

Equally importantly, positions on either the sinking fund or mint boards did not appear to be independent "offices." Members of Congress said as much. For example, Representative John Randolph remarked during an 1806 debate that "the Commissioners of the Sinking Fund [we]re not, strictly speaking, officers," because they "discharge[d]" their "duties . . . *ex officio*, in virtue of their holding other high offices, and, as Commissioners, they receive[d] no salary."[234] The Sinking Fund Commission (and the Mint Commission, too) conferred new duties on existing officers, rather than creating new offices to which appointments had to be made.[235] Indeed, if we do not conceptualize the two commissions in this fashion, they would violate the Appointments Clause

[230] See id.

[231] See id.

[232] Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186. Katz and Rosenblum point out that "Hamilton's initial draft for the [Sinking Fund] Commission included even more" commissioners unremovable by the President. Katz & Rosenblum, supra note 4, at 413. But that was because Hamilton's proposal tested constitutional boundaries if the position of commissioner was a "civil Office." He proposed that Congress vest the fund in "commissioners, to consist of the Vice President of the United States or President of the Senate, the Speaker of the House of Representatives, the Chief Justice, Secretary of the Treasury, and Attorney-General." Alexander Hamilton, Report Relative to a Provision for the Support of Public Credit (Jan. 9, 1790), *reprinted in* 1 Annals of Cong. 1991, 2020 (1790) (Joseph Gales ed., 1834); see U.S. Const. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States . . . ."). When Congress created the Sinking Fund Commission, it substituted the Secretary of State for the Speaker of the House. See Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186.

[233] See Collins v. Yellen, 141 S. Ct. 1761, 1785 n.19 (2021) (observing that of the five members on the Sinking Fund Commission, "three of those Commissioners were part of the President's Cabinet and therefore removable at will").

[234] 15 Annals of Cong. 929 (1806).

[235] For the modern case on this topic, see Weiss v. United States, 510 U.S. 163 (1994).

because Congress would have "appointed" the commissioners to office.[236] Bolstering the inference that these new duties were subject to presidential control, the statute required the Sinking Fund Commission to obtain the President's "approbation" for its actions.[237]

The bottom line is that nothing in either the sinking fund or mint statutory schemes suggest that the President could not effectively "remove" members by directing and controlling the additional duties that had been conferred on preexisting offices. To be sure, that did not mean that the President could remove the Chief Justice from his judicial role. But neither statute barred the President from directing any executive authority that either board wielded. Indeed, the President's approbation was formally necessary for the Sinking Fund Commission's actions, which meant that the President could himself exercise any of the commissioners' executive duties.

The Sinking Fund and Mint Commissions are certainly interesting bodies, but there is little reason to view them as precedents for independence among agencies writ large. Indeed, we are unaware of Congress replicating the structure of these agencies in the pre-Civil War era.

IV. CODA: SOME THOUGHTS ON REMOVAL AND CONSTITUTIONAL METHODOLOGY

Until this point, we have dwelt on the factual disputes (What happened in this debate? What was the practice in this era?) raised by Professors Katz and Rosenblum. As we have discussed, we believe that their factual critiques of our article lack merit.

Any claim about the constitutionality of a law must depend *not merely* on such factual claims, *but also* on a theory of constitutional interpretation. Katz and Rosenblum raise this point expressly when they claim that we have not "establish[ed] a consensus sufficient to liquidate constitutional meaning" on the question of the President's removal power.[238] They contend that the "Decision of 1789 is a poor candidate for

[236] U.S. Const. art. II, § 2, cl. 2.

[237] Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186. For a discussion of the term "approbation" and its use in appointment authorities, see Aditya Bamzai, The Attorney General and Early Appointments Clause Practice, 93 Notre Dame L. Rev. 1501, 1509–10 (2018).

[238] Katz & Rosenblum, supra note 4, at 411 (citing William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1 (2019)).

liquidation as (1) it featured no agreement, (2) it lacked explicit decisional rationale, (3) its significance remains contested, and (4) subsequent political practice continuously varied and departed from its supposed conclusions."[239] Again, leaving to one side our factual disagreements on these points, it remains undeniable that there was disagreement in the First Congress (and, on occasion, in later Congresses) over the President's removal power. This state of affairs naturally raises the question: What is the role of historical disagreement in the settlement of constitutional meaning?

We cannot fully resolve this deep question here. But in general, we believe that historical disagreement alone cannot forestall reliance on historical materials to resolve the meaning of constitutional text. Fair judgment must also be employed to test the significance of the disagreement. Not all disagreements at the time of the Constitution's adoption establish that the Constitution lacks meaning on that issue. Take, for example, the disputes over the constitutionality of the First and Second Banks of the United States.[240] Despite these disputes, and at least in certain respects, the constitutionality of the bank was resolved by those early legislative debates, along with other considerations about the overall constitutional text and structure.

[239] Id. at 411 n.50. Katz and Rosenblum also profess confusion over why we believe the debates during the Decision of 1789 "are probative of constitutional meaning." Id. But our position is no mystery and is so mainstream that we did not think that it needed to be established. It has long been thought that the constitutional views of early Congresses might cast light on the meaning of the Constitution given the proximity in time of the interpretation to the passage of the document. To be sure, that does not mean that the First Congress necessarily got each and every constitutional matter right. But at a minimum, the First Congress's views are worthy of respect. Katz and Rosenblum claim to see some tension between this position and our view that "Congress lacks the 'power to refashion the separation of powers.'" Id. at 411–12 (quoting Bamzai & Prakash, supra note 1, at 1786). But there is no tension. The First Congress's views on the proper interpretation of the First (or the Fourth) Amendment would likewise be worthy of respect, even though Congress "lacks the power to refashion" the First (or the Fourth) Amendment's protections. Again, this perspective is entirely mainstream and embraced by Justices across the ideological spectrum—so much so that we would have thought any further elaboration to be unnecessary.

[240] For a discussion of the debates in Congress over the constitutionality of the First and Second Banks, see David P. Currie, The Constitution in Congress: The Federalist Period, 1789–1801, at 78–81 (1997) (addressing the debate over the constitutionality of the First Bank of the United States in the First Congress); David P. Currie, The Constitution in Congress: The Jeffersonians, 1801–1829, at 250–58 (2001) (addressing the chartering of the Second Bank during the presidency of James Madison); David P. Currie, The Constitution in Congress: Democrats and Whigs, 1829–1861, at 58–87 (2d ed. 2014) (addressing debates over the constitutionality of the Second Bank during the presidency of Andrew Jackson).

One might respond that the existence of disagreement should be coupled with a form of "deference" to the political branches often associated with the legal thinker James Bradley Thayer.[241] But here, too, we have concerns. As an initial matter, a thoroughgoing Thayerism that viewed the existence of constitutional disputes as *automatic* grounds for "deference" would seem to bless congressional enactments that, in our view, deserve scrutiny. Consider, for example, the passage of the infamous Alien and Sedition Acts during the presidency of John Adams.[242] Without going into details on the complex constitutional arguments that surrounded those acts, we think that, if Congress were to enact comparable statutes in the present day, those statutes would not be *ipso facto* constitutional, merely because the 1798 Congress deemed an earlier version of them to be so. Again, some element of judgment would be necessary to assess the validity of the constitutional arguments raised by members of Congress about the Alien and Sedition Acts.

Moreover, in the context of a conflict between the political branches, it is worth noting that it is somewhat more difficult to "defer." Each branch could make a claim to deference—as might happen if the President sought to remove a subordinate protected by a statutory removal restriction. In that case, the litigation would be between the head of one political branch, the President, and a subordinate invoking the prestige and power of Congress to enact legislation as it sees fit. It is by no means clear that Thayer had this sort of conflict in mind when he wrote his article. Nor is it clear which way "deference" to the political branches cuts in such a scenario.

Nevertheless, thoroughgoing Thayerians might take a "hands off" approach to constitutional questions here, because presumably they would take such an approach *everywhere*—with respect to *all* constitutional questions, including the validity of present-day Alien and Sedition Acts. But for those who are not inclined to embrace the constitutionality of all aspects of the Alien and Sedition Acts, it seems to us that the President's removal power offers a strong case for a constitutional settlement that, while initially disputed, became established because of the text, structure, drafting history, and early understandings of the Constitution.

[241] James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129–56 (1893). A comprehensive discussion of Thayerism is outside the scope of this Essay.

[242] See Currie, The Federalist Period, supra note 240, at 253–73.

In sum, early disagreements about removal do not render it impossible to make judgments among the various potential readings, some of which were (and are) more persuasive and others less so. The First Congress did this, and their conclusions reverberate to this day.

CONCLUSION

We began this Essay by asking the question of whether the President has a constitutional power to remove executive branch subordinates. And we observed at the outset that, without such a power, not only would the President be seriously hamstrung in translating electoral mandates into policy, but that, in addition, a temporary political trifecta (a party controlling the presidency and both houses of Congress) could pass a law that entrenches their policy views, notwithstanding future elections. They could do so by creating an office and conferring on its occupant life tenure with removal protections. A position like the one embraced by Katz and Rosenblum—that the Executive Power Vesting Clause gives no removal authority to the President whatsoever—raises the alarming possibility that this form of entrenchment would be perfectly lawful. The Court's recent removal jurisprudence—correctly, in our view—sets up a roadblock to that possibility.

As we discussed in both *The Executive Power of Removal* and this Essay, there are sound historical bases for this jurisprudence. In their critique, Katz and Rosenblum focus on our reliance on the Pennsylvania Censors' Report and on early federal practice. But this Essay demonstrates that their criticisms of our use of those materials were mistaken—indeed, no less mistaken than their claim that the notion of an executive power of removal "disappeared so quickly."[243] The proposition that Article II gives the President a removal power dates back to the earliest debates over the Constitution in Congress and, far from disappearing, continues to have salience in the present day.

[243] Katz & Rosenblum, supra note 4, at 416, 416 n.94 (quoting Goodnow, supra note 12, at 88–89, as declaring that courts "have held that [the Vesting Clause] has little if any legal effect, and that for the most part it is to be explained by the powers which are later specifically mentioned"); but see Goodnow, supra note 12, at 91 (explaining that the "practice" with respect to removal is "that the President has the power to remove arbitrarily almost all civil officers of the United States, not judges. This power has been recognized as belonging to the President as a part of the executive power granted to him").