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## The Independent Counsel Statute: Reading "Good Cause" in Light of Article II

John F. Manning<sup>†</sup>

In a thoughtful article, William Kelley emphasizes that recent experience under the Independent Counsel Reauthorization Act of 1994<sup>1</sup> has cast different parts of the executive branch into awkward litigation against one another over sensitive matters of federal public administration.<sup>2</sup> Most notably, in the criminal investigation of the Lewinsky matter, Independent Counsel Kenneth Starr and other parts of the executive (including the Office of the President) litigated over constitutional and common law privileges asserted on behalf of officials close to the President.<sup>3</sup> This of course raises a

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<sup>†</sup> Professor of Law, Columbia University. I thank Bradford Clark, William Kelley, Henry Monaghan, Gerald Neuman, Peter Strauss, and the participants in the University of Minnesota symposium and the Legal Studies Workshop at the University of Virginia for insightful comments and criticisms. I also thank Adi Goldstein and Matt Solum for excellent research assistance. The author participated in various matters relating to the independent counsel scheme while an attorney-advisor in the Justice Dept from 1986 to 1988; the views reflected herein are my own.

1. Pub. L. No. 103-270, 108 Stat. 732 (1994) (codified at 28 U.S.C. §§ 591-599 (1994)).

2. See William K. Kelley, *The Constitutional Dilemma of Litigation Under the Independent Counsel System*, 83 MINN. L. REV. 1197, 1207-11 (1999).

3. See, e.g., *In re Sealed Case*, 148 F.3d 1073, 1075 (D.C. Cir. 1998) (refusing to recognize a "protective function" privilege under FRE 501), *cert. denied*, 119 S. Ct. 461 (1998); *In re Lindsey*, 148 F.3d 1100, 1103-04 (D.C. Cir. 1998) (holding that attorney-client privilege does not protect communications between President and Deputy Counsel to President on matters relating to criminal investigation of President), *cert. denied*, 119 S. Ct. 466 (1998); *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 24-30 (D.D.C. 1998) (executive privilege ultimately does not protect communications among President and top White House aides concerning Lewinsky and Jones matters), *aff'd on other grounds sub nom. In re Lindsey*, 148 F.3d 1100, 1103-04 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 466 (1998). Recent newspaper accounts suggest that Judge Starr weighed indicting Mr. Clinton before the end of his term as President. See, e.g., Don Van Natta, Jr., *Starr Weighs Plan to Indict, Thinks Clinton Can Be Charged in Office*, SACRAMENTO BEE, Jan. 31, 1999, at A1. Were such an event ever to occur, the catalogue of intra-executive litigation presumably

threshold question of justiciability; the disputants invoked "the judicial Power" to resolve an arguably intra-mural dispute among executive officers, all purporting to represent the federal government. Professor Kelley, however, notes that the Supreme Court has brushed aside such formal concerns in cases involving at least one independent agency or officer.<sup>4</sup> He argues that, under those precedents, even if two or more parties formally speak for the federal government, functional adversity exists if one of them has statutory discretion to take litigation positions free of outside executive control.<sup>5</sup>

This premise, if correct (I assume *arguendo* that it is), invites inquiry into how independent an independent counsel really is. The statute tells us that the Attorney General (and derivatively the President)<sup>6</sup> can remove the independent counsel only "for good cause, physical or mental disability . . . or any other condition that substantially impairs the performance of such independent counsel's duties."<sup>7</sup> Reading that removal restriction in light of the Court's decisions sustaining independent agencies (*Humphrey's Executor v. United States*)<sup>8</sup> and independent prosecutors (*Morrison v. Olson*),<sup>9</sup> Professor Kelley concludes that the statute likely authorizes the independent counsel to set his or her own litigation positions, free of the Attorney General's or President's control.<sup>10</sup> Kelley laments this result. He makes a strong case for the proposition that dividing up the executive's litigating authority produces harmful consequences and, if

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would grow to include the constitutional question whether a sitting President has implied immunity from indictment.

4. See Kelley, *supra* note 2, at 1213-14; see also, e.g., *United States v. Nixon*, 418 U.S. 683, 692-97 (1974).

5. See Kelley, *supra* note 2, at 1213-14. As Professor Kelley recognizes, however, the Court's opinions have not relied on the premise that the President lacked control over the litigation decisions of the independent agencies who were parties to the lawsuits. For further discussion of this point, see *infra* note 60.

6. If the Attorney General can remove the independent counsel for legal disagreements, she legally exercises that authority as the agent of the President, who supervises the Attorney General and can remove her at will. See, e.g., *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922) (noting that the Attorney General is "the hand of the President" in fulfilling official responsibilities).

7. 28 U.S.C. § 596(a)(1) (1994).

8. 295 U.S. 602, 619 (1935).

9. 487 U.S. 654, 685-93 (1988).

10. See Kelley, *supra* note 2, at 1239-40.

anything, undermines the purposes of the independent counsel scheme.<sup>11</sup> But he believes that we are stuck with a strong form of independence as long as *Humphrey's Executor* and *Morrison* remain good law.

Rather than addressing Professor Kelley's analytical framework for resolving intra-branch justiciability, this Comment will raise specific questions about his understanding of the removal restriction.<sup>12</sup> Surely he is correct in stating that conventional indicia of statutory meaning suggest a purpose to insulate the independent counsel, at least to some degree, from other executive officials.<sup>13</sup> And no one familiar with the leading cases upon which Professor Kelley relies—*Humphrey's Executor* and *Morrison*—could doubt Congress's authority to create an independent prosecutor of sorts. Yet Professor Kelley reads those cases for all that they are worth, rather than asking whether a plausible alternative reading might still accommodate presidential claims to control the litigation judgments of federal prosecutors.<sup>14</sup> In a time of growing skepticism of the independent counsel scheme<sup>15</sup> and, for that matter, of independent agencies more generally,<sup>16</sup> it is surely

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11. See *id.* at 1238-39.

12. Questions about the precise scope of the removal power may have a new immediacy. Recent news reports indicate that the Department of Justice was poised "to begin an investigation of alleged irregularities on the part of IC Starr and his staff concerning (1) the initial information regarding the Lewinsky matter presented to IC Starr, (2) his seeking of permission to investigate the information, and (3) his conduct during that investigation." *In re Madison Guaranty Savings & Loan Ass'n*, 1999 WL 144597, at \*1 (D.C. Cir. Mar. 18, 1999) (No. 94-1) (*per curiam*).

13. See *infra* text accompanying notes 26-35.

14. See *infra* Part II.A.

15. For particularly effective criticisms of the statute's operation, see, for example, Julie R. O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463 (1996); Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267 (1998).

16. In the age of delegation, it is widely acknowledged that reasonably contestable legal judgments entail no small measure of policy judgment. See, e.g., *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1244-45 (1989). In light of that reality, growing numbers of scholars have come to emphasize that significant advantages of accountability, efficiency, and coordination flow from the centralization of public administration under a unitary executive. See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 37-47 (1994) (arguing that the founders designed the unitary executive to promote energy, efficiency, and checks and balances); Lawrence Lessig & Cass R. Sunstein, *The President and the*

worth exploring whether there is room for a revisionist view of the independent counsel's independence.

This Comment will suggest some preliminary reasons for concluding that the "good cause" provision may authorize the independent counsel's removal for disobeying the President's legal directives, at least on matters of reasonably contestable legal judgment.<sup>17</sup> Part I will argue that the "good cause" provision, while surely expected to give the independent counsel *some* insulation from outside executive control, nonetheless might be construed to avoid a serious constitutional question about the President's authority to direct the independent counsel. Part II will address the all-too-familiar constitutional question, which is said to emanate from those parts of Article II that vest "the executive Power" in the President and enjoin him or her to "take Care that the Laws be

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*Administration*, 94 COLUM. L. REV. 1, 93-106 (1994) (arguing that a unitary executive promotes values of "coordination, accountability, and efficiency"); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 56 ("[T]here is reason to believe that a President accountable to the entire nation is less likely to be subject to the influence of discrete interest groups than is some extraconstitutional institution established purportedly to check presidential authority."); Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 426-28 (1990) (arguing that "independence from the President often appears to be a mechanism for increasing [an agency's] susceptibility to factionalism").

17. This Comment does not contend that the President would have a serious constitutional claim to order an independent counsel, on pain of removal, to violate a clear legal duty. In the context of issuing a mandamus against a subordinate executive officer, the Court long ago observed that the Constitution does not confer a dispensing power upon the chief magistrate. See *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 613 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."); *id.* (to recognize such authority "would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and . . . would be clothing the President with a power entirely to control the legislation of congress"); see also, e.g., JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 292, at 177 (1840):

[W]e are not to understand, that [the Take Care] clause confers on the President any new and substantial power to cause the laws to be faithfully executed, by any means, which he shall see fit to adopt, although not prescribed by the Constitution, or by the acts of Congress. That would be to clothe him with absolute despotic power over the lives, the property, and the rights of the whole people.

This Comment takes that premise as a starting assumption. Hence, when referring to a subordinate executive officer's disobedience to a specific legal directive, this Comment means only those cases involving reasonably contestable legal judgments.

faithfully executed.”<sup>18</sup> Part II.A contends that while the Court’s precedents seems to bless independent federal officers, the Court has never decisively held that Congress can insulate such an officer from dismissal for disobeying the President’s specific legal directives. Part II.B then considers whether, as an original matter, denying the President authority to remove a subordinate for refusing to obey a specific legal directive would raise a serious constitutional question. In so doing, this Comment will not attempt to rehearse the vast textual and historical evidence on the removal question, which others have ably and exhaustively debated elsewhere.<sup>19</sup> Rather, given the constraints of this format, it will merely ask whether anything remains to be learned from the extraordinary debates surrounding the First Congress’s creation of the Department of Foreign Affairs—the so-called “decision of 1789.” Rather than accepting the most prevalent viewpoints—either that the decision of 1789 endorsed an inherent presidential removal power<sup>20</sup> or that it was almost entirely inconclusive<sup>21</sup>—Part II.B will suggest that the decision convincingly demonstrated that denying the previously discussed claim of inherent presidential removal power raises a serious and difficult constitutional question. That conclusion may itself offer persuasive reasons for constitutional interpreters more than two centuries after the fact to embrace the passive virtues of constitutional avoidance.

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18. U.S. CONST. art. II, §§ 1, 3; see *Myers v. United States*, 272 U.S. 52, 117-18 (1926).

19. See, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155 (1992); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541 (1994); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1787-1801 (1996); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275 (1989); Lessig & Sunstein, *supra* note 16; Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993); Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 YALE L.J. 991 (1993); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 596-625 (1984).

20. See, e.g., *Myers*, 272 U.S. at 115 (“[Madison’s] arguments in support of the President’s constitutional power of removal independently of congressional provision, and without the consent of the Senate, were masterly, and he carried the House.”).

21. See, e.g., Edward S. Corwin, *Tenure of Office and the Removal Power under the Constitution*, 27 COLUM. L. REV. 352, 369 (1927).

## I. THE CANON OF AVOIDANCE AND THE MEANING OF “GOOD CAUSE”

This Part will briefly consider whether the Act's “good cause” provision leaves room for an interpretation that avoids, to the extent appropriate, a serious constitutional question under Article II about the necessary degree of presidential direction and control.<sup>22</sup> Given the growing likelihood that Congress will not renew the independent counsel statute, at least in its present form,<sup>23</sup> the analysis here will not undertake an in-depth analysis of the particular statutory scheme. Rather, it will use the current statute to suggest a general framework for analyzing presidential authority under statutes that contain a “good cause” or a similar removal provision.

Geoffrey Miller has argued that phrases such as “good cause” can be interpreted to cover an executive officer's refusal to comply with any presidential directive<sup>24</sup>—an interpretation that would avoid the need to decide the difficult Article II question of presidential control.<sup>25</sup> Although I agree that one could ultimately read “good cause” broadly enough to avoid the Article II question, one must at least acknowledge that the conventional indicia of statutory meaning, applied in the absence of constitutional overtones, suggest a legislative design to insulate the independent counsel from outside executive

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22. See *infra* Part II.

23. See, e.g., 145 CONG. REC. S2910 (Mar. 18, 1999) (Sen. Toricelli) (“It is now clear . . . that the independent counsel law, when it expires on June 30, 1999, will not be reauthorized. There [are] . . . not the votes in the Senate or in the other body . . .”); *Independent Counsel Renewal Is Unlikely; GOP, Democrats Appear Ready To Let Law Expire*, BALT. SUN., Feb. 15, 1999, at 3A; Marc Lacey & Eric Lichbow, *Independent Counsel Law Faces Reform—Or Demise*, L.A. TIMES, Feb. 24, 1999, at A1; Neil Lewis, *Starr To Ask Congress To End Law That Gave Him His Job*, N.Y. TIMES, Apr. 14, 1999, at A1; Julia Malone, *Calls Growing To Scrap Independent Counsel Law*, ATLANTA J. & ATLANTA CONST., Feb. 24, 1999, at A12.

24. See Miller, *supra* note 16, at 86-87; see also, e.g., Lessig & Sunstein, *supra* note 16, at 110-11 (“We think it would be possible to interpret the relevant statutes as allowing a large degree of removal and supervisory power to remain in the President. . . . The statutory words might even allow discharge of commissioners who have frequently or on important occasions acted in ways inconsistent with the President's wishes with respect to what is required by sound policy.”); Sunstein, *supra* note 15, at 2274 (“It . . . would be reasonable to think that the Attorney General had considerable authority to discharge the independent counsel, and perhaps also to control the counsel's performance.”).

25. For a discussion of the canon of avoidance, see *infra* text accompanying notes 37-41.

control.<sup>26</sup>

First, the statute originated, in part, as a reaction to Acting Attorney General Robert Bork's firing of Special Prosecutor Archibald Cox during the Watergate investigation.<sup>27</sup> Because President Nixon had Cox fired for refusing to obey a presidential directive concerning the conduct of the Watergate prosecution,<sup>28</sup> one might plausibly infer that the independent counsel statute was designed to prevent similar types of interference by the President or the Attorney General in future investigations. Second, although I am skeptical of legislative history,<sup>29</sup> it may be relevant to some that the legislative materials accompanying the law's initial adoption and periodic renewal frequently asserted a narrow conception of the Attorney General's power to remove or otherwise to supervise

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26. Indeed, the mere designation of "independent counsel" seems calculated to distinguish that officer from ordinary federal prosecutors, whom Congress has expressly placed under the supervision of the Attorney General or the President. See 28 U.S.C. § 509 (1994) (noting that with exceptions not relevant here, "[a]ll functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General"); *id.* § 519 ("Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties."); *id.* § 541(c) ("Each United States attorney is subject to removal by the President."); *id.* § 542(b) ("Each assistant United States attorney is subject to removal by the Attorney General.")

27. See, e.g., S. REP. NO. 170, 95th Cong., 1st Sess. 2-3 (1977) (describing role of Watergate in creating the impetus for the independent counsel scheme); Niles L. Godes & Ty E. Howard, *Independent Counsel Investigations*, 35 AM. CRIM. L. REV. 875, 877-78 (1998) (describing origins of independent counsel scheme).

28. See, e.g., JOHN J. SIRICA, TO SET THE RECORD STRAIGHT 166 (1979) (noting that Cox was removed after refusing to comply with Nixon's order to refrain from "further attempts by judicial process to obtain tapes, notes, or memoranda of presidential conversations"); Julian A. Cook, III, *Mend It or End It? What To Do with the Independent Counsel Statute*, 22 HARV. J. L. & PUB. POL'Y 279, 292 (1992) (describing circumstances of Cox's removal).

29. Given my previously stated skepticism regarding legislative history, see John F. Manning, *Textualism As a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997), it is worth noting why I cite it here. I do so principally because legislative history is an interpretive convention sometimes used by others; in an effort to determine the range of acceptable interpretations, resort to conventional tools of construction may offer helpful predictive insights. In addition, I have argued that legislative history sometimes persuasively describes inferences from statutory structure or independently verifiable facts about statutory context. See *id.* at 731-37. In some cases, this paper uses legislative history for that purpose.



an independent counsel.<sup>30</sup>

Third, several structural features of the independent counsel scheme clearly suggest an overall purpose to limit the Attorney General's ability to interfere with the work of independent counsels.<sup>31</sup> One such provision directs the Justice

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30. See, e.g., S. REP. NO. 170, 95th Cong., 1st Sess. 66 (1978) ("The whole purpose of this chapter is defeated if [an independent counsel] is not independent and does not conduct a criminal investigation and prosecution without interference, supervision, or control by the Department of Justice."); S. REP. NO. 496, 97th Cong., 2d Sess. 17 (1982) ("[W]e stress that the Attorney General should use his removal power only in extreme, necessary cases, as removal of [an independent counsel] could severely undermine the public confidence in investigations of wrongdoing by public officials."); *id.* at 17 ("This section [requiring independent counsel to follow established Justice Department policies] should not be interpreted to mean that the failure to follow Departmental policies would constitute grounds for removal . . . by the Attorney General."). Indeed, during the 1987 reauthorization of the statute, the Senate Governmental Affairs Committee went out of its way to disagree with the Justice Department's broad understanding of "good cause":

[T]he Committee is disturbed by recent policy statements by the Department of Justice regarding its interpretation of the statute which permits an independent counsel to be removed from office for "good cause." Although no Attorney General has yet attempted to remove from office an independent counsel appointed under this statute, the Department of Justice has indicated that it believes good cause exists for removing any independent counsel who disobeys a lawful presidential order, even an order which seeks to compromise the very independence of proceedings under the statute.

. . . This interpretation of the statute completely misconstrues Congressional intent, which is to prevent the President's firing an independent counsel unless he or she engages in some type of misconduct, described by one hearing witness, Lloyd Cutler, former counselor to President Carter, as "taking a bribe or committing an impropriety."

S. REP. NO. 123, 100th Cong., 1st Sess. 12-13 (1987). The foregoing citations do not purport to be an exhaustive account of the legislative history; rather, I offer these examples to acknowledge that at least some key legislative actors thought it important to deny the Attorney General the type of control advanced by this Comment.

31. Upon superficial examination, one might also cite the influence of the maxim *ejusdem generis*, which assumes that a general word draws meaning from the specific words that accompany it. See, e.g., *Norfolk & Western Ry. Co. v. Train Dispatchers*, 499 U.S. 117, 129 (1991); *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 387 (1805). The Act provides that the Attorney General may remove an independent counsel only "for good cause, physical or mental disability . . . or any other condition that substantially impairs the performance of such independent counsel's duties." 28 U.S.C. § 596(a)(1) (1994). Hence, one might infer that "good cause" refers narrowly to circumstances that disable an independent counsel from discharging his or her duties.

Yet that contention ultimately seems unpersuasive. If a statute bars "dogs, cats, and other animals" from a public park, the specification of certain

Department and Attorney General to “suspend all investigations and proceedings” concerning matters investigated by an independent counsel.<sup>32</sup> Another provides that an independent counsel “shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply with the written or other established policies of the Department of Justice.”<sup>33</sup> To specify that an independent counsel must follow the Department’s “written or other *established* policies” might be taken to disclaim, by negative implication, any additional duty to follow the Attorney General’s case-specific determinations. Finally, the removal provision provides not only that “[a]n independent counsel removed from office may obtain judicial review,” but also that “[t]he independent counsel may be reinstated or granted other appropriate relief by the court.”<sup>34</sup> That remedy makes clear that the “good cause” determination does not reside in the Attorney General’s sole discretion, and that the removal restrictions aim to protect the independent counsel’s tenure and independence, and not merely his or her right to back pay in the event of wrongful discharge.<sup>35</sup>

Given those indicia of statutory purpose, a court might hesitate to construe “good cause” broadly to permit removal of

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animals may lend insight into the statute’s purpose, shedding light on the appropriate way to apply the open-textured phrase “other animals.” David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 930 (1992). With respect to the independent counsel statute’s removal provision, it would be odd to read “good cause” in light of the other listed causes, making it into a catch-all phrase for unenumerated forms of incapacity. For that interpretation would render superfluous another phrase that expressly serves that function—specifically, “any other condition that substantially impairs the performance of such independent counsel’s duties.” Hence, applying *ejusdem generis* to construe “good cause” would violate another settled canon—that courts should construe a statute, if possible, to avoid rendering part of it superfluous. *See, e.g.*, *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (applying “the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect”); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (discussing the judicial “duty ‘to give effect, if possible, to every clause and word of a statute’”) (*quoting* *Inhabitants of Montclair Tp. v. Ramsdell*, 107 U.S. 147, 152 (1883)).

32. *See* 28 U.S.C. § 597(a).

33. *Id.* § 594(f)(1).

34. *Id.* § 596(c).

35. The Court’s leading removal cases merely involved claims for back pay. *See Wiener v. United States*, 357 U.S. 349, 349-50 (1958); *Humphrey’s Executor v. United States*, 195 U.S. 602, 612 (1935); *Myers v. United States*, 272 U.S. 52, 106-07 (1926).

an independent counsel simply for failing to comply with presidential legal directives—even if such an interpretation would avoid the necessity of deciding a serious and difficult Article II question.<sup>36</sup> Whether a court would apply the canon of avoidance in this context depends in part on basic questions about the canon that can only be touched upon here. The Court has long held that “federal statutes are to be construed so as to avoid serious doubts as to their constitutionality, and . . . when faced with such doubts the Court will first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid.”<sup>37</sup> This approach “not only reflects the prudential concern that constitutional

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36. See *infra* Part II.

37. *Communication Workers of Am. v. Beck*, 487 U.S. 735, 761 (1987); see, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”); *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”). Indeed, its “reluctance to decide constitutional issues is especially great where . . . they concern the relative powers of coordinate branches of government.” *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 466 (1989); cf. *American Foreign Service Ass’n v. Garfinkel*, 490 U.S. 153 (1989) (“Particularly where . . . a case implicates the fundamental relationship between the Branches, courts should be extremely careful not to issue unnecessary constitutional rulings.”). The Court’s heightened preference for the canon of avoidance in structural cases may relate to a broader theme in the Court’s cases. At least since the entrenchment of the modern administrative state, the Court has often hesitated to enforce structural constitutional commitments directly by invalidating acts of Congress. See, e.g., William N. Eskridge, Jr., and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 VAND. L. REV. 597, 630-31 (1992); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1264 (1978). Hence, some have argued that to compensate for the underenforcement of structural constitutional norms, the Court uses structurally inspired canons of interpretation as a constitutional doctrine of second best; instead of invalidating acts of Congress, it interprets statutory phrases to promote the values of federalism and the separation of powers. See Eskridge & Frickey, *supra*, at 630-32. Without endorsing the underenforcement of structural norms, I have elsewhere defended the practice of using structurally inspired canons to interpret open-ended federal statutes establishing governmental institutions. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 632-37 (1996).

issues not be needlessly confronted, but also recognizes that Congress, like th[e] Court, is bound by and swears an oath to uphold the Constitution.<sup>38</sup> Hence, the Court will not conclude that Congress “pressed ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils.”<sup>39</sup>

Although the canon reflects a well-settled interpretive practice, its precise scope has proven controversial—especially of late. Frederic Schauer, for example, has forcefully argued that “it is by no means clear that a strained interpretation of a federal statute that avoids a constitutional question is any less a judicial intrusion than the judicial invalidation on constitutional grounds of a less strained interpretation of the same statute.”<sup>40</sup> Consistent with such concerns, the Court has, at times, refused to extend the canon of avoidance “to the point

38. *Edward J. DeBartolo Corp.*, 485 U.S. at 575.

39. *Public Citizen*, 491 U.S. at 466.

40. Frederic Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 74. Citing similar concerns, moreover, Justice Kennedy once explained in a separate opinion:

[The canon of avoidance] should not be given too broad a scope lest a whole new range of Government action be proscribed by interpretive shadows cast by constitutional provisions that might or might not invalidate it. The fact that a particular application of the clear terms of a statute might be unconstitutional does not provide us with a justification for ignoring the plain meaning of the statute. If that were permissible, then the power of judicial review of legislation could be made unnecessary, for whenever the application of a statute would have potential inconsistency with the Constitution, we could merely opine that the statute did not cover the conduct in question because it would be discomfoting or even absurd to think that Congress intended to act in an unconstitutional manner.

*Public Citizen*, 491 U.S. at 481 (Kennedy, J., concurring in the judgment). For recent scholarship questioning the canon of avoidance, see, for example, JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 101-05 (1997) (using game theory to argue that the canon of avoidance may intrude more severely on legislative choice than straightforward judicial invalidation of a statute); Richard A. Posner, *Statutory Interpretation—In the Classroom and Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) (“The practical effect of interpreting statutes to avoid raising constitutional questions is therefore to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution—to create a judge-made constitutional ‘penumbra’ that has much the same prohibitory effect as the judge-made (or at least judge-amplified) Constitution itself.”); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1959-64 (1997) (arguing that modern avoidance and severability doctrines are in tension). The legitimacy of the Court’s modern approach to avoidance is beyond the scope of this Comment.

of perverting the purpose of a statute."<sup>41</sup> Hence, the Court might well decline to apply the canon of avoidance to the "good cause" provision if a broad construction would contradict the manifest purpose of the removal restriction.

Although such considerations make the appropriateness of avoidance a close question, a court ultimately may be justified in applying the canon of avoidance to an open-ended "good cause" provision. In contrast with the many provisions of the independent counsel statute that prescribe specific and detailed means of assuring independence from the Attorney General,<sup>42</sup> the removal provisions have been Delphic from the

41. *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964) (quoting *Scales v. United States*, 367 U.S. 203, 211 (1961)); see, e.g., *CFTC v. Schor*, 478 U.S. 844, 841 (1986) (same); *Heckler v. Mathews*, 465 U.S. 728, 742-743 (1984) (same). To be sure, the Court has not invoked that formulation since it began to move toward textualism. See, e.g., Thomas Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 356-63 (1994) (describing Court's trend toward textualism). Textualism, however, does not necessarily undermine concerns about applying the canon of avoidance to pervert a statute's manifest purpose. Even the strictest textualist will use statutory purpose to help clarify a vague or ambiguous text. See, e.g., Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 443 (1990) ("Because laws themselves do not have purposes—only the authors are sentient—it may be essential to mine the context of the utterance out of the debates, just as we learn the limits of a holding by reading the entire opinion."); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515:

[I]t seems to me that the "traditional tools of statutory construction" include not merely text and legislative history but also, quite specifically, the consideration of policy consequences. Indeed, that tool is so traditional that it has been enshrined in Latin: "*Ratio est legis anima; mutata legis ratione mutatur et lex.*" ("The reason for the law is its soul; when the reason for the law changes, the law changes as well.")

Although they disfavor the use of legislative history, textualists will consult a statute's context and structure to ascertain the statutory design. See, e.g., *Smith v. United States*, 508 U.S. 223, 241 (1993) (Scalia, J., dissenting) (invoking the "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.") (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993)); *United States v. Fausto*, 484 U.S. 439, 449 (1988) (Scalia, J.) ("This conclusion emerges not only from the statutory language, but also from what we have elsewhere found to be an indicator of nonreviewability, the structure of the statutory scheme."). Hence, even a textualist might hesitate to apply the canon of avoidance if doing so would undermine obvious inferences from the context and structure of a statute.

42. Consider, for example, the provision that defines the relationship between the independent counsel and the Department of Justice:

(a) Suspension of other investigations and proceedings.—

start. As initially enacted in 1978, the statute provided that the Attorney General could remove an independent counsel only for “*extraordinary impropriety*, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such [independent counsel’s] duties.”<sup>43</sup> The statute nowhere specified what might qualify as an “*extraordinary impropriety*,” presumably leaving the elaboration of that open-ended standard to case-by-case judicial development.<sup>44</sup> In 1983, Congress amended the statute to replace “*extraordinary impropriety*” with the more conventional and less strict “*good cause*” provision<sup>45</sup>—the

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Whenever a matter is in the prosecutorial jurisdiction of an independent counsel or has been accepted by an independent counsel under section 594(e), the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 594(d)(1), and except insofar as such independent counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

(b) Presentation as *amicus curiae* permitted.—Nothing in this chapter shall prevent the Attorney General or the Solicitor General from making a presentation as *amicus curiae* to any court as to issues of law raised by any case or proceeding in which an independent counsel participates in an official capacity or any appeal of such a case or proceeding.

28 U.S.C. § 597 (1994).

43. Pub. L. No. 95-521, § 601, 92 Stat. 1824, 1873 (codified at 28 U.S.C. 596(a)(1) (1982)) (emphasis added).

44. In an era in which legislative history was thought to have greater influence than it does today, even the responsible committees offered little explanation of what might constitute an “*extraordinary impropriety*.” The Senate Judiciary Committee, for example, merely noted that “a certain degree of supervision [of the independent counsel] was required,” and that “the Committee felt it appropriate that this supervision be conducted by the Attorney General, who is a member of the executive branch of the government.” S. REP. NO. 95-170, at 73 (1978). To be sure, the committee emphasized that it sought to deal with cases in which “the Attorney General had a conflict of interest,” and that it had provided for removal “only . . . if certain specified causes for removal exist.” *Id.* But the committee conspicuously omitted to elaborate on those causes. If the committee wished to strike a “delicate balance . . . between the independence and accountability of [the independent counsel],” the resulting statute apparently left it to the judiciary to do so on a case-by-case basis. *Id.* at 74.

45. The Senate Governmental Affairs Committee suggested that substituting “*good cause*” for “*extraordinary impropriety*” would give additional guidance to those officials responsible for implementing the removal provisions:

Testimony before the Oversight Committee showed that the present standard of “*extraordinary impropriety*” is undefinable. Amending

standard that remains in force today. The concept of dismissal for cause, of course, has acquired some definition through its application in private and, more significantly, public employment contexts.<sup>46</sup> Still, one might safely assume that "good cause" cannot be reduced to a formula of uniform and fixed content. Rather, it is precisely the type of open-textured

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the standard to allow the Attorney General to remove the [independent counsel] "for good cause"—a standard which is used for removal of the heads of independent agencies—would allow the Attorney General and the [reviewing] court . . . to have a developed body of law to govern the standard of removal.

See S. REP. NO. 496, 97th Cong., 2d Sess. 17 (1982). As discussed below, the Supreme Court has never decisively held that independent agency administrators, subject to removal for various types of cause, are immune from removal for disobeying the lawful directives of the President. See *infra* Part II.A.

46. It is perhaps worth noting that in the civil service context (perhaps the most appropriate model for a public officer's removal provision), "good cause" sometimes justifies discharge for insubordination. See, e.g., *Redfearn v. Department of Labor*, 58 M.S.P.R. 307, 316 (1993) ("Agency employees are expected to respect authority and follow the orders of supervisory officials. An employee's deliberate refusal to follow supervisory instructions constitutes serious misconduct that cannot properly be condoned.") (citations omitted); *Thompson v. United States Postal Service*, 50 M.S.P.R. 41, 46 (1991) ("The Board has held that an employee does not have the unfettered discretion to disobey or ignore agency orders. Moreover, employees are expected to respect authority and to follow the orders of supervisory officials. The disobedience of a supervisor's orders is done at the risk of being insubordinate and may be sufficient cause for removal.") (citations omitted); *Huntley v. Veterans Administration*, 18 M.S.P.R. 71, 74 (1983) ("[T]he appellant first reargues the merits of the first two charges and contends that the evidence does not support a finding of insubordination because the chief's orders conflicted with established agency policy. Our examination of the record does not reveal error in the presiding official's determination that the order was proper. More importantly, regardless of the propriety of the order, the appellant was obligated to obey it while taking whatever necessary steps he thought appropriate to challenge its ultimate validity.") (citations omitted); cf. *Elrod v. Burns*, 427 U.S. 347, 366 (1976) (plurality opinion of Brennan, J.) ("[E]mployees may always be discharged for good cause, such as insubordination or poor job performance, when those bases in fact exist."). Even that observation, however, would lead to circularity if one were not to acknowledge that insubordination presupposes a refusal "to obey an authorized order of a superior officer which the officer is entitled to have obeyed." *Phillips v. General Services Administration*, 878 F.2d 370, 373 (Fed. Cir. 1989) (emphasis added). Hence, the existence of a "good cause" provision cannot alone establish the Attorney General's right to remove an independent counsel for disobedience on matters of legal judgment. But see *Miller, supra* note 16, at 86-87 ("These statutes can rather easily be interpreted as including within the concept of cause the failure of an agency head to comply with the President's instructions to take some action otherwise within his or her statutory authority.").

expression more typically associated with context-specific judicial elaboration than with decisive legislative instruction.<sup>47</sup>

Congress, in short, has consistently opted for a relatively imprecise standard for removing an independent counsel. One can only speculate about the reasons for that choice. If one were disposed to consult the legislative history surrounding the scheme's original adoption and repeated reenactment, it would reveal not only a series of assertions about the need for independence, but also numerous expressions of concern about the accountability of independent counsels.<sup>48</sup> Indeed, quite

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47. As Max Radin once wrote, the first question in statutory interpretation is:

Can the statutory determinable in the widest range be taken to include the determinate before the court? The more nearly determinate the statute is, the easier that question will be to answer. It is far easier to make a statute which contains large determinables than limited ones, but if we wish to see clearly and with brief consideration what the maximum and minimum extension is, in any determinable, we must avoid words like "just" and "reasonable" and "property" and similar almost indefinitely extensible terms. These words have so little color of their own that they can be made to take on almost any hue.

Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 883-84 (1930).

48. See, e.g., H.R. REP. NO. 1307, 95th Cong., 2d Sess. 5 (1978) ("The committee recognizes that by providing for the removal of [an independent counsel, there is a risk of hampering the independence of [an independent counsel]. But the committee also recognizes that there must be a way to remove from office an individual who is not properly carrying out his responsibilities. Accordingly, the committee has established a removal procedure with checks upon the removal power so as not to threaten unduly the independence of [an independent counsel]."); S. REP. NO. 95-170, at 74 (1978) (referring to "the delicate balance struck by the statute between the independence and accountability of [an independent counsel]"); S. REP. NO. 496, 97th Cong., 2d Sess. 15 (1982) ("The Committee believes that the statutory independence of the [independent counsel] is crucial to assure an impartial investigation and public confidence in the prosecutor's findings and decisions. Safeguards should, however, be built into the present law in order to . . . check against abuse of power by [an independent counsel]."). Perhaps most significantly, when Congress last reauthorized the statute in 1994, the Senate Governmental Affairs Committee explained:

In the 1992 and 1993 hearings, Subcommittee members also pointed out that accountability could be further tightened if the Department of Justice were to develop standards and procedures implementing its statutory authority to remove an independent counsel for "good cause." The Supreme Court identified this authority as a key mechanism for ensuring accountability.

S. REP. NO. 101, 103d Cong., 2d Sess. 15 (1994). Hence, at least some legislative deliberations recognized the importance of the independent counsel's accountability, and the crucial role that removal would play in promoting such accountability.



apart from any legislative history, the tension between independence and accountability pervades the entire structure of the scheme.<sup>49</sup> We will never know exactly why the removal provision itself (as opposed to some of the legislative history)<sup>50</sup> fails to address that tension with specificity.<sup>51</sup> Perhaps there was some sentiment for passing the buck to the judiciary, on the assumption that, in particular cases, judges would strike an appropriate balance; or perhaps Congress could not forge a consensus on a more precise definition of the removal standard.<sup>52</sup> Whatever the reason, the important fact is that Congress did not settle upon a precise removal standard.

Max Radin once wrote that a legislature "cannot indulge itself in using large, round, sonorous words and then complain that courts do not treat them as precise, definite, and unreverberant."<sup>53</sup> By leaving it to the courts to strike the balance between independence and accountability in the

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49. The following provisions, inter alia, appear to reflect efforts to foster greater accountability. First, an independent counsel cannot expand the scope of his or her jurisdiction if the Attorney General determines that there are "no reasonable grounds" to warrant further investigation of the additional matter. 28 U.S.C. 593(c)(2)(B). Second, either the Attorney General or the Special Division of the D.C. Circuit must refer related matters to the independent counsel for investigation. *Id.* § 594(e). Third, the statute explicitly provides for congressional oversight of the independent counsel. *See id.* § 595(a).

50. *See supra* note 30.

51. I have argued elsewhere that if Congress can enact a vapoious standard (such as "good cause") and then leave it to its committees to supply an authoritative specification of meaning, it would undermine the structural objectives of bicameralism and presentment. *See Manning, supra* note 29, at 706-25. Given the detailed statements about removal in the legislative history, it is clear that the responsible committees anticipated specific questions about the degree to which the Attorney General should exercise control over independent counsels. That Congress did not address that point with specificity in the statute may suggest that it was too difficult or costly to secure the agreement of both Houses and the President on a more precise standard.

52. For similar speculation about the enactment of a vague term in an agency-administered statute, see *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 864 (1984):

Perhaps [Congress] consciously desired the Administrator to strike the balance . . . thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency.

53. Radin, *supra* note 47, at 884.

context of removal, Congress appears to have provided the judiciary with room to consider the influence of constitutional structure. If the Court determines that denying the President control over the independent counsel raises a serious constitutional question,<sup>54</sup> it need not and, indeed, should not conclude that by enacting the “good cause” provision Congress “press[ed] ahead into dangerous constitutional thickets.”<sup>55</sup> Rather, the very indeterminacy of the statutory standard seems to invite the application of the framework of avoidance long used by the Court—a background convention against which, under standard premises of interpretation, Congress is presumed to have legislated.<sup>56</sup> These considerations make it at least plausible for the judiciary to consider structural constitutional values in determining what “good cause” means in practice.<sup>57</sup>

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54. See *infra* Part II.

55. *Public Citizen*, 491 U.S. at 466.

56. See, e.g., *McNary v. Haitian Refugee Center*, 498 U.S. 479, 496 (1991) (“Congress legislates with knowledge of our basic rules of statutory construction.”); *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1980) (finding it “not only appropriate but also realistic to presume that Congress was familiar with . . . unusually important precedents” establishing rules of construction and that Congress “expect[s] its enactment[s] to be interpreted in conformity with them”).

57. Along these lines, a broad interpretation of “good cause” would not seem to defeat the statutory purpose to grant independent counsels *some* measure of independence from the Attorney General. Service at the pleasure of the President permits removal for any reason or no reason at all. In contrast, even if interpreted broadly to avoid a serious constitutional question, the “good cause” provision would require the Attorney General to establish that an independent counsel refused to follow his or her directives, and that the directives related to a matter of legal judgment about which reasonable people could disagree. It presumably would be open to a court to inquire into whether the stated reasons for dismissal were pretextual; for example, if the Attorney General’s directive reflected a sharp and unexplained departure from established policy, it might support a finding that removal of the independent counsel rested on reasons other than disobedience. If, moreover, the broad interpretation of “good cause” derives from the President’s duty to “take Care that the Laws be faithfully executed,” see U.S. CONST. art. II, § 3, cl. 1, reasons such as general dissatisfaction with the course or pace of an investigation might not suffice to establish “good cause.” Most importantly, litigation over “good cause” would require the Attorney General to articulate reasons for dismissing an independent counsel; otherwise, a reviewing court would have no basis for evaluating the existence of good cause. At a bare minimum, this articulation of reasons would subject the Attorney General and the President to political, as well as a potential judicial, checks based on the stated grounds for removal—a consideration that Congress evidently found important. See 28 U.S.C. 596(a)(2) (“If an independent counsel is removed from office, the Attorney General shall promptly submit to the division of the

## II. A SERIOUS CONSTITUTIONAL QUESTION?

In considering whether a narrow interpretation of "good cause" would raise a serious constitutional question, two issues require attention. First, do the Court's precedents approving independent agencies and officers decisively establish that Congress can place executive officers beyond the President's control on matters of legal judgment?<sup>58</sup> Second, if not, does the original meaning of Article II cast any useful light on the appropriate degree of presidential control over such officers?<sup>59</sup> This Part examines those questions in turn.

### A. THE INFLUENCE OF PRECEDENT

Because Congress chose to use a garden-variety "good cause" provision in the independent counsel statute, the most relevant precedents relate to independent agencies operating under similar removal restrictions.<sup>60</sup> At least since the Court's

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court and the Committees on the Judiciary of the Senate and the House of Representatives a report specifying the facts found and the ultimate grounds for such removal."). Hence, whatever the precise degree of independence the "good cause" provision ultimately affords, it at least ensures a greater degree of independence than the at-will removal typically associated with officers exercising traditional prosecutorial functions.

58. See *infra* Part II.A.

59. See *infra* Part II.B.

60. To the extent that Professor Kelley argues that inter-agency justiciability implicitly depends on the discretion of one or more parties to take independent litigating positions, cases sustaining that type of justiciability might be understood to acknowledge the existence of such discretion. That conclusion, however, does not follow from the Court's reasoning in the typical inter-agency case. The leading case, which involved a rate making dispute between the ICC and the Army, does not rest its justiciability determination explicitly on the independent litigating authority of the ICC. *United States v. ICC*, 337 U.S. 426, 430 (1949). Rather, as Professor Kelley acknowledges, the Court in that case reasoned that the relevant dispute satisfied Article III requirements because private third parties were the real parties in interest. See *id.*; accord, e.g., *Secretary of Agric. v. United States*, 347 U.S. 645, 647 (1954) ("The Secretary of Agriculture, acting on behalf of the affected agriculture interests, intervened [in a proceeding involving the ICC]."). Indeed, in most inter-agency cases, the Court does not even address justiciability. See, e.g., *United States v. Connecticut Nat'l Bank*, 418 U.S. 656, 657 (1974); *United States v. Marine Bancorporation*, 418 U.S. 602, 604 (1974); *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 483 n.2 (1958); *ICC v. Jersey City*, 322 U.S. 503, 507-09 (1944). It is black letter law that cases resolving jurisdictional issues sub silentio lack precedential effect on questions of jurisdiction. See, e.g., *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 38 (1952); *United States v. More*, 7 U.S. (3 Cranch) 159, 172 (1805) (Marshall, J.).

*United States v. Nixon*, 418 U.S. 683 (1974), also does not resolve the

decision in *Humphrey's Executor v. United States* in 1935,<sup>61</sup> the legal culture has assumed that Congress may insulate independent agencies from presidential control.<sup>62</sup> The

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removal question. In that case, the Court held that an executive privilege dispute between the Watergate Special Prosecutor and President Nixon was justiciable. The Court found genuine adversity based on a regulation providing that the special prosecutor was not to be removed "except for extraordinary improprieties . . . and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action." *Id.* at 695 n.9 (quoting 38 Fed. Reg. 30739, as amended by 38 Fed. Reg. 32805). The Court reasoned that this removal restriction effected an extraordinary delegation of prosecutorial authority to the special prosecutor. *See id.* at 696. For two reasons, that holding has no bearing on the appropriate interpretation of a standard "good cause" provision. First, in concluding that the regulation effected an extraordinary delegation to the special prosecutor, the Court emphasized that the regulation stated "that the Special Prosecutor was not to be removed without the 'consensus' of eight designated leaders of Congress." *Id.* at 696. Second, the Court did not even address, much less sustain, the constitutionality of the regulation in question. If Congress had attempted to enact a legislative veto analogous to that of the Watergate regulation, such a measure surely would have violated the constitutional separation of powers. *See, e.g.,* *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986); *INS v. Chadha*, 462 U.S. 919, 958-59 (1983); *Myers v. United States*, 272 U.S. 52 (1926). Hence, *United States v. Nixon* does not establish the constitutionality of eliminating presidential control over the legal judgments of federal prosecutors.

61. 295 U.S. 602 (1935).

62. *See* Miller, *supra* note 16, at 43 (discussing the "undoubted integration" of independent agencies "into the national political culture"). Since the decision in *Humphrey's Executor*, few reported cases have addressed the President's removal of an administrative officer. *See* Wiener v. United States, 357 U.S. 349 (1958); *Morgan v. TVA*, 115 F.2d 990 (6th Cir. 1940); *Mackie v. Bush*, 809 F. Supp. 144 (D.D.C. 1993). The rarity of such cases may suggest that post-New Deal Presidents have largely forgone removing independent officers who were unwilling to go. Perhaps this forbearance owes something to the fact that Presidents have an array of effective, but less blunt, instruments for influencing, if not controlling, the policies of independent agencies. *See* Strauss, *supra* note 19, at 590-91 (arguing that the President often influences an independent commission by virtue of statutory authority to designate its chair, who exerts disproportionate influence over the commission's policymaking and administrative functions); *id.* at 594 (noting that independent agencies frequently "need the goods the President can provide: budgetary and legislative support, assistance in dealing with other agencies, legal services, office space, and advice on national policy"). Whatever the reasons, the executive's acceptance of such agencies, however grudging, has made their independence at least a practical and political reality. *See* Miller, *supra* note 16, at 83-86; *see also* Corwin, *supra* note 21, at 357 (citing early twentieth-century evidence of presidential acceptance of independent agencies). The precise limits of *Humphrey's Executor's* constitutional holding thus remain untested.

reasoning of *Humphrey's Executor* surely invites that conclusion. The Federal Trade Commission Act provided that the President could only remove Federal Trade Commissioners for "inefficiency, neglect of duty, or malfeasance in office."<sup>63</sup> The Court held that this restriction did not violate Article II. Perhaps more importantly, it did so while at the same time concluding that the statute displayed a "congressional intent to create a body of experts . . . which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government."<sup>64</sup> Thus, read for all that it is worth, *Humphrey's Executor* would suggest that no serious constitutional question arises from legislative efforts to create a sphere of agency discretion beyond presidential control.<sup>65</sup>

As others have argued,<sup>66</sup> however, the Court's *holding* sweeps considerably less broadly than its reasoning.<sup>67</sup>

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These observations, however, are not meant to suggest that the executive has necessarily acquiesced in the constitutionality of independent agencies. Professor Miller has argued that evidence of such acquiescence "is mixed, and probably is not strong enough to support the inference that the executive branch has forfeited its constitutional objections to [such] agencies." Miller, *supra* note 16, at 85-86. That question is beyond the scope of this Comment.

63. 15 U.S.C. § 41 (1994).

64. 295 U.S. at 625-26.

65. Even taken on its own terms, however, *Humphrey's Executor* does not establish that the President lacks the authority to use removal to exert control over a subordinate's legal policy judgments. Because *Humphrey's Executor* involved only a request for back pay, *see id.* at 612, it does not address the question whether such a subordinate has the right to seek specific relief against removal. If violating a statutory limitation on removal does not give rise to specific relief, that restriction does not directly interfere with the President's authority to use removal to impose his or her policies on a recalcitrant official.

66. *See, e.g.*, Lessig & Sunstein, *supra* note 16, at 110-11; Miller, *supra* note 16, at 92-95.

67. It is worth noting that the Court explicitly characterized the FTC's functions as "quasi-legislative" and "quasi-judicial," rather than "purely executive." 295 U.S. at 628 ("The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid."). Although an independent counsel is a purely executive official, *Humphrey's Executor's* taxonomy is no longer dispositive. The quasi-legislative and quasi-judicial classifications, to be sure, once determined the force of that precedent. *See, e.g.*, Wiener v. United States, 357 U.S. 349, 353-56 (1958) (holding that War Claims Commissioner performing quasi-judicial functions was not freely removable by the President); Morgan v. TVA, 115

Franklin Roosevelt did not remove Commissioner Humphrey on the ground that the latter refused to follow explicit presidential directives on matters of legal judgment.<sup>68</sup> Rather, the President sought Humphrey's dismissal on the ground that "the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection."<sup>69</sup> *Humphrey's Executor* thus did not present, and could not have resolved, the question

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F.2d 990, 994 (6th Cir. 1940) ("[The TVA] is not to be aligned with the Federal Trade Commission, the Interstate Commerce Commission, or other administrative bodies mainly exercising clearly quasi-legislative or quasi-judicial functions—it is predominantly an administrative arm of the executive department. The rule of the Humphrey case does not apply."); William J. Donovan & Ralstone R. Irvine, *The President's Power to Remove Members of Administrative Agencies*, 21 CORNELL L.Q. 215, 228 (1936) ("Congress may impose reasonable limitations upon the power of the President to remove officers who have quasi-legislative and quasi-judicial duties."). The Court, however, has now reaffirmed *Humphrey's Executor* on the understanding that many of the Commission's functions were, in substance, executive. See *Morrison v. Olson*, 487 U.S. 654, 690 n.28 (1988) ("[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree.") (citing *Bowsher v. Synar*, 478 U.S. 714, 761 n.3 (1986) (White, J., dissenting)); see also *id.* at 691 (*Humphrey's Executor* is properly understood to ask "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty").

68. See *Miller*, *supra* note 16, at 94 ("[T]he issue in *Humphrey's Executor* was not whether the President was disabled from removing a member of the Federal Trade Commission who had refused to comply with a presidential directive. The President had made no allegation that Humphrey had disobeyed any of his directives."); *Strauss*, *supra* note 19, at 611 ("Acting scant weeks after argument, the [*Humphrey's Executor*] Court . . . found that Congress could validly impose a 'cause' requirement on the discharge of a Federal Trade Commissioner; given the circumstances, the Court did not have to say what cause could be."). Although the Court subsequently applied *Humphrey's Executor* to protect the tenure of a War Claims Commissioner who performed adjudicative functions, see *Wiener v. United States*, 357 U.S. 349 (1958), similar considerations limit the force of that precedent:

The ground of President Eisenhower's removal of petitioner was precisely the same as President Roosevelt's removal of Humphrey. Both Presidents desired to have Commissioners, one on the Federal Trade Commission, the other on the War Claims Commission, "of my own selection." They wanted these Commissioners to be their men. The terms of removal in the two cases are identic and express the assumption that the agencies of which the two Commissioners were members were subject in the discharge of their duties to the control of the Executive.

*Id.* at 354.

69. *Humphrey's Executor*, 295 U.S. at 612. Indeed, Roosevelt explicitly "disclaim[ed] any reflection upon the commissioner personally or upon his services." *Id.*

whether the statute shielded Humphrey from removal for refusing to accede to the President's specific legal directives.<sup>70</sup>

Of more direct relevance, the Court's decision in *Morrison v. Olson*,<sup>71</sup> which rejected a facial attack on the constitutionality of the independent counsel statute, did not decisively address the meaning of the constitutional implications of the statute's "good cause" provision.<sup>72</sup> Olson challenged the statute, in part, on the ground that the removal restriction "impermissibly interferes with the President's exercise of his constitutionally appointed functions."<sup>73</sup> But because the Attorney General had made no attempt to remove the independent counsel, the Court had no occasion to determine what "good cause" means in the context of a concrete removal decision. Doubtless as a result of this posture, Chief

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70. The Court's opinion in *Bowsher v. Synar*, 478 U.S. 714 (1986), lends indirect support to that conclusion. *Bowsher* held that Congress could not delegate authority to the Comptroller General to prepare *binding* deficit reduction figures under the Gramm-Rudman-Hollings Act. Reasoning that the preparation of such figures was a form of law execution, *see id.* at 726-27, the Court held that Congress could not assign that function to an officer under its own control. *See id.* at 733. Importantly, the Court rested its conclusion about congressional control on removal provisions substantially similar to those at issue in *Humphrey's Executor*. Thus, by statute, Congress had given itself power to remove the Comptroller General for "(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude." 31 U.S.C. § 703(e)(1)(B) (1994).

In dissent, Justice White argued that the removal provisions did not give Congress meaningful control over the Comptroller General. Invoking *Humphrey's Executor*, he argued that "similarly qualified grants of removal power are generally deemed to protect the officers to whom they apply and to establish their independence from the domination of the possessor of the removal power." 478 U.S. at 770 (White, J., dissenting). The *Bowsher* Court, however, replied that in *Humphrey's Executor*, "the President did not assert that he had removed the Federal Trade Commissioner in compliance with one of the enumerated statutory causes for removal." *Id.* at 729 n.8. In sharp contrast with the reasoning of *Humphrey's Executor*, the *Bowsher* Court further explained:

[T]he dissent's assessment of the statute fails to recognize the breadth of the grounds for removal. The statute permits removal for "inefficiency," "neglect of duty," or "malfeasance." These terms are very broad and, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will.

*Id.* at 729. *Bowsher* thus backs away from the understanding that *Humphrey's Executor* established the constitutionality of a broadly conceived removal restriction. *See, e.g.,* Lessig & Sunstein, *supra* note 16, at 110-11.

71. 487 U.S. 654 (1988).

72. 28 U.S.C. § 596(a)(1) (1994).

73. *Morrison*, 487 U.S. at 686.

Justice Rehnquist's opinion for the Court confined itself to the general observation that a valid removal restriction must preserve the President's ability to ensure the "faithful" execution of the laws.<sup>74</sup> The opinion was deliberately vague about precisely what that premise requires. The Chief Justice thus wrote for the Court:

Nor do we think that the "good cause" removal provision at issue here impermissibly burdens the President's power to control or supervise the independent counsel, as an executive official, in the execution of his or her duties under the Act. This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the "faithful execution" of the laws. Rather, because the independent counsel may be terminated for "good cause," the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act. Although we need not decide in this case exactly what is encompassed within the term "good cause" under the Act, the legislative history of the removal provision also makes clear that the Attorney General may remove an independent counsel for "misconduct." Here, as with the provision of the Act conferring the appointment authority of the independent counsel on the special court, the congressional determination to limit the removal power of the Attorney General was essential, in the view of Congress, to establish the necessary independence of the office. We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.<sup>75</sup>

If "good cause" extends to the presidential judgment that an independent counsel is not acting "in a manner that comports with the provisions of the Act,"<sup>76</sup> it is not self-evident why similar authority should be lacking where the prosecutor's conduct (in the President's judgment) does not "comport[ ] with" the provisions of the Constitution, the substantive criminal statutes that form the basis for a prosecution, or any other applicable source of law. If an independent counsel were to insist upon lodging a RICO indictment that did not, in the President's judgment, satisfy the statute's "pattern" requirement,<sup>77</sup> it is hardly obvious that such conduct should be

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74. U.S. CONST. art. I, § 3, cl. 2 ("The President . . . shall take Care that the Laws be faithfully executed."); see *infra* text accompanying notes 100-102, 117-118 (discussing the Take Care Clause).

75. *Morrison*, 487 U.S. at 692-93 (footnotes and citation omitted).

76. *Id.* at 692.

77. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §



any less an act of faithless execution, in constitutional terms, than a decision to disregard the operational limits of the independent counsel statute. In light of the Court's explicit decision "not [to] decide . . . precisely what is encompassed within the term 'good cause,'"<sup>78</sup> the Court's examples of good cause can hardly be taken as exhaustive catalogue. Rather, consistent with the analysis outlined above,<sup>79</sup> *Morrison's* reasoning suggests, if anything, that the legislative purpose to "establish the necessary independence" of independent counsels remains subject to the President's constitutional responsibility to ensure the faithful execution of the laws, and that the precise relationship between the two impulses must await future adjudication. In the end, all that definitively emerges from the opinions such as *Humphrey's Executor* and *Morrison* is that they have not definitively resolved the constitutionality of a restrictive reading of "good cause."<sup>80</sup>

## B. A SERIOUS ARTICLE II QUESTION

If the case law does not decisively resolve the removal question, it remains to inquire into whether denying the President removal authority would raise a serious question under Article II. To undertake a full-scale inquiry into that issue, one would have to examine a vast and often-conflicting body of evidence relating to, among other things, the pertinent constitutional text, pre-ratification history, and post-ratification practice—ground that others have extensively covered elsewhere.<sup>81</sup> Rather than rehearsing that evidence, I

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1961(5) (1994) (a "pattern" of racketeering activity "requires at least two acts of racketeering activity" within a 10-year period).

78. *Morrison*, 487 U.S. at 692.

79. *See supra* Part I.

80. *See* Lessig & Sunstein, *supra* note 16, at 110 ("There is no controlling authority on how 'independent' the independent agencies and officers can legitimately claim to be."). The Court tangentially spoke to the removal question in *Mistretta v. United States*, 488 U.S. 361 (1989), which sustained the United States Sentencing Commission's authority to promulgate binding Sentencing Guidelines to be used in federal criminal cases. In the course of its opinion, the Court noted that "good cause" restrictions of the kind sustained in *Morrison* and *Humphrey's Executor* were "specifically crafted to prevent the President from exercising 'coercive influence' over independent agencies." 488 U.S. at 411. Because no party in *Mistretta*, however, raised the question whether the "good cause" restriction unconstitutionally limited the President's removal power, the Court had no occasion to address the scope of the President's Article II authority.

81. *See supra* note 19.

will merely suggest that in the debate over the decision of 1789, sophisticated observers far more familiar with the relevant constitutional assumptions than we are today offered persuasive grounds to believe that denying presidential removal authority would at least raise a serious and difficult constitutional question.

Before examining the assumptions of 1789, however, one must acknowledge that the structure of modern government frequently appears to rest upon premises very different from those that underlay the Constitution's original design. In a world in which administrative agencies routinely perform legislative, executive, and judicial functions,<sup>82</sup> and in which independent agencies have long since become commonplace,<sup>83</sup> some may question the relevance of consulting eighteenth-century attitudes about the allocation and separation of powers. Yet, as I have argued elsewhere,<sup>84</sup> original structural commitments remain at least relevant to understanding the constitutional assumptions against which modern government operates. The Court frequently considers evidence of original understanding in resolving unsettled structural constitutional questions.<sup>85</sup> More importantly for present purposes, the Court also uses original structural inferences in construing the statutes that help to organize the federal government. Where statutes give open-ended directions about the allocation of governmental decisionmaking authority,<sup>86</sup> the Court has

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82. See, e.g., Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492-93 (1987) ("Virtually every part of the government Congress has created—the Department of Agriculture as well as the Securities and Exchange Commission—exercises all three of the governmental functions the Constitution so carefully allocates among Congress, President, and Court. These agencies adopt rules having the shape and impact of statutes, mold governmental policy through enforcement decisions and other initiatives, and decide cases in ways that determine the rights of private parties.").

83. See *supra* note 62 and accompanying text. As previously discussed, despite the entrenchment of independent agencies, the precise scope of their independence remains unsettled. See *supra* Part II.A.

84. This discussion draws upon a more extended analysis in Manning, *supra* note 37, at 632-37.

85. See, e.g., *Edmond v. United States*, 520 U.S. 651, 659-60 (1997); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219-24 (1995); *Bowsher v. Synar*, 478 U.S. 714, 721-24 (1986); *INS v. Chadha*, 462 U.S. 919, 946-51 (1983).

86. For example, the Administrative Procedure Act (APA) uses relatively vague expressions such as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A) (1994), to define the scope of judicial review of administrative agencies. See, e.g., Manning,

tended to interpret those statutes to promote, rather than undermine, the values implicit in the original structural design.<sup>87</sup> That impulse has much to commend it. To the extent that the system of separated powers and checks and balances was adopted in response to concerns about unchecked governmental power,<sup>88</sup> such concerns surely have no less, and perhaps far more, purchase in a complex twentieth-century society whose government pervades our daily lives in a way that few could have imagined in 1789.<sup>89</sup> Although the structure of modern government looks very different from Madison's day, if our written Constitution is to remain relevant,<sup>90</sup> then judges should try, where possible, to shape modern governmental arrangements to reflect the commitments implicit in the original constitutional structure.

Turning to the merits of the removal question, it is necessary first to say a few words about why this issue has proven so difficult. The complexity of the removal question

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*supra* note 37, at 635-36 (discussing open-ended language of APA); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1194 (1986) (noting that "regulatory legislation has been characterized by ambiguity of intention, leaving an open field for the judiciary to assume a substantial presence in defining the contours of administrative power").

87. See, e.g., Eskridge & Frickey, *supra* note 37, at 605-07, 617-19; Manning, *supra* note 37, at 633-34. For example, even though the Court will not directly enforce the nondelegation doctrine, it narrowly construes regulatory statutes to avoid excessive delegations to agencies. See, e.g., *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) (plurality opinion) (Occupational Safety & Health Act of 1970); *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974) (Independent Offices Appropriation Act of 1952); see also *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.").

88. For analysis of the separation of powers and checks and balances, see, for example, FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961); *id.* NO. 51, at 320-25 (James Madison).

89. See, e.g., Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 601 (1986) ("The doctrine has afforded less and less adequate protection for the individual as government has grown into the Leviathan it has become."); Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were To Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 453 (1991) ("[T]he separation of powers provisions of the Constitution are tremendously important . . . because the fears of creeping tyranny that underlie them are at least as justified today as they were at the time the Framers established them.").

90. See Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 771-72 (1988).

doubtless arises from the fact that nothing in the Constitution, save the Impeachment Clause,<sup>91</sup> speaks directly to the removability of executive officers. Any answer to the question of presidential removal power, therefore, inevitably depends upon often-conflicting inferences from relatively open-textured constitutional language.<sup>92</sup> As Justice Scalia recently wrote, even Chief Justice Taft's classic opinion in *Myers v. United States*,<sup>93</sup> the leading precedent for broad presidential removal power, only scratched the surface of the question in its seventy-one page historical exposition of the meaning of Article II.<sup>94</sup> The array of unanswered, and perhaps unanswerable, questions is dizzying. To what extent does Article II, § 1, by vesting "the executive Power" in the President, incorporate the traditional English conception of executive power, including the power to remove executive officers?<sup>95</sup> Powerful evidence suggests that the founders consulted Blackstone's description of the Crown's prerogatives as their starting point not only in defining (or redefining) many of the enumerated powers in Article II, but also in deciding which traditionally executive powers to reallocate to Congress.<sup>96</sup> Yet does this suggest that

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91. U.S. CONST. art. II, § 4.

92. In his influential history of the presidency, Professor Thach wrote: The completion of Article II of the Constitution seems, at first sight, a logical place for an evaluation of the work of the Convention and an interpretation of the executive established by it. A closer view reveals the fact that such an evaluation and interpretation is hardly possible. Rushed through in the last days of the Convention's being, as much of it was, the executive article bristles with contentious matter, and, until it is seen what decision is given to these contentions, it is impossible to say just what the national executive meant.

CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY 1775-1789*, at 140 (1969).

93. 272 U.S. 52 (1926).

94. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989) ("It is easy to understand why [Taft's opinion] would take almost three years and seventy pages. As I shall later have occasion to describe, done perfectly it might well take thirty years and 7,000 pages.")

95. Even to ask that question is to assume the answer to an extensively debated antecedent question: whether the Vesting Clause of Article II, § 1 does any more than designate the President as the officer who is to exercise the specific powers enumerated in the balance of Article II. Compare, e.g., Calabresi & Prakash, *supra* note 19, at 570-81 (arguing that the Vesting Clause grants residual executive powers to the President), with Lessig & Sunstein, *supra* note 16, at 47-54 (arguing that the Vesting Clause assigned little more than the enumerated powers).

96. See, e.g., 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE*

traditional executive powers, not expressly modified or reassigned, accrued to the President by virtue of the clause vesting "the executive Power . . . in a President of the United States"?<sup>97</sup> How much weight do we attach to the many statements expressly distancing the Presidency from the British Monarchy in the private and public deliberations on the Constitution?<sup>98</sup> And what do we make of the models of executive power offered by the pre-1787 state constitutions, which served as both positive and negative examples for those who designed the United States Constitution?<sup>99</sup>

CONSTITUTION 428 (1953); Scalia, *supra* note 94, at 859.

97. See Scalia, *supra* note 94, at 859-60:

It is apparent from all this that the traditional English understanding of executive power, or, to be more precise, royal prerogatives, was fairly well known to the founding generation, since they appear repeatedly in the text of the Constitution in formulations very similar to those found in Blackstone. It can further be argued that when those prerogatives were to be reallocated in whole or part to other branches of government, or were to be limited in some other way, the Constitution generally did so expressly.

98. See, e.g., Lessig & Sunstein, *supra* note 16, at 13 ("It is an important truism that the framers were quite skeptical of broad executive authority, a notion they associated with the tyrannical power of the King."); Scalia, *supra* note 94, at 858-59 ("[T]he proponents of the Constitution during the ratification campaign felt constrained to emphasize the important differences between British royal prerogative and the powers of the presidency."); see also, e.g., I MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65 (1966) ("Mr. Wilson . . . did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers."); THE FEDERALIST NO. 67, at 408 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It is impossible not to bestow the imputation of deliberate imposture and deception upon the gross pretense of a similitude between a king of Great Britain and a magistrate of the character marked out for the President of the United States."); 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 107-10 (1866) (remarks of Iredell at North Carolina Convention) (distinguishing the President from the King of Great Britain). Indeed, Corwin suggests that English history is inapposite because the Crown's power "in the appointment and removal of officers is an historical outgrowth of and is still intimately involved with a much wider prerogative in the creation of offices." Corwin, *supra* note 21, at 383. Hence, the source of the removal power may not translate readily to a system in which the more basic allocation of governmental power departs from the British model. See *infra* text accompanying notes 129-130.

99. Compare, e.g., Calabresi & Prakash, *supra* note 19, at 607 (arguing that pre-ratification state constitutions adopted a strong conception of distinctive executive and legislative powers), with Flaherty, *supra* note 19, at 1768-69, 1776-77 (arguing that the New York and Massachusetts Constitutions served as models for the United States Constitution, but did not embrace a strong version of gubernatorial control over executive officers).

Other aspects of Article II, not to mention Article I, only complicate matters further. Some have argued that broad removal authority is implicit in the President's duty to "take Care that the Laws be faithfully executed."<sup>100</sup> Since it is pointless, they say, to assign the President a duty that he or she has no authority to fulfill, ordinary rules of construction would indicate an implied executive power to remove officers, who, in the President's judgment, are not faithfully executing the laws.<sup>101</sup> While that understanding appears to be a reasonable implication of the Take Care Clause, it is surely not incontestable,<sup>102</sup> particularly when considered in conjunction with related constitutional texts. Along these lines, critics of broad removal power have questioned whether such a potent implication can be reconciled with the Constitution's inclusion of the Opinion Clause, which authorizes the President to "require the Opinion, in writing, of the Principal Officer in each of the executive Departments, relating to the Duties of their respective Offices."<sup>103</sup> They maintain, in short, that it would have made little sense for the founders to confer so trivial a power in *express* terms if Article II connoted a broad *implied*

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Determining the appropriate role to assign to state models of constitutional power is especially treacherous; as Gordon Wood has established, much of the design of the Constitution reflected a reaction *against* the structural arrangements of the early state governments. See GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 463-67 (1969).

100. U.S. CONST. art. II, § 3.

101. See *Myers*, 272 U.S. at 122 ("[W]hen the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal."); see also *infra* text accompanying note 118.

102. See Corwin, *supra* note 21, at 385 ("Nor should it be overlooked . . . that the clause requiring the President to 'take care that the laws be faithfully executed' was taken almost verbatim from the New York Constitution of 1777, which none the less gave the executive of that state very little voice in either appointing or removals."); see also *Myers*, 272 U.S. at 236 (McReynolds, J., dissenting):

The Constitution of New York, much copied in the federal Constitution . . . defined [the Governor's] powers and duties—among them, 'to take care that the laws are faithfully executed to the best of his ability.' It further provided 'that the treasurer of this state shall be appointed by act of the Legislature,' and intrusted the appointment of civil and military officers to a council. The Governor had no power to remove them, but apparently nobody thought he would be unable to execute the laws through officers designated by another.

103. U.S. CONST. art. II, § 2, cl. 1.

power to control the execution of the laws through the removal of executive officials.<sup>104</sup> And then there is the important question of the Necessary and Proper Clause of Article I,<sup>105</sup> which some have read as broad grant of congressional authority to determine the shape of the federal government, including the independence vel non of federal agencies.<sup>106</sup>

This necessarily stylized account of the major textual issues (or, more accurately, a subset of the major textual

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104. See, e.g., *Myers*, 272 U.S. at 207 (McReynolds, J., dissenting) ("It is beyond the ordinary imagination to picture 40 or 50 capable men, presided over by George Washington, vainly discussing, in the heat of a Philadelphia summer, whether express authority to require opinions in writing should be delegated to a President in whom they had already vested the illimitable executive power here claimed."); Lessig & Sunstein, *supra* note 16, at 32 ("What reason would there have been for providing the President with a constitutional power to demand written reports from officers over whom he already had an inherent power to control?"). In response, Calabresi and Prakash have argued, inter alia, that "the Opinion Clause empowers the President to obtain information on government matters precisely so he will be able to issue binding orders to his subordinates." Calabresi & Prakash, *supra* note 19, at 584. That explanation, however, does not address why the founders thought it necessary to make explicit the power to request such opinions. For an interesting explanation of the Opinion Clause, see Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647 (1996).

105. U.S. CONST. art. I, § 8, cl. 18 ("Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

106. See, e.g., Donovan & Irvine, *supra* note 67, at 217 ("If the functions of [an administrative] office require the exercise of independent action, then Congress has the express power to pass all 'necessary and proper' laws to safeguard that independence even from the President."); Lessig & Sunstein, *supra* note 16, at 67 ("In as clear a textual commitment as possible, it is Congress that is granted the power to determine the means for specifying how powers—and, again, all powers—in the federal government are to be exercised."). In somewhat less sweeping terms, Peter Strauss has argued that "[i]n almost all significant respects . . . the job of creating and altering the shape of the federal government was left to the future—to the congressional processes suggested by Congress's authority [under the Necessary and Proper Clause]." Strauss, *supra* note 19, at 598-99. Building on that assumption, Justice Holmes once argued that the President's duty of faithful execution extends to the allocations of discretion that Congress has prescribed in creating agencies and defining their powers. See, e.g., *Myers*, 272 U.S. at 295 (Holmes, J., dissenting) ("The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress saw fit to leave within his power."). Professor Corwin nicely summarized the core constitutional tension when he said that the "confrontation . . . of the 'executive' power of the President with the 'necessary and proper' powers of Congress supplies the grand issue" of the removal power. Corwin, *supra* note 21, at 359 (italics omitted).

issues) cannot begin to capture the complexity and sophistication of a debate that has filled thousands of pages and spanned more than two centuries. The difficulty of untangling the necessary textual, structural, and historical implications two centuries after the fact surely highlights the usual concern that with the passage of time, “[a]lterations in the legal and cultural landscape may make . . . meaning hard to recover.”<sup>107</sup> But for reasons that soon will become apparent, the more telling point is that skilled eighteenth century observers, familiar with the assumptions of the day, did not find it much easier to resolve this complex question that the constitutional text did not explicitly address.

Evidence for this proposition lies in the debate associated with the decision of 1789—the First Congress’s debate over the establishment of the Department of Foreign Affairs. That debate, which spanned many days, focused on a clause in the bill providing that the Secretary was “to be removable by the President of the United States.”<sup>108</sup> The deliberations gave detailed, indeed exhaustive, consideration to the constitutional ground rules, if any, for removing an executive officer. The discussions produced a wide array of opinion, which Edward Corwin accurately classified as follows:

Three fairly equal parties disclosed themselves: first, those who believed that the power of removal was the President’s alone by the intention of the constitution; second, those who believed, on like grounds, that it belonged to the President acting by and with the advice and consent of the Senate; thirdly, those who held that the Constitution had not settled the question, and that, therefore, it remained for Congress to settle it. A fourth group, comprising apparently only two or three members, were of opinion that impeachment was the only constitutional method of removal.<sup>109</sup>

Most of the arguments were sophisticated and lawyerly, invoking the text and structure of the Constitution, analogies involving English and state law institutions, and the practical consequences of choosing one interpretation over another.<sup>110</sup>

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107. Atchison, T. & S.F. Ry. v. Pena, 44 F.3d 437, 445 (7th Cir. 1994) (Easterbrook, J., concurring).

108. 1 ANNALS OF CONGRESS 474 (Joseph Gales & William W. Seaton eds., 1834).

109. Corwin, *supra* note 21, at 361. For a substantially similar account of the debate, see THACH, *supra* note 92, at 152.

110. Even the small minority who argued in favor of the exclusivity of impeachment made plausible arguments in support of that claim. See 1 ANNALS OF CONGRESS, *supra* note 108, at 475 (Rep. Smith of South Carolina) (“Now, I infer . . . that, as the constitution has not given the President the



Even a brief account of the major claims of the three major subgroups—the presidential, senatorial, and congressional parties, as Corwin once called them<sup>111</sup>—will suffice to show not only the seriousness of their engagement, but also the difficulty of the question debated.

The presidential party, led by Madison, contended that the President possesses inherent Article II authority to remove subordinate executive officers.<sup>112</sup> At least in the early days of the debate, the Madisonian forces favored retaining the statute's express removal clause as a practical exposition of the Constitution.<sup>113</sup> Although many of their arguments sought to answer the precise claim that the Constitution required the Senate's concurrence in removal, the presidential party's reasoning had broader implications. Referring to the Vesting Clause of Article I, § 1, for example, Madison contended that "if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute

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power of removability, it meant that he should not have that power; and this inference is supported by that clause in the constitution which provides that all civil officers of the United States shall be removed by impeachment . . . Here is a particular mode described for removing; and if there is no other mode directed, I contend that the constitution contemplated only this mode."); *id.* ("I imagine, sir, we are declaring a power in the President which may hereafter be greatly abused; for we are not always to expect a Chief Magistrate in whom such entire confidence can be placed as the present.").

111. See Corwin, *supra* note 21, at 361 n.22.

112. At first, Madison argued that the question of removal lay within the regulatory power of Congress. See 1 ANNALS OF CONGRESS, *supra* note 108, at 389 (Rep. Madison) (arguing that "because Congress may establish offices by law; therefore most certainly, it is in the discretion of the Legislature to say upon what terms the office should be held, either during good behavior or during pleasure"). Upon further reflection, he shifted to the position that the President possessed inherent removal authority. See *id.* at 480 ("I have, since the subject was last before the House, examined the constitution with attention, and I acknowledge that it does not perfectly correspond with the ideas I entertained of it from the first glance.").

113. See, e.g., *id.* at 479 (Rep. Madison) ("[I]f it is nothing more than a mere declaration of a clear grant made by the constitution, it can do no harm; but if it relates to a doubtful part of the constitution, I suppose an exposition of the constitution may come with as much propriety from the Legislature, as any other department of Government."); *id.* at 482 (Rep. Vining) ("The House has determined to make a declaration of their construction on the constitution."); *id.* at 488 (Rep. Boudinot) ("I am disposed to think the clause proper; and as some doubts respecting the construction of the constitution have arisen, I think it also necessary."); *id.* at 509 (Rep. Clymer) ("These being my sentiments, I wish the clause to stand as a legislative declaration, that the power of removal is constitutionally vested in the President.").

the laws.”<sup>114</sup> While acknowledging that the Constitution had expressly qualified the appointment power by requiring the Senate’s advice and consent for principal officers,<sup>115</sup> Madison argued that the separation of powers disfavored engrafting, by implication, any unspecified qualifications upon the executive power.<sup>116</sup> An implied presidential removal power also was

114. *Id.* at 481; *see, e.g., id.* at 397 (Rep. Clymer) (“[T]he power of removal was an executive power, and as such belonged to the President alone, by the express words of the Constitution: ‘the executive power shall be vested in a President of the United States of America.’”); *id.* at 516 (Rep. Madison) (“I agree that if nothing more was said in the constitution than that the President, by and with the advice and consent of the Senate, should appoint to office, there would be great force in saying that the power of removal resulted by natural implication from the power of appointing. But there is another part of the constitution, no less explicit . . . [I]t is that part which declares that the executive power shall be vested in a President of the United States.”); *id.* at 548-49 (Rep. Boudinot) (“If we establish an office avowedly to aid the President, we leave the conduct of it to his discretion. Hence the whole executive is to be left with him. Agreeably to this maxim, all executive power shall be vested in a President.”). Representative Ames made the following structural argument based on the Vesting Clause:

The Constitution places all the executive power in the hands of the President, and could he personally execute all the laws, there would be no occasion for establishing auxiliaries; but the circumscribed powers of human nature in one man, demand the aid of others. . . . But in order that [the President] may have responsibility to his country, he must have a choice in selecting his assistants, a control over them, with power to remove them when he finds the qualifications which induced their appointment to cease.

*Id.* at 492.

115. *See, e.g., id.* at 397 (Rep. Clymer) (“It was true, in some instances, [the Senate] held a qualified check, but that was in consequence of an express declaration in the constitution; without such declaration, they would not have been called upon for advice and consent in the case of appointment.”); *id.* at 481-82 (Rep. Madison) (“If the constitution had not qualified the power of the President in appointing to office, by associating the Senate with him in that business, would it not be clear by virtue of his executive power, to make such an appointment? Should we be authorized, in defiance of that clause in the Constitution—‘The executive power shall be vested in a President,’ to unite the Senate with the President in the appointment to office?”).

116. Madison thus contended:

There is another great maxim which ought to direct us in expounding the constitution . . . that the three great departments of government be kept separate and distinct; and if in any case they are blended, it is in order to admit a partial qualification, in order more effectually to guard against an entire consolidation. I think, therefore, when we review the several parts of this constitution, when it says that the legislative powers shall be vested in a Congress of the United States under certain exceptions, and the executive power vested in a President with certain exceptions, we must suppose that they were intended to be kept separate in all cases in which they are not blended. . . .

deemed essential to the fulfillment of the President's enumerated Article II powers.<sup>117</sup> Madison, among others, relied specifically upon the Take Care Clause to substantiate that contention:

[T]here is another part of the constitution which inclines, in my judgment, to favor the construction I put on it; the President is required to take care that the laws be faithfully executed. If the duty to see the laws faithfully executed be required at the hands of the Executive Magistrate, it would seem that it was generally intended to have that species of power which is necessary to accomplish that end. Now, if the officer once appointed does not depend upon the President for his existence, but upon a distinct body . . . I confess I do not see how the President can take care that the laws be faithfully executed.<sup>118</sup>

The presidential party did not rest alone upon the text of Article II. Its members reinforced their textual claims with a series of structural and practical arguments.<sup>119</sup> For example, some argued that recognizing presidential removal power would ensure that executive officers were ultimately

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*Id.* at 516-17 (Rep. Madison); *accord, e.g., id.* at 580 (Rep. Baldwin) ("It was found necessary to blend powers to a certain degree; so far we must acquiesce. The Senate must concur with the President in making appointments, but with respect to removal they are not associated . . .").

117. See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS* 39-40 (1997).

118. 1 *ANNALS OF CONGRESS*, *supra* note 108, at 516; *see also, e.g., id.* at 393 (Rep. Goodhue) ("It was the peculiar duty of the President to watch over the executive officers; but of what avail would be his inspection, unless he had a power to correct the abuses he might discover."); *id.* at 561 (Rep. Ames) ("In the constitution the President is required to see the laws faithfully executed. He cannot do this without he has a control over officers appointed to aid him in the performance of this duty."). Representative Vining also invoked the Take Care Clause in arguing that presidential removal power posed no threat to liberty: "Who, let me ask, is the Chief Magistrate under this Government? The President. What are his duties? To see the laws faithfully executed; if he does not do this effectually, he is responsible. To whom? To the people." *Id.* at 594.

119. Corwin curiously dismisses this aspect of the debate as being based "largely or altogether on the argument from convenience." Corwin, *supra* note 21, at 362. If the derivation of presidential removal power from the Vesting or the Take Care Clause was a matter of implication and conceded to be a close and serious question, it is difficult to see why such practical arguments were not legitimate instruments for identifying the purpose of those clauses. Even the strictest textualist would acknowledge that purpose is relevant in determining the meaning of a doubtful text, and that the policy consequences of alternative interpretations illuminate purpose. In fact Corwin himself notes that the citation of practical considerations likely was calculated to determine "what the Constitution must have intended." Corwin, *supra* note 21, at 362.

accountable to the people.<sup>120</sup> Little was to be feared, moreover, from vesting removal power in the President alone, for any President who abused that authority could be impeached or, at least, turned out at the ballot box every four years.<sup>121</sup> Conversely, the failure to acknowledge an unfettered presidential removal power would raise serious concerns. If the President had to secure the advice and consent of the Senate, it would diffuse official responsibility for retaining bad characters in office.<sup>122</sup> And whereas the threat of removal would promote an officer's vigilance to his or her public duty,<sup>123</sup>

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120. As Madison put it:

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

1 ANNALS OF CONGRESS, *supra* note 108, at 518; *see, e.g., id.* at 480 (Rep. Madison) ("It is evidently the intention of the constitution, that the first Magistrate should be responsible for the executive department; so far therefore as we do not make the officers who are to aid him in the duties of that department responsible to him, he is not responsible to his country.").

121. *See, e.g., id.* at 480 (Rep. Madison) ("I own that I am not afraid to place my confidence in [the President], especially when I know he is impeachable for any crime or misdemeanor before the Senate; and that, at all events, he is impeachable before the community at large every four years, and liable to be displaced if his conduct shall have given umbrage during the time he has been in office."); *id.* at 581 (Rep. Baldwin) (emphasizing that the President is "subject to impeachment, and ever dependent upon the will of the people for his re-election"); *id.* at 594 (Rep. Vining) ("Have [the people] the means of calling [the President] to account, and punishing him for neglect? They have secured it in the constitution, by impeachment, to be presented to their immediate representatives; if they fail here, they have another check when the time of election comes around.").

122. *See, e.g., id.* at 495 (Rep. Ames) ("If the President is inclined to shelter himself behind the Senate, with respect to having an improper person in office, we lose the responsibility, which is our greatest security; the blame among so many will be lost."); *id.* at 509 (Rep. Clymer) ("If the President is divested of this power, his responsibility is destroyed . . ."). In answer to the claim that impeachment supplied the sole basis for removing an officer, Madison added that "[t]he threat to liberty, the danger of mal-administration has not yet been found to lie so much in the facility of introducing improper persons into office, as in the difficulty of displacing those who are unworthy of the public trust." *Id.* at 515.

123. *See id.* at 495 (Rep. Ames) ("[A]dvantages may result from keeping the power of removal *in terrorem* over the heads of the officers; they will be stimulated to do their duty to the satisfaction of the principal, who is responsible for the whole executive department.").

the public would suffer a "most manifest injury" if the President and a subordinate could "go on pulling in different ways."<sup>124</sup>

At least initially, opposition to the express removal clause came largely from the senatorial party. Members of that group thoughtfully and substantively engaged proponents of inherent presidential removal power. With regard to principal officers appointed by and with the advice and consent of the Senate, the senatorial party contended that the entity possessing the power to appoint traditionally also enjoyed the power to remove.<sup>125</sup> As Elbridge Gerry thus explained, "it is in the nature of things, that the power which appoints, removes also. If there are deviations from this general rule, the instances are few, and not sufficient to warrant our attention."<sup>126</sup> The senatorial party also emphasized that the Constitution blends, rather than separates, the government's powers; hence, giving the President and Senate joint authority over removals flowed naturally from their joint constitutional responsibility for appointments.<sup>127</sup> Some further maintained that, without the

124. *Id.* at 581 (Rep. Baldwin).

125. Elbridge Gerry thus explained:

What clause is it that gives this power in express terms? I believe there is none such. If there is a power of removal, besides that by impeachment, it must vest somewhere. It must vest in the President, or in the President and the Senate, or in the President, Senate, and House of Representatives. Now, there is no clause which expressly vests it in the President. I believe no gentleman contends it is in this House, because that would be that mingling of executive and legislative powers gentlemen deprecate. I presume, then, gentlemen will grant, that if there is such a power, it vests with the President, by and with the advice and consent of the Senate, who are the body that appoints. . . . If the power of removal vests where I suppose, we, by this declaration, undertake to transfer it to the President alone.

1 ANNALS OF CONGRESS, *supra* note 108, at 395-96; *see, e.g., id.* at 396 (Rep. Bland) ("The constitution declares, that the President and the Senate shall appoint, and it naturally follows that the power which appoints shall remove also."); *id.* at 510 (Rep. Sherman) ("I consider it as an established principle that the power which appoints can also remove, unless there are express exceptions made."); *id.* at 559 (Rep. Sherman) ("I have not heard any gentleman produce an authority from law or history which proves, that where two branches are interested in the appointment, one of them has the power of removal."); *id.* at 576-77 (Rep. Jackson) ("The words of the constitution forcibly imply our construction; and it has never yet been proved, nay, it has hardly been controverted, that the power which appoints is not the power to remove.").

126. *Id.* at 596 (Rep. Gerry).

127. *See, e.g., id.* at 575 (Rep. Jackson) (arguing that governmental powers "are blended; not to be sure, in so high or dangerous a degree, but in all

Senate as a check, the President would have the power arbitrarily to dismiss executive officers,<sup>128</sup> and that an illimitable presidential removal power would grant the President a form of dispensing power.<sup>129</sup> Indeed, many feared that recognizing an inherent presidential removal power would transform the President into a monarch.<sup>130</sup> Finally, the senatorial party challenged the Madisonian understanding of the "executive Power" with evidence of state constitutional practice, which commonly denied removal authority to governors in whose hands the state executive power was placed.<sup>131</sup>

The claims of the congressional party were, in many respects, the most measured. Proponents of congressional regulatory authority argued that if the Constitution did not

possible forms they are capable of receiving"); *id.* at 485 (Rep. Stone) ("[I]f no such principle [of separation of powers] is declared in the constitution, and that instrument has adopted exceptions, I think we ought to follow those exceptions, step by step, in every case to which they bear relation.").

128. *See, e.g., id.* at 475 (Rep. Smith of South Carolina) ("I imagine, sir, we are declaring a power in the President which may hereafter be greatly abused . . ."); *id.* at 540 (Rep. Page) ("If you take from [the Senate] their right to check the President in the removal of officers, they cannot prevent the dismissal of a faithful servant, who has opposed the arbitrary mandates of an ambitious President.").

129. *See id.* at 597 (Rep. Gerry) ("[T]he President is to have the power of preventing the execution; the office, and its duties, are suspended on the pleasure of the President. Suppose an officer discharges his duty as the law directs, yet the President will remove him . . .").

130. *See id.* at 505 (Rep. Jackson) ("It has been mentioned that in all Governments the Executive Magistrate has the power of dismissing officers under him. This may hold good in Europe, where monarchs claim their powers *jure divino*, but it never can be admitted in America, under a constitution delegating only enumerated powers."); *id.* at 509 (Rep. Page) ("I venture to assert, that this clause of the bill contains in it the seeds of royal prerogative."); *id.* at 596 (Rep. Gerry) ("In Great Britain, this is the prerogative of the throne; where it is likewise held a maxim, that the King can do no wrong.").

131. *Id.* at 491 (Rep. Gerry) ("Is [the] maxim [of inherent presidential removal power] supported by precedent drawn from the practice of the individual states? The direct contrary is established. . . . How then can the gentlemen assert that the powers of appointment and removal are incidental to the Executive Department of Government?"); *id.* at 534 (Rep. White) ("Each State has an Executive Magistrate; but look at his powers, and I believe it will not be found that he has in any one, of necessity, the right of appointing or removing officers."); *id.* at 570 (Rep. Page) ("Has any State of the Union ever thought it necessary to put such a power into the hands of their Chief Magistrate, in order to secure the liberties of the citizen? If it is that great security which some gentlemen seem to think, it is strange that it should never, as yet, have been thought of under the State Governments.").

speak to the removal of executive officers, the matter fell to Congress under the Necessary and Proper Clause.<sup>132</sup> On that assumption, establishing the tenure of office and prescribing the conditions for discharging its occupant were incidental to the legislative power to create the office.<sup>133</sup> Representative Hartley aptly expressed that position when he observed:

If [the removal power] is omitted [from the Constitution], and the power is necessary and essential to the Government and to the great interests of the United States, who are to make the provision and supply the defect? Certainly the Legislature is the proper body. It is declared they shall establish offices by law. The establishment of an office implies every thing relative to its formation, constitution, and termination; consequently, the Congress are authorized to declare their judgment on each of these points.<sup>134</sup>

To be sure, when it came to the Secretary of Foreign Affairs, many in the congressional party believed that Congress should exercise its discretion to vest the removal power in the President alone.<sup>135</sup> Yet many also thought it important to

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132. U.S. CONST. art. I, § 8, cl. 17; *see, e.g.*, 1 ANNALS OF CONGRESS, *supra* note 108, at 545 (Rep. Sedgwick) (“[T]he constitution vests the power of removal, by necessary implication in the Government of the United States. Have not Congress, therefore, the power of making what laws they think proper to carry into execution the powers vested by the constitution in the Government of the United States?”); *id.* at 584 (Rep. Sylvester) (“Now, I would infer . . . that the House having the power lodged with them of creating offices, and passing all laws necessary to carry the constitution into effect, they have a right to declare the tenure by which the office shall be held.”).

133. *See, e.g., id.* at 392 (Rep. Lawrence) (“[A]s the constitution was silent with respect to the time the Secretary of Foreign Affairs should remain in office . . . it therefore depended upon the will of the Legislature to say how the department should be constituted and established by law, and the conditions upon which he shall enjoy the office. We can say he shall hold it for three years from his appointment, or during good behavior; and we may declare unfitness and incapacity causes of removal and make the President alone judge of this case.”); *id.* at 511 (Rep. Sherman) (“As the officer is the mere creature of the Legislature, we may form it under such regulations as we please, with such powers and such duration as we think good policy requires.”); *id.* at 565 (Rep. Sedgwick) (“[T]he Legislature were at liberty to determine that an officer should be removable by the President, or by whom they pleased; that he was absolutely the creature of the law, and subject to legislative discretion.”).

134. *See id.* at 503.

135. *See id.* at 500 (Rep. Hartley) (“Under these circumstances . . . I have no doubt in my own mind, that this office is during pleasure, and that the power of removal which is a mere temporary one, ought to be in the President, whose powers, taken together, are not very numerous, and the success of this Government depends upon their being unimpaired.”); *id.* at 542 (Rep. Sedgwick) (“I say it would be absurd, in the highest degree, to continue such a person in office contrary to the will of the President, who is responsible that

reserve legislative discretion to prescribe a different arrangement where the circumstances warranted.<sup>136</sup>

Because much of the congressional party appeared to support presidential removal power as the best disposition of the question before the House, one might have thought that the congressional and presidential parties would join in voting for the express removal clause—the former on the ground that it reflected a wise exercise of legislative discretion, the latter as a means of declaring its sense of Article II. In the end, however, key members of the presidential party changed course, seeking to distance themselves from anything that might imply legislative control over the removal question. Madison, for example, argued that if the removal power derived from Article II, Congress had no right to disturb that allocation of authority: “The powers relative to offices are partly legislative and partly executive. The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the legislative power ceases.”<sup>137</sup> That sentiment took concrete form in a legislative maneuver by Egbert Benson of New York to strike the express removal clause. A stalwart of the presidential party, he feared that an *express* removal provision would imply that Congress, rather than the Constitution, had supplied the President’s authority.<sup>138</sup> Benson initially attempted simply to strike the clause, but that motion failed.<sup>139</sup> He ultimately achieved that objective, however, through a two step process. First, he moved to add language that would give *implied* recognition to the President’s removal power, proposing a clause that gave a clerk custody of departmental papers “whenever the

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the business be conducted with propriety, and for the general interest of the nation.”); *id.* at 584 (Rep. Sylvester) (“The President is the whole executive branch of Government; and yet you so fetter him, by attaching to him a legislative branch, that he has little or no agency in displacing a public officer who holds his commission of him alone.”).

136. *See, e.g., id.* at 499 (Rep. Sedgwick) (“[W]e must consider every [nonjudicial] office according to its nature, and regulate it in a corresponding manner.”); *id.* at 607 (Rep. Tucker) (“I apprehend a law is necessary in every instance to determine the exercise of the power. In some cases, it may be proper to that the President alone should have it. I am not clear in my own mind, what general rule, if any, can be established on this subject.”).

137. *Id.* at 604.

138. *Id.* at 525 (“If we declare in the bill that the officer shall be removable by the President, it has the appearance of conferring the power upon him.”).

139. *See id.* at 599 (noting that the motion failed by a vote of 20 to 34).



[Secretary] shall be removed by the President."<sup>140</sup> Second, Benson made clear that if his first motion succeeded, he would next move "to strike out the words . . . 'to be removable by the President,' which appeared somewhat like a grant."<sup>141</sup>

Although at least some members of the congressional party supported Benson's motion to give implied recognition to presidential removal power,<sup>142</sup> several objected to striking the express removal provision on the ground that its excision would imply a lack of legislative control over removal.<sup>143</sup> Prominent members of the presidential party spoke in favor of Benson's motions on the same ground.<sup>144</sup> In separate votes, the

140. *Id.* at 601 (Rep. Benson).

141. *Id.* (Rep. Benson).

142. *See, e.g.,* CURRIE, *supra* note 117, at 40-41; THACH, *supra* note 92, at 154.

143. Theodore Sedgwick, for example, argued that deleting the clause would unnecessarily force the issue:

[T]here seem to be two opinions dividing the majority of this House. Some of these gentlemen seem to suppose that, by the constitution, and by implication and certain deduction from the principles of the constitution, the power vests in the President. Others think it is a matter of legislative determination, and that they must give it to the President. Now, suppose either of these sentiments be just, there is no impropriety in the other's assenting to the mode of expression already adopted [the express removal clause]; yet, if the latter opinion which I stated is true, there is an evident impropriety in agreeing to the amendment, and it may tend more properly to divide than unite the House.

1 ANNALS OF CONGRESS, *supra* note 108, at 602 (Rep. Sedgwick). For additional arguments of the congressional party, see, for example, *id.* at 605 (Rep. Sedgwick) ("[H]e thought it was the discretion of the Legislature to authorize the exercise of [the removal power], because they had complete power over the duration of the offices they created. Hence he deemed it necessary to make an express grant of the power of removal; but strike out these words, and there is no express grant in the bill."); *id.* at 606 (Rep. Lawrence) (speaking "against striking out the words, because he thought the Legislature had power to establish offices on what terms they pleased"); *id.* at 607 (Rep. Tucker) ("If we say the President may remove from office, it is a grant of power; and we can repeal the law, and prevent the abuse of it. But if we, by law, imply that it is a constitutional right vested in the President, there will be a privilege gained, which the Legislature cannot affect; at least, the reversion of such a solemn opinion will occasion much inconvenience, not to say confusion.")

144. *See, e.g., id.* at 604 (Rep. Madison) ("First, altering the mode of expression tends to give satisfaction to those gentlemen who think it not an object of legislative expression; and second, because the amendment already agreed to fully contains the sense of the House upon the doctrine of the constitution; and therefore the words are unnecessary as they stand there."); *id.* at 608 (Rep. Vining) (noting that he "acquiesced in striking it out, because he was satisfied that the constitution vested the Power in the President").

House ultimately decided first to adopt the clause impliedly recognizing presidential removal power and then to delete the express removal clause.<sup>145</sup> The bill passed the House as amended,<sup>146</sup> and secured the approval of the Senate in an equally divided vote, with Vice President Adams breaking the tie.<sup>147</sup>

What bearing should the decision of the First Congress have on the proper interpretation of “good cause” in the independent counsel statute, passed by the 104th Congress more than two centuries later? Some have treated the decision of 1789 as an authoritative constitutional precedent establishing that the President has illimitable removal power, at least in some contexts.<sup>148</sup> To establish the decision of 1789’s

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145. A number of the members of the senatorial party joined in striking out the express removal clause. See THACH, *supra* note 92, at 154-55. Although Boudinot believed that the President had constitutional power to “remove, without limitation,” he voted against striking the clause because “he was clear for making a legislative declaration, in order to prevent future inconvenience.” 1 ANNALS OF CONGRESS, *supra* note 108, at 606.

146. 1 ANNALS OF CONGRESS, *supra* note 108, at 614.

147. See THACH, *supra* note 92, at 155-58. Although the Senate did not keep official records, Professor Thach has argued that informal records suggest that “the matter of removal was voted upon by the Senate with a full knowledge of what it signified in all its aspects.” *Id.* at 157. Because I rely only upon the *persuasive* force of the House deliberations, see *infra* text accompanying notes 150-163, I will not undertake to examine Professor Thach’s claim.

148. See, e.g., *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839) (“[I]t was very early adopted, as the practical construction of the Constitution, that this power [to remove principal officers] was vested in the President alone. And such would appear to have been the legislative construction of the Constitution [in 1789].”); 4 Op. Att’y Gen. 1, 1 (1842) (“Whatever I might have thought of the power of removal from office, if the subject were *res integra*, it is now too late to dispute the settled construction of 1789. It is according to that construction, from the very nature of executive power, absolute in the President, subject only to his responsibility to the country (his constituent) for a breach of such a vast and solemn trust.”); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §§ 799-800, at 572-73 (Ronald D. Rotunda & John E. Nowak eds., 1987) (“The public . . . acquiesced in [the Decision of 1789]; and it constitutes, perhaps, the most extraordinary case in the history of government of a power, conferred by implication on the executive, by a bare majority of congress, which has not been questioned since. . . . If there has been any aberration from the true constitutional exposition of the power of removal, which the reader must decide for himself, it will be difficult, and perhaps impracticable, after forty years’ experience, to recall the practice to the true theory.”); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 310-11 (John M. Gould ed., 1896) (“The question has never been made the subject of a judicial discussion; and the construction given to the Constitution in 1789 has continued to rest on this loose, incidental, declaratory opinion of Congress,

relevance to a proper interpretation of "good cause," however, one need not go that far.<sup>149</sup> Properly understood, the decision of 1789 at least offers persuasive evidence of a more modest and, for present purposes, more relevant proposition—that claims of inherent Article II removal authority raise a serious constitutional question, the type that in modern times commonly warrants the invocation of the canon of avoidance.

I have elsewhere argued that post-ratification interpretations of the Constitution properly inform modern constitutional decisionmaking, at least in part, because they "reflect the considered analyses of intelligent observers far closer to the relevant events than we are today."<sup>150</sup> Indeed, the Court often consults early legislative interpretations of the Constitution, not on the assumption that they somehow settle the question, but because the early legislators who adopted them "must have had a keen awareness of the influences which had shaped the Constitution and the restrictions which it

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and the sense and practice of government since that time. It may now be considered firmly and definitively settled, and there is good sense and practical utility in the construction."

149. Treating the decision of 1789 as an authoritative constitutional precedent appears to build on Madison's famous argument, first expressed in *The Federalist*, that the Constitution would inevitably contain ambiguities, whose meaning would be "liquidated," in part, by governmental practice. See THE FEDERALIST NO. 37, at 229 (Clinton Rossiter ed., 1961) (James Madison) ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."); see also, e.g., *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 300 (1803) (Marshall, C.J.) (reasoning that the constitutionality of requiring the Justices to ride circuit had been settled by a "contemporary practical exposition" of the Constitution); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 919, 921, 936, 939-41, 943-44 (1985) (describing evidence that the founding generation expected ambiguities in constitutional meaning to be settled, at least in part, by practice).

Madison's premise is assuredly open to debate. *Marbury* itself makes clear that the early Congresses sometimes enacted unconstitutional statutes, and that the federal courts retain full authority to say so in their exercise of "the judicial Power." See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175-80 (1803) (invalidating Section 13 of the Judiciary Act of 1789); see also Lessig & Sunstein, *supra* note 16, at 13 n.47 (cataloguing some of those statutes); cf. Calabresi & Prakash, *supra* note 19, at 550-51 (questioning the legitimacy of relying on "the Constitution's postenactment 'legislative' history"). The legitimacy of giving authoritative effect to early practical constructions of the Constitution is beyond the scope of this Comment.

150. John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1356 (1998).

embodied, since all questions which were related to the Constitution and its adoption must have been, at that early date, vividly impressed on their minds."<sup>151</sup> Thus, modern interpreters should care about the substance of the debates surrounding the decision of 1789 because they reflect persuasive accounts of constitutional meaning by eighteenth-century Americans who were steeped in the assumptions of contemporary law and politics.<sup>152</sup> Read in that spirit, the debates concerning the decision of 1789 persuasively demonstrate that the removal power raised a serious and difficult constitutional question. As previously discussed, proponents of inherent presidential removal power made careful and intricate arguments about the nature of the executive power, the proper influence of the separation of powers, and the implications of the Take Care Clause.<sup>153</sup> Although the proponents of inherent presidential removal power did not rely exclusively on such arguments,<sup>154</sup> the main

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151. *Knowlton v. Moore*, 178 U.S. 41, 56 (1899); *accord, e.g., Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) ("That act . . . was passed by the first congress assembled under the constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning.").

152. See *Manning, supra* note 150, at 1357. Chief Justice Taft's opinion for the Court in *Myers v. United States*, 272 U.S. 52 (1926), suggests a similar (though not identical) basis for considering the decisions of the First Congress:

We have devoted much space to this discussion and decision of the question of the presidential power of removal in the First Congress, not because a congressional conclusion on a constitutional issue is conclusive, but first because of our agreement with the reasons upon which it was avowedly based, second because this was the decision of the First Congress on a question of primary importance in the organization of the government made within two years after the Constitutional Convention and a much shorter time after its ratification, and third because that Congress numbered among its leaders those who had been members of the convention.

*Id.* at 136. Note that the primary reason for the Court's reliance was its "agreement" with the arguments made by those most familiar with the relevant historical context.

153. See *supra* text accompanying notes 114-118.

154. For example, some argued in the alternative that the Appointments Clause, in fact, gave the President the power to appoint (subject only to senatorial assent), and that the President enjoyed the power to remove under the principle that removal followed appointment. See, e.g., 1 ANNALS OF CONGRESS, *supra* note 108, at 484 (Rep. Vining) ("It may be contended, on the gentleman's principles, that the President shall have the power of removal; because it is he who appoints."); *id.* at 547 (Rep. Boudinot) ("The President nominates and appoints; he is further expressly authorized to commission all officers. Now, does it appear from this distribution of power that the Senate

thrust of the Madisonian forces was that the removal authority generally derived from the President's unitary control over all subordinate officers performing executive functions.<sup>155</sup> To be sure, proponents of senatorial power engaged these arguments seriously,<sup>156</sup> sometimes taking strong issue with the assumptions that underlay claims of inherent presidential authority.<sup>157</sup> Yet it was not uncommon for proponents of senatorial power,<sup>158</sup> any less than proponents of inherent

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appoints."). Corwin has suggested that such observations cast doubt on the coherence of the arguments favoring presidential removal power. *See* Corwin, *supra* note 21, at 362. Yet the tenor of these arguments suggests that they were largely defensive, calculated to respond specifically to the contentions of those who advocated inherent senatorial power to give advice and consent to removals.

155. *See* 1 ANNALS OF CONGRESS, *supra* note 108, at 514 (Rep. Madison) ("I feel the importance of this question, and know that our decision will involve the decision of all similar cases."); *id.* at 518 (Rep. Madison) (arguing that "the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President"). The proponents of senatorial power seized on the generality of the arguments made by the Madisonian forces, focusing particularly on the implications of the Madisonian position for the Treasury. *See, e.g., id.* at 507 (Rep. Jackson) ("If [the President] wants to establish an arbitrary authority, and finds the Secretary of Finance not inclined to second his endeavors, he has nothing more to do than to remove him, and get one appointed of principles more congenial to his own."); *id.* at 522 (Rep. Gerry) ("But what consequence may result from giving the President absolute control over all officers? Among the rest, I presume he is to have an unlimited control over the officers of the Treasury."); *id.* at 552 (Rep. Jackson) ("[I]f the President has the power of removing all officers who may be virtuous enough to oppose his base measures, what would become of the liberties of our fellow-citizens?"). The proponents of inherent presidential power engaged these arguments on the merits, rather than denying the premise of wide-ranging presidential control. *See, e.g., id.* at 494 (Rep. Ames) (arguing that the President needs a "sudden and decisive remedy" in the event that the Treasurer sought "to betray the public chest to the enemy, and so injure the Government beyond the possibility of reparation"); *id.* at 553-54 (Rep. Scott) ("[T]he constitution says that no money shall be taken out the Treasury but by appropriations; this alone, I think, a sufficient answer to all that has been said, and will serve to soften down the harsh features which the terrible picture I have just now mentioned displayed.").

156. The senatorial party took the lead in answering the claims of inherent presidential authority. *See supra* text accompanying notes 125-131.

157. Many proponents of senatorial power felt that their position was clearly implied by established governmental practice. They also forcefully relied on the contrast between the Madisonian conception of federal executive power and contradictory state constitutional practice. *See supra* text accompanying notes 125-126, 131.

158. *See, e.g.,* 1 ANNALS OF CONGRESS, *supra* note 108, at 398 (Rep. Page) (requesting "the committee to delay the decision of this question, because he did not wish gentlemen to commit themselves, without having fully reflected upon the subject"); *id.* at 523 (Rep. Gerry) ("The system, it cannot be denied, is

presidential power,<sup>159</sup> to make pleas for careful deliberation or, otherwise, to acknowledge the complexity or uncertainty of the constitutional question before the House.<sup>160</sup> In addition, one of the most influential members of the congressional party backed a legislative grant of presidential removal power

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in many parts obscure . . ."); *id.* at 533 (Rep. White of Virginia) ("This question, complicated in its nature, and interesting in its consequences, has occasioned a serious and solemn debate . . ."); *id.* at 558 (Rep. Sumter) ("He had received considerable information from the discussion which had already taken place, and he hoped that more light would still be thrown upon it, if gentlemen were not precluded from pursuing the subject by a precipitate call for the question."); *id.* at 587 (Rep. Stone) ("It has been said, that if we have a right to dismiss, the right vests in the President, because he nominates and appoints. It has been said, that if the Government has the power, it belongs to the President and the Senate. Whichever of these assertions is true, it is founded on implication.").

159. *See id.* at 561 (Rep. Ames) ("It must be admitted that the constitution is not explicit on the point in contest; yet the constitution strongly infers that the power is in the President alone. . . . [I]f it is at the disposal of [Congress], clearly we ought not to bestow it on the Senate; for the doubt, whether the President is not already entitled to it, is an argument against placing it in other hands."); *id.* at 578 (Rep. Baldwin) ("I do not like to construe over much. It is a very delicate and critical branch of our duty; and there is not, perhaps, any part of the constitution on which we should be more cautious and circumspect than on the present."); *id.* at 582 (Rep. Baldwin) ("The great division of this committee proves that it is a question not so easily resolved as others which have heretofore engaged our attention."); *id.* at 593 (Rep. Vining) ("I am confounded with the diversity of arguments used on this occasion. I know not how to reply."). Madison himself shifted from a firm advocacy of congressional regulatory authority to an equally firm position in favor of inherent presidential power during the course of the debate. *See supra* note 112. And Representative Vining argued that Congress should recognize presidential removal authority regardless of whether it came from Article II or the Necessary and Proper Clause. *See* 1 ANNALS OF CONGRESS, *supra* note 108, at 532. ("If the Constitution does not prohibit the exercise of this power, I conceive it to be granted, either as incidental to the executive department, or under that clause which gives Congress all powers necessary and proper to carry the constitution into effect. This being the case, we are at liberty to construe, from the principles and expressions of the constitution, where the power resides.").

160. Indeed, recognition of the uncertainty of the question was what led some to call for a legislative construction of the Constitution. Fisher Ames perhaps put it best when he said:

[T]here are three opinions entertained by gentlemen on this subject. One is, that the power of removal is prohibited by the constitution; the next is, that it requires it by the President; and the other is, that the constitution is totally silent. It therefore appears to me proper for the House to declare what is their sense of the constitution.

1 ANNALS OF CONGRESS, *supra* note 108, at 496; *see also, e.g., id.* at 479 (Rep. Madison) (acknowledging that "if [the removal question] relates to a doubtful part of the constitution, I suppose an exposition of the constitution may come from the Legislature, as from any other department of the Government").

precisely in order to sidestep a serious constitutional question concerning the scope of that power.<sup>161</sup> Even if one were ultimately to disagree with the conclusions reached by the proponents of inherent presidential removal power, it is hard to say, after reading the debates in their entirety, that the Madisonian arguments were not substantial or that they were not taken seriously.

In interpreting the removal provisions of the independent counsel statute, the decision of 1789 thus may offer persuasive reasons for concluding that a narrow construction of "good cause"—one that omits disobedience to the President's legal directives—would raise a serious question under Article II.<sup>162</sup> The Article II arguments advanced by Madison and his allies were substantial, and the final disposition of the bill at least took Madison's claims seriously enough to avoid contradicting them.<sup>163</sup> If a court were to follow a similar path of avoidance in

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161. See *id.* at 608 (Rep. Hartley) ("He owned that he had some doubts on this head himself [the inherent removal power of the President]; perhaps some others might be in the same predicament; but he had none with respect to the propriety of the President's exercising that prerogative, and therefore should readily consent to grant it."). Other proponents of congressional regulatory power expressed more general doubts about the constitutional question. See, e.g., *id.* at 561 (Rep. Sedgwick) ("He had undertaken to say that the Legislature were at liberty to determine that an officer should be removable by the President, or by whom it pleased . . . He also said it was more plausibly contended that the power of removal was more constitutionally in the President than in the Senate; but he did not say that the arguments on either side were conclusive."); *id.* at 583 (Rep. Sylvester) (referring to "the controversy we have had . . . and the contrariety of sentiments advanced").

162. One might argue that the sharp disagreement about the meaning of Article II in the early Republic suggests that courts should simply defer to modern Congresses' resolution of the problem. Such a conclusion would reflect James Bradley Thayer's premise that courts should sustain legislation unless Congress could be said to have made a "very clear [mistake]—so clear that it is not open to rational question." James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 136 (1893). Even if one were to accept Thayer's premise, it is still possible to conclude that courts should construe statutes, where feasible, to avoid serious doubts about their constitutionality—a course that avoids unnecessary judicial invalidation of legislation. In any case, it is at least open to question whether Thayer's conception reflects the received tradition of American constitutional law. See, e.g., Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 8-10 (1983).

163. In his opinion for the Court in *Myers v. United States*, 272 U.S. 52, 115 (1926), Chief Justice Taft perhaps overstated the case when he said that Madison's "arguments in support of the President's constitutional power of removal independently of congressional provision, and without the consent of the Senate . . . carried the House." In recent scholarship analyzing the voting

construing the “good cause” provision, moreover, its decision would hardly be unprecedented. In *Shurtleff v. United States*,<sup>164</sup> decided early in this century, the Court made clear that it would demand “explicit language . . . before holding the power of the President to have been taken away by an act of Congress.”<sup>165</sup> In the Court’s view, Congress could not restrict presidential control over an executive officer’s tenure “without stating such intention in plain and explicit language, instead of leaving it to be implied from doubtful inferences.”<sup>166</sup> Although *Shurtleff* has had little generative capacity, the lessons of the First Congress may suggest that there was wisdom in its approach. Reading “good cause” to permit presidential

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coalitions that ultimately produced the decision of 1789, David Currie suggests that it is hard to read the ultimate outcome as an unalloyed victory for the Madisonian forces:

For better or worse, the two halves of Benson’s proposal were put to the House separately. The members first voted thirty to eighteen to add Benson’s “whenever” language. All those who had spoken in favor of presidential removal voted aye, whether they thought that Article II settled the question or left the matter to Congress. The House then voted thirty-one to nineteen to drop the phrase “to be removable by the President.” The numbers were virtually identical, but it was a different majority. For on this question, the proponents of Article II power prevailed only because they were joined by a substantial number of members who had opposed presidential removal altogether.

The original coalition was patched up again when it came time for the House to pass the amended bill, and after similar discussion in the Senate Benson’s “whenever” formula became law. Thus it was the considered judgment of the majority in both Houses that the President could remove the Secretary of Foreign Affairs, but there was no consensus as to whether he got that authority from Congress or from the Constitution itself.

CURRIE, *supra* note 117, at 40-41 (footnotes omitted). At a minimum, however, the final bill’s deletion of the express removal provision avoided any contradiction of Madison’s position.

164. 189 U.S. 311 (1903).

165. *Id.* at 316.

166. *Id.* The statute at issue in *Shurtleff* provided that a general appraiser of merchandise “may be removed at any time by the President for inefficiency, neglect of duty, or malfeasance in office.” *Id.* at 313 (citation omitted). The President had removed Shurtleff from that office without cause, provoking a suit for back pay. Shurtleff argued that “because the statute specified certain causes for which the officer might be removed, it thereby impliedly denied the right to remove for any other cause.” *Id.* at 316. As a matter of ordinary statutory construction, this was a reasonable position; if the enumerated causes had not supplied the exclusive basis for presidential removal, the enumeration would have served no function. Nevertheless, after invoking Madisonian premises, the Court applied its rule of narrow construction to reject Shurtleff’s argument. *See id.* at 315-16.



direction and control over contestable legal questions would avoid entering what the First Congress persuasively showed to be a dangerous constitutional thicket—one perhaps wisely to be avoided in the absence of clear congressional direction to the contrary.

### CONCLUSION

No analysis of the decision of 1789 could supply a firm answer to the removal question. Full consideration of that question would entail an extended analysis of innumerable pre- and post-ratification historical and doctrinal developments—an inquiry that exceeds the scope of this paper. Do the lessons of 1789 apply only to officers, like the Secretary of Foreign Affairs, whom the President appoints with the advice and consent of the Senate?<sup>167</sup> Does it extend to Article II

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167. See *Myers*, 272 U.S. at 114 (arguing that “the vote was, and was intended to be a declaration that the power to remove officers appointed by the President and the Senate vested in the President alone”). Along similar lines, in *Perkins v. United States*, 116 U.S. 483 (1886), the Court held that Congress may regulate the removal of inferior officers when, by the terms of the Appointments Clause, it has vested their appointment in “the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. CONST. art. II, § 2, cl. 2. As the Court explained:

Whether or not congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the president by and with the advice and consent of the senate, under the authority of the constitution, does not arise in this case, and need not be considered. We have no doubt that when congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as congress may enact in relation to the officers so appointed. The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of congress, and by such legislation he must be governed, not only in making appointments, but in all that is incident thereto.

*Perkins*, 116 U.S. at 484-85 (citation omitted). This distinction between principal and inferior officers seems open to question if one starts from the assumption that the removal power is necessary to fulfill the President's duty to ensure the faithful execution of the laws. An inferior officer, no less able than a principal officer, is capable of faithless execution of the laws. See *Donovan & Irvine*, *supra* note 67, at 227-28 (criticizing *Perkins*). Indeed, it is doubtful whether *Perkins*' recognition of plenary congressional authority to limit the removal of inferior officers remains good law. In a recent decision, the Court indicated that to be an “inferior officer” in the executive branch, a more senior executive officer must possess at least some supervisory authority. See *Edmond v. United States*, 117 S. Ct. 1573, 1580-81 (1997) (“[I]n the context of a clause designed to preserve political accountability relative to

officers to whom Congress has assigned adjudicative, rather than classically executive, functions?<sup>168</sup> More generally, are there categories of administrative officers whose functions lie

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important government assignments, we think it evident that ‘inferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.”); see also Eric Bravin, Note, *Is Morrison v. Olson Still Good Law? The Court’s New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103, 1117-20 (1998) (discussing *Edmond*). Hence, if Congress has effectively insulated an executive officer from the direction of a superior executive officer, the former may no longer qualify as an inferior officer for purposes of the Appointments Clause. The foregoing discussion is not meant to resolve that difficult question, but rather to illustrate the complexity of properly interpreting the decision of 1789.

168. The Court has often approved the delegation of Article III business to non-Article III tribunals. See, e.g., *CFTC v. Schor*, 478 U.S. 833 (1986); *Crowell v. Benson*, 285 U.S. 22 (1935). It has also held that administrative agencies can properly adjudicate federal claims that fall under the loose rubric of “public rights.” See, e.g., *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985) (environmental regulation); *Block v. Hirsh*, 256 U.S. 135 (1921) (federal landlord/tenant law); *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929) (tariff dispute). In *Myers*, for example, Chief Justice Taft indicated that the President cannot necessarily use the removal power to dictate the outcome of an adjudication. 272 U.S. at 135 (“Then there may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control.”). Indeed, the distinction between purely executive and adjudicative powers may trace back to remarks that Madison made during the First Congress’s debate over the Comptroller of the Treasury, whose duties included determining claims against the United States. See, e.g., CURRIE, *supra* note 117, at 41 n.245 (discussing debate over Comptroller); Donovan & Irvine, *supra* note 67, at 219-20 n.19 (same). Compare, e.g., 1 ANNALS OF CONGRESS, *supra* note 108, at 636 (Rep. Madison) (“Whatever . . . may be my opinion with respect to the tenure by which an executive officer may hold his office according to the meaning of the constitution, I am very well satisfied, that a modification by the Legislature may take place in such as partake of the judicial qualities . . .”), with *id.* at 637 (Rep. Sedgwick) (“[A] majority of the House had decided that all officers concerned in executive business should depend upon the will of the President for their continuance in office; and with good reason, for they were the eyes and ears of the principal Magistrate, the instruments of execution. Now the office of Comptroller seemed to bear a strong affinity to this branch of the Government.”). Madison, however, ultimately did not propose to limit the President’s power to remove the Comptroller. See *id.* at 636 (Rep. Madison) (arguing that “the Comptroller would be dependent upon the President, because he can be removed by him”). And Congress ultimately did not specify the conditions under which the President might remove the Comptroller. See CURRIE, *supra* note 117, at 41 n.245. The question whether Congress can insulate an adjudicative official from the President’s removal power is beyond the scope of this Comment.

beyond the President's control?<sup>169</sup> Rather than trying to offer firm answers to those and countless other questions implicated by the removal debate,<sup>170</sup> this Comment has sought to demonstrate that interpreters in the earliest days of our Republic persuasively established that the basic Article II claim of inherent presidential removal power involves a serious and difficult constitutional question. Given their intimate familiarity with the legal and political background of the

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169. Professors Lessig and Sunstein, for example, have argued that the early Congresses composed the Department of Treasury and the Post Office differently from the Departments of Foreign Affairs, War, and Navy. Lessig & Sunstein, *supra* note 16, at 27-30. For the Treasury Department and the Post Office, they argue, "Congress granted the President no clearly stated or implied authority over the affairs of the relevant officers, and did not hesitate to articulate the full range of departmental structures and officers, complete with a full specification of the duties such officers had." *Id.* at 30. Lessig and Sunstein thus conclude "[s]ome departments the framing Congresses treated as purely executive and some not." *Id.* Professors Calabresi and Prakash have replied that the differences among the departments bear less significance than Lessig and Sunstein suggest, and that the founding generation regarded them as "executive" departments. See Calabresi & Prakash, *supra* note 19, at 647-58.

170. Indeed, one would have to examine the history of prosecution. Lessig and Sunstein have suggested that the longstanding practice of private prosecution reflected in *qui tam* actions contradicts the idea of constitutionally mandated presidential control over prosecution. Lessig & Sunstein, *supra* note 16, at 14-22. That concern requires serious attention, but does not necessarily negate the force of Madisonian premises on the question of criminal prosecution. Consider the following analogy. To some extent, private parties enforce federal law whenever Congress creates a private right of action. Civil lawsuits seeking treble damages under the Sherman Act, for example, surely enforce important federal policies favoring competition. Yet the President has no authority to supervise private litigants. It does not follow, however, that when Congress opts to rely on federal officials, rather than private litigants, to enforce such policies, it is free to give them full independence from presidential supervision. Indeed, the felt imperative to rely on federal officials for law enforcement may serve as a structural check on Congress's ability to assign the execution of federal policy to officials beyond the President's control.

Similar reasoning applies to evidence that in the early days of the Republic, state officials beyond the President's direct control sometimes conducted federal prosecutions. See, e.g., Krent, *supra* note 19, at 303-04 (discussing state prosecutions of federal offenses); Lessig & Sunstein, *supra* note 16, at 19 (same). As Lessig and Sunstein note: "[T]here an important difference between vesting executive authority in a state official and vesting executive authority in a federal official not directly responsible to the President. Only the latter is subject to the machinations of Congress, and hence the former might be considered constitutionally distinct." *Id.* at 19 n.76. By analogy, state court judges without life tenure and salary protection may constitutionally decide federal matters that, if handled by federal officials, would demand the protections of Article III.

Constitution, we could scarcely hope to recover the founding generation's feel for the context that informs the meaning of Article II. Perhaps these realities should at least give us pause before concluding that Congress provoked a decisive resolution of the removal question by enacting an open-ended "good cause" provision in the independent counsel statute.<sup>171</sup> If modern interpretive practice requires judges to hesitate before inferring that Congress has entered a dangerous constitutional thicket, the extraordinary debates surrounding the decision of 1789 may suggest that the removal question presents an appropriate case for such hesitation.

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171. Indeed, this premise may draw further support from the *Morrison* Court's obvious reluctance to speak conclusively to the removal question. See *supra* text accompanying note 75.

