Cornell Law Review

Volume 91
Issue 5 *July 2006*

Article 2

New Light on the Decision of 1789

Saikrishna Prakash

NEW LIGHT ON THE DECISION OF 1789

Saikrishna Prakash†

In the Constitution's earliest days, before there were any federal judges, members of the House engaged in the young nation's first constitutional debate. While considering the bill to create a new Department of Foreign Affairs, Representatives considered the means of removing executive officers; the debate culminated in the Decision of 1789. The traditional view of the Decision, held by James Madison, Alexander Hamilton, and William Howard Taft, is that because the Foreign Affairs Act conveyed no removal authority, but rather discussed what would happen when the President removed, the Act presumed that the Constitution granted the President a removal power. There has long been a revisionist view, however, which holds that the Decision of 1789 did not resolve any constitutional question, certainly not in any definitive way. Citing a split in the House majority on a crucial amendment, Justice Louis Brandeis, Edward Corwin, and others have argued that the majority coalition that voted for the Foreign Affairs Act was deeply divided on constitutional principles. Specifically, revisionists have asserted that approximately half of the House majority that approved the Act did not in fact believe that the Constitution granted the President a removal power. Using evidence recently made available, this Article defends the traditional understanding of the Decision. Majorities in the House and the Senate concluded that the Constitution's grant of executive power enabled the President to remove executive officers. On two later departmental bills, majorities in both chambers voted to reaffirm that view. The Decision of 1789, the first significant legislative construction of the Constitution, is thus a rare instance when Congress confronted a difficult constitutional question and sided with its rival, the executive. Moreover, the Decision stands as an exemplary episode in congressional history when Congress approached its constitutional obligations with sophistication, sincerity, and careful deliberation.

† Herzog Professor of Law, University of San Diego School of Law. J.D., Yale Law School; B.A., Stanford University. Thanks to Steve Smith and Mike Rappaport for helpful discussions and comments. Thanks to Adam Gamboa and Michael Lough for excellent research assistance.

INTRODUCTION

America's most famous constitutional law decisions—cases like *Marbury*, *Brown*, and *Roe*—were made by judges. Judicial decisions virtually monopolize constitutional law casebooks and classroom discussions. Given this fact, the unwary student might wrongly infer that determining the Constitution's meaning involves little more than discerning what judges have written, and that other institutions inevitably defer to the courts without ever making their own constitutional judgments.

Of course, judges have never enjoyed a monopoly on constitutional decision making. In 1798, the Virginia and Kentucky legislatures resolved that the Alien and Sedition Acts were unconstitutional.[1] During the Civil War, Abraham Lincoln decided that the Constitution permitted him to suspend the writ of habeas corpus.[2] And Harry Truman concluded that he had the constitutional authority to seize steel mills to ensure supplies for the Korean War.[3] One could cite many more examples.

One of the most significant yet less-well-known constitutional law decisions is the "Decision of 1789."[4] In the earliest days of the Constitution, members of the House engaged in one of the nation's most

---

1 *See* Kentucky Resolutions (Nov. 10, 1798), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 131–32 (Philip B. Kurland & Ralph Lerner eds., 1987); Virginia Resolutions (Dec. 21, 1798), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra*, at 135–36.

2 *See generally* DANIEL FARBER, LINCOLN'S CONSTITUTION 157–70 (2003) (stating that the constitutional issue regarding Lincoln's suspension of the writ was whether the President, rather than Congress, had the power to suspend).

3 *See* Exec. Order No. 10,340, 17 Fed. Reg. 3139 (April 10, 1952) (directing the Secretary of Commerce to take possession of and operate certain steel plants and facilities).

4 This tag for Congress's 1789 decision regarding the removability of the Secretary of Foreign Affairs has been in currency at least since 1835. *See, e.g.*, Myers v. United States, 272 U.S. 52, 151 (1926) (quoting Daniel Webster's speech of February 1835, which referred to the "decision of 1789").

exhaustive, erudite, and edifying constitutional debates. While discussing a bill that would create a Department of Foreign Affairs, Representatives debated the issue of who had the authority to remove executive officers. Some Representatives asserted that Article II's grant of executive power vested the President with a power to remove such officers (the executive-power theory); others argued that because the Senate's consent was necessary to appoint, its consent was necessary to remove (the advice-and-consent theory); a third group declared that since the Constitution did not expressly grant removal authority, Congress could vest a removal power with the President (the congressional-delegation theory); finally, a handful of Representatives asserted that impeachment was the only permissible means of removing an officer of the United States (the impeachment theory).[5] Even at the time, James Madison noted the gravity of the issue and that the ultimate decision would serve as a precedent for future cases.[6]

Ultimately, in 1789—at the end of a debate that spanned more than a month—Congress enacted three departmental acts that contained nearly identical language.[7] None of these acts expressly granted the President a removal power.[8] Rather, each discussed who would have custody of departmental papers when the President removed a secretary.[9]

Advocates of broad presidential power have consistently cited the Decision of 1789 as revealing that the first Congress concluded that the Constitution's grant of executive power authorized the President to remove executive officers.[10] Alexander Hamilton, writing as

---

5 See *infra* Part I.B for a discussion of the four principle arguments regarding the removal of executive officers.

6 *See* The Congressional Register (June 17, 1789), *reprinted in* DEBATES IN THE HOUSE OF REPRESENTATIVES, FIRST SESSION: JUNE–SEPTEMBER 1789, 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789–1791, at 904, 921 (Charlene Bangs Bickford et al. eds., 1992) [hereinafter DEBATES] ("I feel the importance of the question, and know that our decision will involve the decision of all similar cases.").

7 *Compare* An Act for Establishing an Executive Department, to be Denominated the Department of Foreign Affairs, ch. 4, § 2, 1 Stat. 28, 29 (1789) (providing that the Chief Clerk would have custody of all departmental papers "whenever the said principal officer shall be removed from office by the President of the United States"), *with* An Act to Establish the Treasury Department, ch. 12, § 7, 1 Stat. 65, 67 (1789) (providing that the Assistant to the Secretary of the Treasury would have custody of all departmental papers "whenever the Secretary shall be removed from office by the President of the United States"), *and* An Act to Establish an Executive Department, to be Denominated the Department of War, ch. 7, § 2, 1 Stat. 49, 50 (1789) (providing that an inferior officer would have custody of all departmental papers "whenever the said principal officer shall be removed from office by the President of the United States").

8 *See* ch. 4, 1 Stat. 28; ch. 12, 1 Stat. 65; ch. 7, 1 Stat. 49.

9 *See supra* note 7.

10 *See, e.g.*, Myers v. United States, 272 U.S. 52, 115, 161 (1926) ("[T]he power of removal must remain where the Constitution places it, with the President, as part of the executive power, in accordance with the legislative decision of 1789 . . . .").

Pacificus in 1793, had no doubt that the first Congress had endorsed the executive-power theory.[11] Chief Justice John Marshall, in his biography of George Washington, claimed that the Decision "has ever been considered as a full expression of the sense of the legislature" that the Constitution granted the executive removal authority.[12] William Howard Taft, the only Chief Justice to have also served as Chief Executive, read the Decision of 1789 in a similar vein.[13]

Conversely, an impressive array of judges and scholars has long denied that there even was a Decision of 1789, at least as Hamilton, Marshall, and Taft described it. Dissenting in *Myers v. United States*, Justice Louis Brandeis emphatically declared that the "facts of record" do not warrant the conclusion that a House majority supported the executive-power theory.[14] Justice Brandeis insisted that the final text of the Foreign Affairs bill, which implied a constitutional removal power, "was due to the strategy of dividing the opposition and not to unanimity of constitutional conceptions."[15] In the aftermath of *Myers*, the renowned constitutional scholar Edward Corwin built upon Justice Brandeis's assertions. Corwin asserted that less than a third of the House actually favored the view that the President had a constitutional removal power.[16] More recently, David Currie made a similar claim.[17] In his exceptional book, *The Constitution in Congress: The Federalist Period 1789–1801*, Currie wrote that though a majority of the House favored presidential removal, "there was no consensus as to whether [the President] got that authority from Congress or from the Constitution itself."[18]

In support of their arguments, Corwin and Currie cited a vote on a crucial amendment to the Foreign Affairs bill offered in the

---

11 *See* Pacificus No. 1, *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON 33, 40 (Harold C. Syrett ed., 1969) (stating that the "power of removal from office is an important instance" of Congress's construing the Constitution, "in formal acts, upon full consideration and debate," to place full executive power with the President).

12 5 JOHN MARSHALL, The LIFE OF GEORGE WASHINGTON 200 (1807).

13 *See Myers*, 272 U.S. at 115, 161.

14 *See id.* at 285 n.75 (Brandeis, J., dissenting). Somewhat contradictorily, Justice Brandeis earlier admitted that the Decision of 1789 decided that the President had a constitutional power of removal, at least in the absence of legislative limitation. *See id.* at 284.

15 *Id.* at 285 n.75. As Justice Brandeis points out, he was not the first to deny that a majority of the House supported the executive-power theory. Justice Samuel Lockwood of the Illinois Supreme Court made this argument in 1839. *See id.* at 285 n.73 (citing Field v. People, 3 Ill. (2 Scam.) 79, 162–73 (1839)). Justice Brandeis also cites Senator George F. Edmunds as making the same claim during the impeachment of Andrew Johnson. *See id.*

16 *See* 1 CORWIN ON THE CONSTITUTION 332 (Richard Loss ed., 1981).

17 *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, at 41 n.240 (1997).

18 *Id.* at 41. Relying on Corwin and Currie, recent scholars reiterated the assertion that the executive-power theory lacked majority support in the House. *See, e.g.*, Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 662–63 (2004).

House.[19] Though a majority of the House ultimately voted for the final bill, the majority coalition first split on this key amendment.[20] The amendment sought to strike out a provision stating that the Secretary of Foreign Affairs was "to be removable [from office] by the president" of the United States.[21] The amendment's sponsor, Representative Egbert Benson of New York, believed that a House majority favored the executive-power theory.[22] Because the provision could be read as a grant of removal authority, and thus as an endorsement of the congressional-delegation theory, Benson advocated that the House delete it.[23] Some, such as James Madison, who ultimately voted for the House bill first voted for Benson's crucial amendment to delete this provision.[24] By voting to delete text that could be read as endorsing the congressional-delegation theory, such Representatives plainly favored a House bill that endorsed the executive-power theory. According to Corwin, these were true executive-power partisans.[25]

Other Representatives who eventually voted for the House bill first voted *against* Benson's amendment.[26] Because they voted to retain text that could be read as delegating removal power to the President, these members, Corwin concluded, desired a bill that endorsed the congressional-delegation theory.[27] Put another way, those who voted for the final bill but against Benson's amendment must have been congressional-delegation partisans. By dividing on Benson's amendment, Corwin argued, the majority that later approved the House bill revealed that it was split, almost equally, between executive-power and congressional-delegation proponents.[28]

These detailed critiques seem to utterly devastate Chief Justice Taft's reading of the Decision of 1789. If Justice Brandeis and Corwin are right, no majority ever regarded the Constitution as granting a presidential removal power. Instead, a majority approved the text of the Foreign Affairs bill, but were evenly divided on constitutional prin-

---

19 *See* CORWIN, *supra* note 16, at 331 n.22; CURRIE, *supra* note 17, at 41 n.240.

20 To see how Representatives voted on Representative Egbert Benson's crucial amendment and on the House bill, see *infra* Appendix I.

21 The Congressional Register (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1028, 1028.

22 *See* Gazette of the United States (June 24, 1789), *reprinted in* DEBATES, *supra* note 6, at 1026, 1026.

23 *See* The Congressional Register (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1028, 1030.

24 *See* Journal of the First Session of the House of Representatives of the United States (June 22, 1789), *reprinted in* HOUSE OF REPRESENTATIVES JOURNAL, 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789–1791, at 91, 92 (Charlene Bangs Bickford et al. eds., 1992) [hereinafter JOURNAL].

25 *See* CORWIN, *supra* note 16, at 331 n.22.

26 *See infra* Appendix I.

27 *See* CORWIN, *supra* note 16, at 331 n.22.

28 *See id.*

ciple. Thus, revisionists depict the Decision of 1789 as a "non-decision," insofar as it concerns the Constitution's meaning.

Using materials recently made available by the first-rate scholars at the First Federal Congress Project,[29] this Article argues that Chief Justice Taft was right all along. Chief Justice Taft's critics have regarded shifting majority coalitions and a split on a particular amendment as evidence that no majority existed in favor of any constitutional principle.[30] His critics are wrong. In passing three acts in 1789 that assumed the President enjoyed a preexisting removal power, majorities in the House and Senate affirmed the executive-power theory on three separate occasions. Following these votes, members of Congress and newspaper accounts repeatedly described the final acts as endorsing the theory that the Constitution granted the President a removal power.[31]

Part I of this Article sketches a timeline across all three departmental acts and introduces the reader to the four removal positions. Part II attempts to solve two mysteries. On the one hand, if all the Representatives who voted for the House Foreign Affairs bill were true executive-power partisans, as Chief Justice Taft and others have assumed, why did a sizable number of these same members first vote against Benson's second amendment? In other words, why would executive-power partisans vote to retain text that could be read as endorsing the congressional-delegation theory?

On the other hand, Chief Justice Taft's detractors have their own mystery to solve. Why did supposed congressional-delegation partisans vote for three bills that assumed the President had a preexisting removal authority? If such Representatives truly rejected the executive-power theory, as evidenced by their vote on Benson's crucial second amendment, their votes to approve the three bills are

---

29 The First Federal Congress Project has published seventeen volumes of the DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789–1791 (Charlene Bangs Bickford et al. eds., 1972–2004). The materials relating to the Decision of 1789 are scattered throughout these volumes, but some of the most revealing material, such as congressional correspondence, was published only in 2004.

The best treatments of the Decision of 1789 are to be found in CORWIN, *supra* note 16, at 317–71; CURRIE, *supra* note 17, at 36–41; JAMES HART, THE AMERICAN PRESIDENCY IN ACTION: 1789, at 155–214 (1948); CHARLES C. THACH, THE CREATION OF THE PRESIDENCY: 1775–1789, at 140–65 (1923). The various opinions in *Myers* also discuss the Decision of 1789. *Compare* Myers v. United States, 272 U.S. 52, 161 (1926) (Taft, C.J.) (stating that the Decision of 1789 reinforced the executive-power theory), *with Myers*, 272 U.S. at 285 (Brandeis, J., dissenting) (using the voting patterns on Benson's amendments to argue that the Decision of 1789 did not necessarily endorse the executive-power theory).

30 *See supra* notes 14–28 and accompanying text.

31 *See infra* Part II.B.3. For a broader discussion of the power to remove non-Article III officers, see Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. (forthcoming 2006). For a discussion on the removal of federal judges, see Saikrishna Prakash & Steve Smith, *How to Remove a Federal Judge*, 116 YALE L.J. (forthcoming 2006).

confounding. By analogy, no sensible Representative would ever vote for a bill that wrongly assumed the President could remove Article III judges.[32] Likewise, no true proponent of the congressional-delegation theory should have voted for three bills that assumed that the President had a constitutional removal power.

Part III concludes by briefly discussing what the Decision of 1789 actually decided. What, if anything, does the Decision of 1789 say about inferior executive officers, such as postmasters, or nonexecutive officers, such as the Commissioners of the Securities and Exchange Commission? Moreover, what does the Decision of 1789 suggest about Congress's ability to constrain the President's constitutional removal power? Finally, did members of Congress believe that the Decision of 1789 would have any precedential value?

Decoding the Decision of 1789 is important for a host of reasons. There is a burgeoning "departmentalist" movement that asserts that divining the Constitution's meaning is not the peculiar province of the courts; rather, the other branches have equal roles in interpreting the Constitution.[33] The Decision represents the first meaningful instantiation of the departmentalist theory. Well before judges began interpreting the Constitution, members of Congress debated its meaning. If one is a departmentalist or is sympathic to the theory, one should not overlook the first major post-ratification debate over the Constitution's meaning.

Even those who believe the judiciary has a special claim on constitutional interpretation have reason to consider these debates. The Supreme Court has stated that early constitutional interpretations, including the Decision of 1789, are "weighty evidence" of the Constitution's true meaning.[34] Indeed, in *Myers* and *Bowsher v. Synar*, the

---

32 The general point is that members of Congress do not vote in favor of legislation that assumes the existence of a power that they deny exists. Hence, no Representative would vote in favor of a statute that assumed the President had a constitutional power to remove Article III judges.

33 For a review of the departmentalist literature, see Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 110–20 (2004). The scholar most responsible for reviving departmentalism is Michael Stokes Paulsen. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994). Since the publication of Paulsen's article, others have defended more modest versions of departmentalism. *See, e.g.*, Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1270 (1996) ("[T]he structural, historical, and normative case for 'departmentalist' constitutional interpretation . . . is now familiar. Some version of departmentalism may even reflect the consensus view among serious scholars of the Constitution.").

34 *See* Bowsher v. Synar, 478 U.S. 714, 723–24 (1986) (quoting Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888) (stating that an act "passed by the first congress assembled under the constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of [the Constitution's] true meaning")); Marsh v. Chambers, 463 U.S. 783, 790 (1983) ("This 'Decision of 1789' pro-

Court asserted that the Decision affirms the executive-power theory.[35] If, on the other hand, Justice Brandeis and Corwin are correct, the Court has drawn the wrong conclusions from the Decision of 1789.[36]

Finally, the Decision of 1789 belies those who suppose that constitutional decisions rendered by the political branches are inferior to those rendered by the courts. The earnestness and erudition that characterized the debates confirms that politicians are capable of staying true to their constitutional oaths. For those who wish Congress would take its constitutional responsibilities more seriously,[37] and for those who would like to remove constitutional interpretation from the courts and place it exclusively with the political branches,[38] the Decision of 1789 stands as an exemplar of congressional constitutional deliberation.

1
THE CREATION OF THE THREE GREAT DEPARTMENTS

The Articles of Confederation lacked an independent executive branch of government.[39] No separate Chief Executive or Executive Council superintended foreign affairs or war powers; nor did any direct the execution of federal law. Instead, the Continental Congress enjoyed executive power over foreign affairs, war, and law execu-

---

vides 'contemporaneous and weighty evidence' of the Constitution's meaning since many of the Members of the First Congress 'had taken part in framing that instrument.'").

35 *See Bowsher*, 478 U.S. at 723 ("Madison's position ultimately prevailed . . . ."); Myers v. United States, 272 U.S. 52, 146 (1926) ("It is argued that these express provisions for removal at pleasure indicate that without them no such power would exist in the President. We cannot accede to this view. Indeed the conclusion that they were adopted to show conformity to the legislative decision of 1789 is authoritatively settled . . . .").

36 At least six Supreme Court cases have discussed the Decision of 1789 at some length. *See* Bowsher v. Synar, 478 U.S. 714 (1986); Humphrey's Executor v. United States, 295 U.S. 602 (1935); Myers v. United States, 272 U.S. 52 (1926); Parsons v. United States, 167 U.S. 324 (1897); United States *ex rel.* Goodrich v. Guthrie, 58 U.S. 284 (1854); *Ex parte* Hennen, 38 U.S. 230 (1839).

37 *See, e.g.*, Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1290 (2001) (proposing incremental reforms in the internal design of Congress that foster constitutional deliberation in Congress).

38 *See, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 154–76 (1999) (arguing that courts should have a far more circumscribed role in constitutional interpretation).

39 *See* U.S. ARTS. OF CONFEDERATION art. IX. *See generally* Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1173 n.107 (1999) ("[T]he Articles of Confederation did not create an independent executive branch with powers and authorities unalterable by statute."); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 272–78 (2001) (reviewing executive power over foreigu affairs prior to the adoption of the Constitution); Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591, 1609 (2005) ("The 'president' of Congress under the Articles of Confederation, for example, had no material powers. . . . The Articles' 'president' was a single person, but did not have executive power." (citation omitted)).

tion.[40] In 1780–81, Congress abandoned its unworkable practice of using congressional committees to handle these tasks and created the executive Departments of Foreign Affairs, War, and the Treasury.[41] Because these departments helped implement Congress's executive powers, they were entirely under congressional control.[42]

With the Constitution's enactment, these departments became obsolete in their construction. Under the Constitution, the President had many of the executive powers formerly lodged with Congress, including the power over law execution and foreign affairs.[43] While Congress could continue to prescribe various duties for officers in these areas, the Constitution required that they serve under the President's control.[44] Hence, the creation of new departments within the executive branch became necessary.

A. The Timeline

On May 19, 1789, New Jersey Representative Elias Boudinot presented to the Committee of the Whole House a plan for the "arrangement of the executive departments."[45] Boudinot argued that the previous departments did not exist in the eyes of the new law, and even if they did, they were inappropriate under the Constitution.[46] Though Boudinot wanted to consider the Treasury Department, New York Representative Egbert Benson thought it best to first decide the number of departments to be created.[47] Representative James Madison, with Benson's approval, moved that there be three depart-

---

40 *See* U.S. ARTS. OF CONFEDERATION art. IX; Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 764–68 (2003); Prakash & Ramsey, *The Executive Power over Foreign Affairs*, *supra* note 39, at 272–78.

41 *See, e.g.*, Prakash, *supra* note 40, at 766–67 ("The most significant lesson learned as a result of the Articles experience was the need for an independent, energetic national executive.").

42 *See id.* at 766–67.

43 *See* U.S. CONST. art. II, §§ 2, 3.

44 *See generally* Prakash, *supra* note 40, at 790–99 (discussing law execution and the role of executive officers in the early post-ratification period); Prakash & Ramsey, *The Executive Power over Foreign Affairs*, *supra* note 39, at 298–302 ("Washington, his advisers, and his contemporaries in Congress and elsewhere immediately assumed, upon the commencement of the new government, that the President controlled the Department [of State]. Moreover, this assumption rested on the understanding that management of foreign affairs was an executive function constitutionally conveyed to the President as part of the executive power.").

45 DAILY ADVERTISER (May 20, 1789), *reprinted in* DEBATES IN THE HOUSE OF REPRESENTATIVES, FIRST SESSION: APRIL–MAY 1789, 10 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789–1791, at 718, 718 (Charlene Bangs Bickford et al. eds, 2004) [hereinafter DEBATES II].

46 *See id.* (arguing that existing departments were inappropriate models, presumably because departments were totally subservient to Congress in their day-to-day functioning).

47 *See id.*

ments, each with a Secretary, appointable by the President with the Senate's advice and consent but removable by the President alone.[48]

Representative William Smith of South Carolina objected to Madison's appointments provision, believing it could be read as a grant of the appointment power. Smith argued that the Constitution already established that the President could appoint Secretaries with the Senate's advice and consent.[49] After Madison declared that he was not wedded to the appointments language,[50] the Committee of the Whole struck the appointments provision from Madison's motion.[51]

Immediately thereafter, some members objected to the removal provision: Some maintained that impeachment was the only constitutional means of removal,[52] while others argued that the Senate should participate in both the appointment and removal of officers.[53] A member of the latter group, Representative Theoderick Bland of Virginia, moved to add that removals would be "by and with the advice and consent of the senate."[54] Bland's motion failed.[55] By a "considerable majority," the Committee of the Whole approved Madison's resolution, including the removal provision.[56]

Two days later, on May 21, the House considered the Committee of the Whole's resolution and approved it without a division of yeas and noes.[57] The House then created a committee of eleven members to draft bills consistent with the resolution.[58] This committee reported two departmental bills on June 2[59] and another on June 4.[60]

---

48 *See* Gazette of the United States (May 20, 1789), *reprinted in* DEBATES II, *supra* note 45, at 720, 720.

49 *See* The Congressional Register (May 19, 1789), *reprinted in* DEBATES II, *supra* note 45, at 722, 726 (noting that Smith "conceived the words [in the appointments provision] to be unnecessary, besides it looked as if they were conferring power which was not the case, for the constitution had expressly given the power of appointment in the words there used").

50 *See id.*

51 *See id.*

52 *See id.* at 727–39 (statements of Representatives Smith (S.C.), Jackson, and White).

53 *See id.* at 729–38 (statements of Representatives Bland, Silvester, and Gerry).

54 *See id.* at 738.

55 *See id.*

56 *See id.* at 740.

57 *See* Journal of the First Session of the House of Representatives of the United States (May 21, 1789), *reprinted in* JOURNAL, *supra* note 24, at 68, 68–69.

58 . *See id.* at 69.

59 *See* Journal of the First Session of the House of Representatives of the United States (June 2, 1789), *reprinted in* JOURNAL, *supra* note 24, at 79, 79 (reporting bills to establish a department of war and a department of foreign affairs).

60 *See* Journal of the First Session of the House of Representatives of the United States (June 4, 1789), *reprinted in* JOURNAL, *supra* note 24, at 81, 82 (reporting a bill to establish a treasury department).

But the House of Representatives did not resolve the removal controversy with only one day of debate. On June 16, the Committee of the Whole took up the bill to establish the Department of Foreign Affairs.[61] Instantly, Representative Alexander White of Virginia moved to delete the removal provision providing that the Secretary of Foreign Affairs was "to be removed from office by the President of the United States."[62]

Over the next four days, Representatives passionately debated the removal provision, with many members reasserting that the provision was unconstitutional, either because removal could be accomplished only upon an impeachment conviction or because the Senate had a constitutional right to approve removals.[63] In the face of such arguments, on June 19 the Committee of the Whole, voting 20 to 34, rejected a motion to delete the removal provision from the Foreign Affairs bill.[64] With such a thorough and spirited debate behind them, it seemed the House had settled the removal question once and for all. The text declaring the Secretary "to be removable by the president" would remain in the bill.[65]

Some Representatives, however, could not resist reopening the issue. On June 22, the House agreed to various amendments to the Foreign Affairs bill.[66] Shortly after taking up the amended bill, which included the original removal language, Benson proposed an amendment which, he believed, "would more fully express the sense of the committee [of the Whole], as it respected the constitutionality of the decision which had taken place [on June 19]."[67] Benson moved to modify language that referred to the Chief Clerk as having custody of departmental papers whenever there was a "vacancy" in the office of Secretary.[68] Instead of simply discussing vacancies, the new language would specifically mention presidential removal: The Chief Clerk would have custody of papers "[w]henever the said principal officer[ ] shall be removed by the President, or a vacancy in any other way shall happen."[69] Benson also declared that if his first amendment passed,

---

61 *See* DAILY ADVERTISER (June 18, 1789), *reprinted in* DEBATES, *supra* note 6, at 845, 847–48.

62 *See* DAILY ADVERTISER (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 842, 842.

63 *See generally* DEBATES, *supra* note 6, at 842–1026 (summarizing the comments of Representatives during the debate over the removal provision).

64 *See* The Congressional Register (June 19, 1789), *reprinted in* DEBATES, *supra* note 6, at 999, 1024.

65 *See id.*

66 *See* Gazette of the United States (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1026, 1026.

67 *Id.* at 1027.

68 *Id.* Benson's first amendment would replace the original language, "In case of vacancy in the said office of Secretary of the United States, for the department of foreign affairs." *Id.*

69 *Id.*

he would move to strike out the bill's text providing that the Secretary was "to be removable by the president."[70] He believed that this latter text could be read to suggest that Congress was somehow granting or delegating removal authority.[71] According to Benson, the House ought to delete this language because a majority of the Representatives actually endorsed the executive-power theory.[72]

With relatively little discussion, the House passed Benson's first amendment 30 votes to 18.[73] Benson's second amendment, to strike the language "to be removable by the president," generated more discussion, but passed 31 to 19.[74] Though the vote margins were similar, the majority coalitions were quite different.[75] Many members who had voted for Benson's first amendment voted against his second. Because many members who voted against the first amendment switched their votes as well, however, Benson's second amendment passed. On June 24, the House approved the entire bill, including Benson's amendments, on a vote of 29 to 22.[76] This time, the majority coalition closely resembled the majority that approved Benson's first amendment.[77]

The Senate took up the bill in mid-July. According to Pennsylvania Senator William Maclay, Vice President John Adams broke a 10–10 tie on July 14, leading the Senate to reject a proposal that would have struck the entire reference to the President's power of removal.[78] Four days later, the Vice President broke a second tie to reject a motion to strike out "by the President" from the removal clause.[79] Had either of these motions passed, the Senate bill would not have affirmed any constitutional theory of removal.[80] As it was, by not granting removal authority, and by discussing what would happen when the President removed the Secretary, the final bill signed by the

---

70 *See* The Congressional Register (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1028, 1028.

71 *See id.*

72 *See id.*

73 *See* Journal of the First Session of the House of Representatives of the United States (June 22, 1789), *reprinted in* JOURNAL, *supra* note 24, at 91, 92.

74 *See id.* at 93.

75 *See infra* Appendix I, columns 1 and 2 (providing the vote distribution on Benson's two amendments).

76 *See* Journal of the First Session of the House of Representatives of the United States (June 24, 1789), *reprinted in* JOURNAL, *supra* note 24, at 94, 95.

77 *See infra* Appendix I, columns 1 & 3.

78 *See* Foreign Affairs Bill, H.R. 8, 1st Cong. (1789), *reprinted in* LEGISLATIVE HISTORIES, 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789–1791, at 696, 697 n.4 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) [hereinafter HISTORIES].

79 *See id.*

80 *See* Foreign Affairs Act, H.R. 8, 1st Cong. (1789), *reprinted in* HISTORIES, *supra* note 78, at 689, 693.

President arguably assumed that the President had a preexisting, constitutionally based removal power.[81]

Similar divisions emerged over the other departmental bills. Benson proposed an amendment to the House War Department bill similar "to that which had been obtained in the bill establishing the department of foreign affairs."[82] Benson's amendment passed in the House 24 to 22.[83] Before approving the bill, the Senate voted 10–9 to reject a motion to delete the removal text.[84] As with the Foreign Affairs bill, the War Department bill discussed what would happen in the event the President removed the War Secretary,[85] suggesting that Congress believed the President had preexisting removal authority.

The Treasury bill's history is harder to trace. On June 25, in the Committee of the Whole, Representative John Page of Virginia moved to strike the bill's language providing that the Treasury Secretary would serve at the President's pleasure.[86] Page's motion passed without debate.[87] By the time the House sent the bill to the Senate, the House had added language paralleling Benson's second amendment to the Foreign Affairs bill.[88]

Almost a month later, the Senate deleted the entire section of the Treasury bill that contained this removal text and returned the bill to the House.[89] Following "considerable debate," the House determined

---

81 *See* An Act for Establishing an Executive Department, to be Denominated the Department of Foreign Affairs, ch. 4, § 2, 1 Stat. 28, 29 (stating that the Chief Clerk of the Department of Foreign Affairs would have custody of papers "whenever the said principal officer shall be removed from office by the President of the United States").

82 *See* The Congressional Register (June 24, 1789), *reprinted in* DEBATES, *supra* note 6, at 1043, 1044.

83 *See id.*

84 *See* War Department Bill, H.R. 7, 1st Cong. (1789), *reprinted in* LEGISLATIVE HISTORIES: MITIGATION OF FINES BILL [H.R. 38] THROUGH RESOLUTION ON UNCLAIMED WESTERN LANDS, 6 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789–1791, at 2031, 2032 n.5 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) [hereinafter HISTORIES II].

85 *See* War Department Act H.R. 7, 1st Cong. (1789), *reprinted in* HISTORIES II, *supra* note 84, at 2028, 2028 (establishing a Chief Clerk who would take charge of the War Department "whenever the said principal Officer shall be removed from Office by tbe President of the United States").

86 *See* DAILY ADVERTISER (June 26, 1789), *reprinted in* DEBATES, *supra* note 6, at 1044, 1045. Representative Page moved to strike out bill language providing that the Secretary would "be removable at the pleasure of the President." *Id.*

87 *See id.*

88 *See* Treasury Bill, H.R. 9, 1st Cong. (1789), *reprinted in* HISTORIES II, *supra* note 84, at 1983, 1985 (establishing that the Assistant to the Secretary of the Treasury shall take charge "whenever the Secretary shall be removed from office by the President of the United States").

89 *See id.* at 1985 n.9 (citations omitted). *But see* DAILY ADVERTISER (Aug. 5, 1789), *reprinted in* DEBATES, supra note 6, at 1174 (suggesting that the Senate made two amendments to section 7, one to delete the removal language and the other to provide that the assistant to the Treasury Secretary ought to be appointed by the Secretary).

to refuse to accede to the Senate's amendment.[90] After the Senate insisted on its deletion, a conference committee failed to resolve the matter.[91] Madison reported that in the opinion of the House members of the conference committee, "it would not be right for the [H]ouse to recede from their disagreement."[92] One month later, with the Vice President once again breaking a 10–10 tie, the Senate finally approved the House bill.[93] By including language that discussed who would have custody of papers when the President removed the Secretary, the Treasury bill paralleled its counterparts in implying that the Constitution granted the President a removal power.[94]

B. Removal Theories

The foregoing timeline leaves out the most fascinating part of the Decision of 1789: the House debates about the constitutional mechanism for removal. Without simplifying too much, Representatives voiced four theories: 1) impeachment was the only means of removing officers (the impeachment theory); 2) because the Senate's concurrence was necessary to appoint, the President could not remove officers unless he secured the Senate's concurrence (the advice-and-consent theory); 3) Congress could decide who could remove officers and should grant this power to the President (the congressional-delegation theory); 4) the Constitution's grant of executive power in Article II enabled the President to remove executive officers on his own (the executive-power theory).

Though there were four principal theories, there were not four static camps. Some members straddled positions. Other members changed their minds. Among the latter was Madison, who ultimately decided that the Constitution granted the President a removal power.[95]

---

90 *See* DAILY ADVERTISER (Aug. 5, 1789), *reprinted in* DEBATES, *supra* note 6, at 1173, 1174.

91 *See* Treasury Act, H.R. 9, 1st Cong. (1789), *reprinted in* HISTORIES II, *supra* note 84, at 1975, 1979.

92 The Congressional Register (Aug. 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1319, 1324.

93 *See* Treasury Act, H.R. 9, 1st Cong. (1789), *reprinted in* HISTORIES II, *supra* note 84, at 1975, 1979–80.

94 *See* Treasury Bill, H.R. 9, 1st Cong. § 7 (1789), *reprinted in* HISTORIES II, *supra* note 84, at 1983, 1985. Compare section 1 of the original House bill, which noted that the Secretary was removable at the President's pleasure, with section 7 of the bill as enacted by the House, which implied that the President had a preexisting removal power. *See* HISTORIES II, *supra* note 84, at 1980, 1985.

95 *See, e.g.*, DAILY ADVERTISER (June 18, 1789), *reprinted in* DEBATES, *supra* note 6, at 845, 846 (noting Madison's "original impression" that the advice-and-consent theory was correct). Earlier, Madison seemed to endorse the congressional-delegation theory. *See, e.g.*, The Congressional Register (May 19, 1789), *reprinted in* DEBATES II, *supra* note 45, at 722,

1. *The Impeachment Theory*

This theory had the fewest adherents, no more than two or three Representatives.[96] Its foremost and tireless proponent, Representative William Smith of South Carolina, played the *expressio unius est exclusio alterius* card: Since the Constitution expressly provided for the removal of officers through impeachment, this was the only means of removing them.[97] Relying on English conceptions, Smith apparently believed that officers had a property interest in their offices.[98] This meant that officers could not be deprived of their offices except when they had committed malfeasance.

Perhaps recognizing the difficulty with his impeachment theory, Smith later asserted that Congress could set terms of office for superior officers and thus periodically cull the incompetent and infirm.[99] Moreover, Smith claimed—somewhat contradictorily—that because Congress could vest the appointment of inferior officers with the President, the heads of departments, or judges, Congress could also vest removal power over the inferior offices.[100] Evidently, Smith thought that Congress could take some measures to reduce the property value of offices.

Smith's position had obvious weaknesses. To begin with, the *expressio unius* argument could be used against his theory. Why specify that federal judges had tenure during good behavior if all officers could serve for life?[101] Arguably, the Constitution specified judicial

729–30 (paraphrasing Madison: "[I]t is in the discretion of the legislature to say upon what terms the office shall be held, either during good behaviour, or during pleasure.").

96 *See* CORWIN, *supra* note 16, at 331–32 n.22 (identifying the supporters of the impeachment theory as Representatives Smith, Huntington, and Jackson, who later recanted).

97 *See* DAILY ADVERTISER (June 17, 1789) *reprinted in* DEBATES, *supra* note 6, at 842, 843 (quoting Representative Smith as stating that "[i]f the constitution bad provided a particular mode of removing from office, it was a reason from which to conclude that it was improper to adopt any other"); *see also* DAILY ADVERTISER (June 18, 1789), *reprinted in* DEBATES, *supra* note 6, at 845, 850 (noting that Representative Smith "went through a train of reasoning in support of impeachments as a sufficient remedy, and to prove that the constitution had left no discretion in the Legislature to expoint it, or to vest any new powers").

98 *See* The Congressional Register (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 904, 936 ("Wherever a man has a right he has a remedy; if he suffers a wrong he can have a redress; he would be entitled to damages for being deprived of his property in his office.").

99 *See id.* at 934 ("With respect to the other offices to be established by law, there is nothing to prevent us from limiting their appointment to two or three years.").

100 *See* The Congressional Register (June 18, 1789), *reprinted in* DEBATES, *supra* note 6, at 951, 988.

101 *See, e.g.*, The Congressional Register (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 904, 931 (quoting Representative Benson's remark that "it cannot be rationally intended that all offices should be held during good behaviour, because the constitution has declared one office to be held by this tenure"). Of course, Smith might have replied that his position was not that all officers had life tenure, only that officers had such tenure unless Congress affirmatively established a shorter tenure via statute.

tenure during good behavior precisely because it was an exception to a general rule that other officers could be removed more easily.[102] Moreover, Smith's theory, if accepted, would have led to the splintering and distribution of executive power.[103] The Secretaries would have ruled the roost, with the President at their tender mercies.[104] Still, Smith's position had its attraction: It was relatively uncomplicated.

2. *The Advice-and-Consent Theory*

A half dozen or so Representatives spoke in favor of the theory that the Senate's concurrence was necessary to remove.[105] Adherents of this theory clearly rejected the notion that executive officers could be removed only by impeachment. Instead, these members asserted, the power to appoint implied a parallel power to remove.[106] Since the Senate had to approve appointments, it had to consent to removals as well.[107] Others viewed the Senate as an executive council, charged with participating in every question relating to treaties and federal officers.[108] Perhaps the President could suspend an officer until the Senate acted, one way or another, on the President's removal request.[109]

Proponents of the executive-power theory tried to turn the appointment argument against advice-and-consent theorists.[110] Even if it were true that appointers inherently enjoyed removal power, it did

---

102 *See id.*

103 *See id.* at 931–34 (quoting Representative Benson's comment on the "absurd scene [that] must be displayed" if the President's authority was limited in the manner implicit in Smith's reasoning).

104 *See id.*

105 *See* CORWIN, *supra* note 16, at 331–32 n.22. Corwin claims that seven spoke in favor of the advice-and-consent theory, which he refers to as the "senatorial party," and that eight others voted consistently with this theory.

106 *See* DAILY ADVERTISER (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 842, 842 (noting the comments of Representative White advocating an advice-and-consent role for Congress in the removal of such officials); DAILY ADVERTISER (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 895, 901–02 (noting the comments of Representative Gerry advocating a similar role for Congress).

107 *See id.*

108 *See* DAILY ADVERTISER (June 20, 1789), *reprinted in* DEBATES, *supra* note 6, at 889, 893–95 (noting the comments of Representative Stone, who argued that "the Senate were [sic] a body to whom the constitution had given great weight in the executive scale, and in the administration of government").

109 *See* The Congressional Register (June 16, 1789), *reprinted in* DEBATES, *supra* note 6, at 860, 872–73 (statement of Representative White); *see also* The Congressional Register (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 904, 930 (quoting Representative Gerry advocating a view that "[i]n case the senate should not be sitting, the officer could be suspended, and at their next session the causes which require his removal might be enquired into").

110 *See, e.g.*, DAILY ADVERTISER (June 19, 1789), *reprinted in* DEBATES, *supra* note 6, at 886, 886–87 (statements of Representative Laurance).

not follow that the Senate's consent was necessary to remove. Executive-power proponents claimed that the Senate did not formally participate in the actual appointment.[111] While the Senate's *consent* was necessary to appoint, the President alone actually appointed persons to offices.[112] Hence, if the appointer necessarily enjoyed an implied removal power, that power resided with the President, who had sole power to appoint.

Opponents of the advice-and-consent theory made additional claims. Some rejected the "rule" that he who appoints may remove, arguing that removal authority ought to be vested with the person responsible for the officer, namely, the President.[113] Others maintained that the Senate's impeachment role implied that it could remove in no other way.[114] And still others argued that the advice-and-consent theory prejudiced the Senators. If the Senate denied the President's request to remove, it would be awkward should the House impeach the same officers, for the Senate would refuse to convict and remove, having "prejudged" the case earlier.[115]

Executive-power proponents also argued that the Senate's executive functions were limited to advising and consenting on treaty-making and appointments. The Constitution did not make the Senate an all-purpose executive council, armed with a check on all of the President's executive functions.[116] One of the most powerful objections was that a Senate check on presidential removals would render the legislature a two-headed monster and "reduce the power of the president to a mere vapor."[117] Officers would curry senatorial favor and thereby secure the permanence of their positions.[118]

As previously mentioned, the Committee of the Whole House rejected an amendment to provide that removals of the Secretary of For-

---

111 *See id.* at 887 (noting Representative Laurance's comments distinguishing between the advisory power, which the Constitution had given to the Senate, and the nomination-and-appointment power, which the Constitution gave "in the strongest language" to the President).

112 *See id.*

113 *See* The Congressional Register (June 16, 1789), *reprinted in* DEBATES, *supra* note 6, at 860, 870 (noting the comments of Representative Vining arguing that "he who is responsible for the conduct of the officer[ ] ought to have the power of removing him").

114 *See e.g., id.* at 873–74 (comments of Representative Boudinot).

115 *See id.* at 874–75 (noting Representative Boudinot's "more solid objection": "I conceive the senate will be too much under the controul of their former decision, to be a proper body for this house to apply to for impartial justice.").

116 *See, e.g.*, DAILY ADVERTISER (June 18, 1789), *reprinted in* DEBATES, *supra* note 6, at 845, 846 (noting Madison's view that "as far as the constitution had separated [the three branches of government], it would be improper to blend them").

117 The Congressional Register (June 16, 1789), *reprinted in* DEBATES, *supra* note 6, at 860, 867 (statement of Representative Madison).

118 *See id.*

eign Affairs could occur only with the Senate's advice and consent.[119] Moreover, the final bill, because it assumed unilateral presidential removal authority, likewise rejected the idea "that the two clauses allowing senatorial participation in executive matters constituted the Senate a permanent executive council."[120] While the advice-and-consent theory had the one-time support of Publius,[121] it could not muster a majority in the House.[122]

3. *The Congressional-Delegation Theory*

The congressional-delegation theory's champions voiced two simple propositions: First, the Constitution did not grant a removal power, and second, Congress could remedy this shortcoming simply by delegating removal authority.[123] Because the Constitution implied that most offices—excepting a handful, including President and Vice President—would be created by law, Congress could legislate the terms and conditions of such offices, including authorizing presidential removal.[124] The Necessary and Proper Clause not only authorized office creation, it sanctioned the grant of removal authority.[125]

Most supporters of this theory favored the delegation of removal power to the President.[126] Some representatives argued that the fact that the Constitution gave the President responsibility over law execution, foreign affairs, and the conduct of war argued in favor of grant-

---

119 *See* The Congressional Register (June 19, 1789), *reprinted in* DEBATES, *supra* note 6, at 999, 1024.

120 THACH, *supra* note 29, at 150.

121 *See* THE FEDERALIST No. 77 (Alexander Hamilton) ("The consent of [the Senate] would be necessary to displace as well as to appoint [officers of the United States.]"). During the debates, Hamilton apparently had a change of heart. *See* Letter from William Smith to Edward Rutledge (June 21, 1789), *in* CORRESPONDENCE, FIRST SESSION: JUNE–AUGUST 1789, 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789–1791, at 831, 832–33 (Charlene Bangs Bickford et al. eds., 2004) [hereinafter CORRESPONDENCE] (noting that Benson sent a note stating that Hamilton "had informed [Benson] since the preceding day's debate, that upon more mature reflection he *had changed his opinion* & was now convinced that the Presidt. alone shod. have tbe power of removal at pleasure" (emphasis in original)).

122 *See* The Congressional Register (June 19, 1789), *reprinted in* DEBATES, *supra* note 6, at 999, 1024 (citing the result of the vote—20 yeas to 34 noes—on the issue of whether the words "to be removable by the president" should be struck out).

123 *See, e.g.*, DAILY ADVERTISER (June 19, 1789), *reprinted in* DEBATES, *supra* note 6, at 886, 887–89 (noting Representative Laurance's comment that "Congress had the right and . . . duty to supply the deficiency in the constitution").

124 *See id.* at 888; *see also* The Congressional Register (June 18, 1789), *reprinted in* DEBATES, *supra* note 6, at 951, 959 (statement of Representative Sedgwick).

125 *See, e.g.*, The Congressional Register (June 19, 1789), *reprinted in* DEBATES, *supra* note 6, at 999, 1009 (noting Representative Silvester's argument that "the [H]ouse 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").

126 *See generally* THACH, *supra* note 29, at 140–65 (discussing the various positions regarding the removal power during the debate).

ing the President a removal power.[127] Others spoke as if the Constitution affirmatively obliged Congress to grant the President a removal power, lest he be burdened with constitutional duties that he could not effectively fulfill.[128]

Though Madison began as a partisan of the congressional-delegation theory, he eventually came to denounce it.[129] He and others were wary of the theory's implications. If Congress could delegate removal authority wherever and however it saw fit, Congress could delegate such power to someone other than the President.[130] Congress might elect not to delegate removal authority at all.[131] In either case, the President would be unable to superintend the executive branch, as the Constitution contemplated. Moreover, if Congress delegated removal authority to some other entity, that institution would become the de facto Chief Executive.

Determining the level of support for the congressional-delegation theory is difficult. A handful of Representatives spoke favorably of it at various times.[132] Some of these same Representatives, however, also made statements seeming to favor the executive-power theory, making their views difficult to classify.[133] Moreover, given the fluidity of posi-

---

127 *See, e.g.*, The Congressional Register (June 18, 1789), *reprinted in* DEBATES, *supra* note 6, at 951, 960 (noting Representative Sedgwick's statement that "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 the business be conducted with propriety, and for the general interest of the nation. The president is made responsible; and shall he not judge of the talents abilities and integrity of his instruments?").

128 *See id.* at 964 ("The legislature has the power to create and establish offices; but it is their duty so to modify them as to make them conform to the general spirit of the constitution.").

129 *See supra* note 95 and accompanying text.

130 *See* DAILY ADVERTISER (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 895, 895 (comments of Madison); *see also* The Congressional Register (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 904, 921–22 (comments of Madison).

131 *See* The Congressional Register (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 904, 921–22 (noting that Madison declared that implicit in the congressional-delegation theory is the possibility that Congress may "exclude the president altogether from exercising any authority in the removal of officers; they may give it to the senate alone, or the president and senate combined; they may vest it in the whole congress, or they may reserve it to be exercised by this house").

132 *See* CORWIN, *supra* note 16, at 331–32 n.22. Corwin claims that seven spoke in favor of the congressional-delegation theory, while nine others followed their lead during voting. *See id.*

133 For instance, Corwin counts Representative Laurance among those who favored the congressional-delegation theory. *See id.* But Laurance also made statements that seemed to favor the executive-power theory. *See, e.g.*, The Congressional Register (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 904, 908 ("The constitution gives an advisory power to the senate, but it is considered that the president makes the appointment. The appointment and responsibility are actually his; for it is expressly declared, that he shall nominate and appoint. . . . If from the nature of the appointment we are to collect the authority of removal, then I say the latter power is lodged in the president . . . .").

tions on this complex issue, others may have trod the same path as Madison, ultimately rejecting the congressional-delegation theory.

Scholars such as Corwin have inferred that the group favoring the congressional-delegation theory was large enough to deny the executive-power group an outright majority. As noted earlier, many Representatives who voted against removing the original Foreign Affairs bill language went on to vote for the bill containing the final removal language.[134] Corwin and others reasoned that these Representatives endeavored to retain language implying delegation precisely because they were congressional-delegation partisans.[135] Based on a combination of recorded speeches and voting patterns, Corwin argued that this group was composed of some sixteen members, with seven vocal members and nine silent ones.[136]

4. *The Executive-Power Theory*

Some Representatives argued that because the Constitution granted the President executive power, and because removal was an executive function, the President had a constitutional right to remove.[137] Madison, with the zeal of a convert, claimed that the "constitution affirms[ ] that the executive power shall be vested in the president."[138] Madison concluded that because the Constitution created some exceptions to the executive power, such as the Senate's participation in appointments, Congress could create no further exceptions.[139] In his words, the "legislature has no right to diminish or modify [the President's] executive authority."[140] Because the Constitution had clearly granted the President the "executive power," and because Congress could not modify this executive power, the question was simple: "Is the power of displacing an executive power? I conceive that if any power whatsoever is in its nature executive it is the power of appointing, overseeing, and controling [sic] those who execute the laws."[141] Others, such as Representative Fisher Ames of Massachu-

---

134 *See supra* text accompanying note 26.

135 *See* CORWIN, *supra* note 16, at 331–32 n.22; CURRIE, *supra* note 17, at 41 n.240. As discussed later, *see infra* Part II.A, I think there are far better explanations for these voting patterns.

136 *See* CORWIN, *supra* note 16, at 331–32 n.22; *see also* CURRIE, *supra* note 17, at 41 n.240 (showing the same figure).

137 *See, e.g.*, The Congressional Register (June 16, 1789), *reprinted in* DEBATES, *supra* note 6, at 860, 869 (noting Madison's statement declaring the power of removal to be "as much of an executive nature as" the power of appointment).

138 *Id.* at 868.

139 *See id.*

140 *Id.*

141 *Id.*

setts[142] and Representative John Vining of Delaware,[143] echoed Madison's claims.

Voicing arguments that still reverberate today, opponents of the executive-power theory made several assertions. First, the vesting of executive power did not convey any independent power, but merely vested the specific powers enumerated in Article II.[144] Second, they claimed that reading the Vesting Clause—"The executive power shall be vested in a President of the United States of America"[145]—as if it vested power would make the remainder of Article II superfluous.[146] Third, they claimed that even if the Vesting Clause was a general grant, removal was not an executive power, at least if the state constitutions were a guide.[147] Fourth, arguments about a substantive grant of executive power were better suited for monarchical countries.[148] Finally, if the President had removal power, he could toss aside incumbents at the drop of a hat, thereby depriving them of their "constitutional rights" to their offices.[149]

---

142 *See, e.g.*, The Congressional Register (June 16, 1789), *reprinted in* DEBATES, *supra* note 6, at 860, 880 ("[I]n order that [the President] may be responsible 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 cease to exist.").

143 *See* The Congressional Register (May 19, 1789), *reprinted in* DEBATES II, *supra* note 45, at 722, 728 (noting Representative Vining's argument that because "all executive power should be vested in [the President], except in cases where it is otherwise qualified," there should be a strong presumption that the President had the power to remove). Although some Representatives who thought the Constitution granted the President a removal power also made arguments about the Appointments Clause, they did not endorse the view that the President had a removal power by virtue of his power to appoint. Instead, they tried to undermine the arguments of advice-and-consent partisans who argued that the Senate must have a role in removal. These Representatives argued that if the power to remove followed the power to appoint, then the President had a unilateral power to remove. Though the Senate had to consent to appointments, it did not actually participate in the act of appointing. *See supra* text accompanying notes 110–12.

144 *See, e.g.*, The Congressional Register (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 904, 937 (comments of Representative Smith).

145 U.S. CONST. art. II, § 1.

146 *See* The Congressional Register (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 904, 937 (noting Representative Smith's argument that to hold that removal authority is implied in the grant of executive authority "proves too much, and therefore proves nothing; because it implies that powers which are expressly given by the constitution, would have been in the president without the express grant").

147 *See* The Congressional Register (June 16, 1789), *reprinted in* DEBATES, *supra* note 6, at 860, 877 (quoting Representative Smith as stating, "I have turned over the constitutions of most of the states, and I do not find that any of them have granted this power to the governor.").

148 *See* The Congressional Register (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 904, 912 (noting Representative Jackson's statement that an argument for executive removal power "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").

149 *See id.* at 936 (comments of Representative Smith).

As noted previously,[150] some executive-power partisans were unsatisfied with merely securing language that ensured a presidential removal power over the Secretary of Foreign Affairs.[151] These Representatives wanted to establish that a House majority favored not just a presidential removal power, but also the more precise proposition that the Constitution itself granted the President a removal authority.[152] It was for this reason that Benson proposed his two amendments.[153] Just days after the majority coalition fended off remarkably persistent attempts to delete the original bill's provision that the Secretary could be "removed from office by the president," Benson moved to strike this very language and add new language implying that the President had a constitutional right to remove.[154] The debates made clear that some read the original text as a grant of authority rather than a confirmation of constitutional authority.[155] According to Benson, his amendments would more clearly convey the majority's conclusion that the President had constitutional removal authority; the resulting statute would be a legislative construction of the Constitution in favor of the executive-power theory.[156]

Ironically, the votes on Benson's two amendments and the final bill seem to have clouded the meaning of the Decision of 1789. In the minds of some scholars and judges, Benson's amendments accomplished nothing except the exacerbation of preexisting ambiguities.[157] The next Part of this Article explains that Benson's amendments in fact accomplished a lot, because they generated a bill that endorsed the executive-power theory. In particular, the next Part explains why some members seemingly voted against the executive-power theory but then went on to vote for a Foreign Affairs bill (and two other bills) that endorsed this theory.

II
DEMYSTIFYING THE DECISION OF 1789

Two mysteries about the Decision of 1789 remain unsolved to this day. First, why did Representatives who supposedly favored the executive-power theory initially vote to retain text that appeared to Madison and Benson to be a *delegation* of removal authority? One can call this

---

150 *See supra* text accompanying note 67.

151 *See* The Congressional Register (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1028, 1028.

152 *See id.*

153 *See supra* Part II.B.1.

154 *See* The Congressional Register (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1028, 1028.

155 *See id.* at 1029 (comments of Representative Sedgwick).

156 *See id.* at 1028–30.

157 *See supra* text accompanying notes 19–28.

group of fifteen Representatives—those who voted against Benson's second amendment but for the final House bill[158]—the "enigmatic faction." Chief Justice Taft's detractors, such as Justice Brandeis and Corwin, contend that if all members who voted for the final bill favored the executive-power theory, then members of the enigmatic faction ought to have voted for Benson's second amendment. Chief Justice Taft's critics claim that by voting against this amendment—and hence voting to retain the delegation language—members of the enigmatic faction signaled their endorsement of the congressional-delegation theory.[159] More importantly, Chief Justice Taft's critics argue, because the twenty-nine-person majority in favor of the House bill was composed of so many members of the enigmatic faction, the executive-power theory never commanded a House majority. In other words, though a majority obviously favored the House bill, the executive-power theory did not actually enjoy majority support.[160] Corwin claimed that the executive-power theory only enjoyed the support of about sixteen members.[161]

The second mystery also relates to the enigmatic faction. Why would members of the enigmatic faction—congressional-delegation partisans, in the eyes of Justice Brandeis and Corwin—vote for a Foreign Affairs bill that delegated no removal authority, that was proposed as a means of endorsing the executive-power theory, and that seemed to endorse the executive-power theory? Because the bill never conveyed any removal authority and spoke only of what would happen when the President removed the Secretary, the bill seemed to imply that the President had some preexisting removal authority. Since the only source of that authority could be the Constitution, the bill seemed to endorse the executive-power theory, as Benson and Madison had hoped. If members of the enigmatic faction actually opposed the executive-power theory, they ought to have voted against the House bill rather than for it. Justice Brandeis and Corwin say nothing about this troubling feature of their claim about the enigmatic faction.[162]

---

158 As Appendix I shows, there were fifteen representatives who voted "no" on Benson's second amendment but voted "yes" on the final House bill. *See infra* Appendix I.

159 *See* CORWIN, *supra* note 16, at 331 n.22; *see also* Myers v. United States, 272 U.S. 52, 285 nn.73 & 75 (1926) (Brandeis, J., dissenting) (saying same). Strangely, Justice Brandeis just one page earlier claimed that the Decision had determined that the President had a constitutional power of removal. *See Meyers*, 272 U.S. at 284 (Brandeis, J., dissenting).

160 *See* CORWIN, *supra* note 16, at 332 ("[L]ess than a third of the membership of the House was at any time of the opinion that the Consitution vested the President alone with the power of removal . . . ."); CURRIE, *supra* note 17, at 41; *see also Myers*, 272 U.S. at 285 n.75 (Brandeis, J., dissenting) (saying same).

161 *See* CORWIN, *supra* note 16, at 331 n.22 (noting that of the executive-power partisans, ten persons spoke, while six others simply voted in conformity).

162 *See* CORWIN, *supra* note 16, at 331–32; CURRIE, *supra* note 17, at 41.

A. Possible Solutions Considered and Rejected

Neither Chief Justice Taft nor his supporters have ever responded to the challenge posed by Justice Brandeis and Corwin.[163] This suggests either a failure to understand the challenge or an inability to develop an adequate response. On the other hand, Chief Justice Taft's critics seem unaware of the parallel difficulties in their account. Justice Brandeis and Corwin focus on the votes on Benson's amendments without addressing the vote on the House bill itself.[164] Their failure to grasp the latter's obvious negative implications for their claims suggests a weakness in their readings. This section considers some possible solutions, each of which has its flaws.

Attempting to solve these mysteries, a defender of Justice Brandeis and Corwin might assert that congressional-delegation partisans who favored presidential removal swallowed hard and voted for a bill that assumed a presidential removal power. These partisans sought to retain the congressional-delegation language, but having lost that vote, they decided to satisfy their policy preferences at the expense of their constitutional theory. This reading supposes that congressional-delegation partisans abandoned their constitutional principles.

Other defenders of the Brandeis/Corwin thesis might instead argue that congressional-delegation partisans voted for the final bill because it did not actually contradict their constitutional theory. The final bill did not expressly claim that the President had a constitutional removal power.[165] The bill merely said that when the President removed the Secretary, the Assistant Secretary would have custody of departmental papers.[166] Under this view, the bill's removal language was wholly innocuous, for it discussed something impossible, namely, removal by the President. Thus, the final bill really said nothing relating to removal, and congressional-delegation partisans could vote for it without abandoning their convictions.

Finally, some might suppose that congressional-delegation partisans read the final House bill as indirectly endorsing their theory.

---

163 In his majority opinion in *Myers*, Chief Justice Taft cryptically notes that "[s]ome effort has been made to question whether the decision [of 1789] carries the result claimed for it." *Myers*, 272 U.S. at 114. Presumably, he meant the efforts of Justice Brandeis. *See id.* at 285 n.75. Nevertheless, Chief Justice Taft does not directly respond to any of Justice Brandeis's claims regarding the enigmatic faction.

164 *See Myers*, 272 U.S. at 284–85 (Brandeis, J., dissenting); CORWIN, *supra* note 16, at 331–32.

165 *See* Foreign Affairs Bill, H.R. 8, 1st Cong. (1789), *reprinted in* HISTORIES, *supra* note 78, at 694, 696–97.

166 *See id.* at 697 ("[T]here shall be in the [foreign affairs department] an inferior officer . . . to be called the chief Clerk . . . who whenever the said principal officer shall be removed from office by the President of the U.S., or in any other case of Vacancy, Shall during such Vacancy have the charge & custody of all records, books, & papers appertaining to the sd. Department.").

The bill did not expressly endorse the executive-power theory, and it did not expressly reject the congressional-delegation theory either.[167] Instead, by discussing what would happen when the President removed the Secretary, the bill might have implicitly granted removal authority, thus silently endorsing the congressional-delegation theory.

None of these explanations are persuasive. First, with the Constitution's ratification so fresh in their memory, and having recently taken their Article VI oaths in support of the Constitution,[168] it seems unlikely that the congressional-delegation partisans would casually toss aside their constitutional scruples merely to satisfy their policy preferences. Consistent with this intuition, no member of the enigmatic faction ever explained their vote as the triumph of pragmatism over principle. Nor did anyone ever charge that members of the enigmatic faction cast constitutionally insincere votes. Rather, members praised the quality and sincerity of the debate.[169]

Second, almost all congressional-delegation partisans wanted the President to enjoy a removal power.[170] Yet such partisans logically could not satisfy their policy preferences by voting for a bill that did not grant removal authority. If a Representative who firmly believed that the President lacked a constitutional removal power wanted to ensure that the President would nonetheless enjoy the power to remove, that Representative would not vote for a bill that did not grant removal authority. Nor would he vote for a bill that assumed that the President had a preexisting, constitutional removal power. It was impossible for die-hard congressional-delegation partisans to believe that a vote for the House bill could satisfy their policy preference for presidential removal authority.

Third, it is unlikely that congressional-delegation partisans felt comfortable voting for the final bill simply because they regarded its removal language harmless. While the final bill never explicitly expressed the view that the President had a preexisting constitutional removal power, it nonetheless seems farfetched to suppose that members of Congress knowingly voted for bills that contained removal language that they regarded as mere dross, especially since a supermajority of the House did not regard the language as empty or

---

167 *See id.* at 696–97.

168 *See* U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned . . . shall be bound by Oath or Affirmation, to support this Constitution . . . .").

169 Fisher Ames wrote that both sides in the removal debate held "a most sanguine belief of their creed." Letter from Fisher Ames to George R. Minot (July 9, 1789), *in* CORRESPONDENCE, *supra* note 121, at 983, 984. There was "little art" in the House, he wrote: "If [a group] wish to carry a point, it is directly declared, and justified. Its merits and defects are plainly stated, not without sophistry and prejudice, but without management . . . . There is no intrigue, no caucusing . . . ." *Id.* at 985.

170 *See supra* notes 124–26 and accompanying text.

useless.[171] Moreover, one also has to suppose that enigmatic members silently rejected the construction put on the final bill by Benson and Madison, the two Representatives most responsible for its language. No member of the enigmatic faction ever claimed that they voted for the House bill because its removal language was a harmless nullity.

Finally, it is extremely difficult to read the final Foreign Affairs bill that emerged from the House, or its counterpart War and Treasury Department bills, as somehow containing an implicit grant of removal authority to the President. First, the language of the bills most naturally reads as if it assumed the President had a removal power.[172] This is especially true when one considers the legislative debates that preceded the crafting of the final language.[173] Moreover, Benson—the sponsor of the amendments that led to the final result—expressly proposed them as an endorsement of the executive-power theory and as a rejection of the congressional-delegation theory.[174] Lastly, there is no evidence that any member actually regarded the bills or acts as a delegation of removal authority. No member of Congress ever claimed that the House Foreign Affairs bill, or the other bills, endorsed the congressional-delegation theory.

Defenders of Chief Justice Taft's position could make more plausible claims. These defenders might borrow a page from Justice Antonin Scalia and argue that it does not matter why Representatives voted for the final bill. From a textualist perspective, the text of the final bill contemplated a constitutional power of removal in the President's hands; what members actually believed is of no significance. Chief Justice Taft's supporters also might claim that Representatives who voted to retain the congressional-delegation language were not firmly entrenched congressional-delegation partisans, and instead were open to the executive-power theory. Their openness thus permitted them to eventually become executive-power supporters, of whatever intensity, by the time of the final vote. Chief Justice Taft's partisans might even cite Madison's change of heart.[175]

Neither of these explanations is entirely satisfactory. One of the reasons we might defer to the constitutional readings of early congressmen, presidents, and judges is that we believe that these actors

---

171 The executive-power partisans clearly believed this language served a purpose, since they engineered the final removal language. Those who opposed the bill because of its removal language cannot have believed this language was useless; otherwise, they would not have bothered opposing it.

172 *See, e.g.*, Foreign Affairs Bill, H.R. 8, 1st Cong. (1789), *reprinted in* HISTORIES, *supra* note 78, at 696, 697.

173 *See infra* Parts II.B.1–2.

174 *See supra* text accompanying notes 22–23.

175 *See supra* note 95.

were closer to the Constitution's creation and believed in the constitutional readings supposedly reflected in a bill or act. Saying that only the text matters, however, suggests that we do not really care what these actors thought about the Foreign Affairs bill or the Constitution. If Representatives were tricked into accepting the removal language by virtue of Benson's decision to propose two amendments, or if the final removal language resulted from some accident, these circumstances ought to affect how much deference to accord to the Decision of 1789.

Similarly, it seems unlikely that fifteen Representatives changed their minds about the relative merits of the executive-power and congressional-delegation theories. There was no debate between the vote on Benson's second amendment and the vote on the House bill that might have changed minds or revealed a change of heart.

Perhaps a combination of these theories can explain the votes of a few Representatives. Yet given the lack of evidence backing any of these explanations, it seems unlikely that any combination of these reasons ultimately will demystify most or all of the votes of the enigmatic faction.

There is, however, a much better theory to explain the enigmatic faction's vote, one that does not ask us to suppose that many members of the enigmatic faction sacrificed their principles or had a last-minute change of heart.

B. A Blindsided Majority Divided by Tactics, Not Principles

The best explanation for the seemingly inconsistent votes of the fifteen members of the enigmatic faction is that most, if not all, of them did not cast inconsistent votes. All the while, members of the enigmatic faction favored, with varying intensity, the executive-power theory and merely differed with other executive-power partisans about tactics.

How could those who voted against Benson's second amendment actually be executive-power partisans? Answers can be found in the newspaper accounts of the legislative debates and in the House members' private letters. Laying out all the evidence will take some time. For now, here is a summary of the reasons why a vote against Benson's second amendment was hardly a vote against the executive-power theory.

First, some executive-power proponents voted against Benson's second amendment because they regarded the original bill language as a useful congressional "declaration" about the Constitution.[176] Despite the arguments of Benson and Madison, some members clearly

176 *See infra* Part II.B.1.

thought that the original text was a more open and unequivocal affirmation of the executive-power theory, especially as compared to the bill that would result from the passage of Benson's second amendment.

Second, some supporters likely voted against Benson's second amendment because they were surprised by it and were not sure what to make of it.[177] Having participated in or witnessed four intensive days of debate on whether to retain the original removal language, some members of the executive-power coalition recoiled at the idea of deleting the very language that they had fought so hard to preserve.[178] This hypothesis also explains why opponents of the executive-power theory joined Madison, Benson, and others to remove the bill's original removal language. Having fought to alter the original removal text in May and delete it in June,[179] opponents of the executive-power theory seized the opportunity to delete it, even if its removal was in the service of a subset of executive-power partisans.

Third, some Representatives likely regarded Benson's second amendment as an unwarranted concession to their opponents. To fight to retain some legislative language, only to abandon it within days, seemed more like a capitulation than a clarification. Consistent with this theory, many opponents of the House bill needled the majority, delighting in the notion that the majority had somehow conceded a substantial point.[180]

Fourth, some Representatives might have feared that removing the original removal language would split the majority. Even if those Representatives could see the merits of Benson's second amendment, they had to be aware that others in their coalition might oppose it to the end. Representatives who viewed Benson's second amendment as a defeat might go on to vote against any final bill that included the amendment, thereby dooming the final bill.

Finally, some Representatives may have favored both the executive-power theory *and* the congressional-delegation theory.[181] Justice Brandeis and Corwin assumed that if a member favored the congres-

---

177 *See id.*

178 *See* The Congressional Register (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1028, 1034 (noting Representative Boudinot's statement against the motion to strike the language "because the constitution vested all executive power in the president").

179 *See supra* text accompanying notes 55 (noting the failed vote on a proposed amendment to alter removal language), 64 (noting the failed attempt to delete removal language).

180 *See infra* text accompanying notes 232–35.

181 *See, e.g.*, The Congressional Register (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 904, 939 (noting that Representative Vining declared: "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 to congress all powers necessary and proper to carry the constitution into effect.").

sional-delegation theory, he could not have concurrently favored the executive-power theory.[182] But some members might have thought that if the executive-power theory was wrong—if a court concluded that the Constitution did not grant removal authority—the original bill language could be read to provide a delegation of removal authority. Hence, some executive-power partisans might have wanted to retain text that could be read as both an affirmation of the executive-power theory and, secondarily, as a delegation of removal power.

These theories explain how many members who voted against Benson's second amendment nonetheless had no difficulty voting for the final House bill. The enigmatic faction consisted of executive-power partisans who favored different tactics than the Benson/Madison faction. While the final House bill lacked the original removal language that many of these Representatives clearly preferred, it still confirmed, in an understated way, that the President had a constitutionally based grant of removal power.

1. *Benson's Troublesome Amendments*

To better explain the votes of the enigmatic faction, we need to dissect the crucial events that took place on June 22, 1789. Recall that Benson, reacting to the claim that the majority favoring removal consisted of two clashing factions,[183] had proposed two amendments. Hoping to clarify the removal-power debate for posterity, Benson intended his amendments to make it clear that the executive-power theory enjoyed an outright majority.[184] The initial removal language "appeared somewhat like a grant. Now, the mode he took would evade that point, and establish a legislative construction of the constitution."[185] Benson thought that if Congress enacted the original language, then removal would be "subject[ ] to legislative instability,"[186] presumably because subsequent Congresses might conclude that it was the first Congress, not the Constitution, that had granted the Pres-

182 Neither Justice Brandeis nor Corwin considered the possibility that a Representative could simultaneously favor both theories. *See* Myers v. United States, 272 U.S. 52, 240 (1926) (Brandeis, J., dissenting); CORWIN, *supra* note 16, at 331–32.

183 *See, e.g.*, DAILY ADVERTISER (June 18, 1789), *reprinted in* DEBATES, *supra* note 6, at 849 (recording the remarks of Representative Smith, who claimed that the majority "were inconsistent with themselves. Some argued that the constitution had given the power of removal, others, that this house OUGHT to give it.").

184 *See supra* note 72.

185 The Congressional Register (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1028, 1028 (comments of Representative Benson). When the Committee of the Whole first discussed the departments, Benson regarded the language of Madison's resolution as a "mere declaration of the Legislative construction" of the Constitution. 1 ANNALS OF CONG. 373 (Joseph Gales ed., 1834). That resolution provided that the Secretary was "to be removable by the President." *Id.* at 371.

186 The Congressional Register (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1028, 1029–30 (comments of Representative Benson).

ident a removal power. Benson believed his two amendments "more fully express the sense of the [C]ommittee [of the Whole], as it respected the constitutionality of the decision which had taken place."[187]

Madison shared Benson's concerns that the original bill language could be viewed as a legislative grant of a removal power to the President, rather than a confirmation of an extant constitutional power.[188] Consequently, Madison "wished every thing [sic] like ambiguity expunged, and the sense of the house explicitly declared."[189] He reasoned that Representatives

> have *all along* proceeded on the idea that the *constitution* vests the power in the president . . . . Now, as the words proposed by [Benson] expressed to his mind the meaning of the constitution, he should be in favor of them, and would agree to strike out those agreed to in committee.[190]

Madison also claimed that the original bill text was unnecessary because the bill, as altered by Benson's first amendment, "fully contain[ed] the sense of this house upon the doctrine of the constitution."[191] Consistent with the reported arguments of Benson and Madison, the *Gazette of the United States* noted that the "principal reason assigned for striking out" the original language was that it "appears to be a grant of power; whereas it was presumed to be the sense of the [C]ommittee [of the Whole], that the power was vested in the President by the Constitution."[192]

---

187 Gazette of the United States (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1026, 1027. On June 17, Benson declared that he would propose an amendment to the original House bill because the bill "has the appearance of conferring the power upon" the President. The Congressional Register (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 931. Benson thought this improper "because it would be admitting the house to be possessed of an authority which would destroy those checks and balances." *Id.* This amendment would "change in the manner of expression, that so the law may be nothing more than a declaration of our sentiments upon the meaning of a constitutional grant of power to the president." *Id.* at 932.

188 *See* The Congressional Register (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1028, 1029 (comments of Representative Madison).

189 *Id.*

190 *Id.* at 1029 (emphasis added).

191 *Id.* at 1031.

192 Gazette of the United States (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1026, 1027. In a letter written before Benson proposed his amendments, Representative Thomas Fitzsimons also shared this characterization of the majority position. Fitzsimons noted that the advocates of the removal clause claimed that the removal power was "expressed in the Constitution to be Vested in the [President] in the [General] powers of the Executive." *See* Letter from Thomas Fitzsimons to Benjamin Rush (June 20, 1789), *in* CORRESPONDENCE, *supra* note 121, at 819–20.

Shortly after Madison spoke, the House approved Benson's first amendment 30 to 18.[193] Members of the enigmatic faction voted for the amendment because they likely regarded it as largely inconsequential. The amendment merely added another provision discussing removal by the President,[194] leaving the bill's existing removal language undisturbed.

The House immediately took up Benson's second amendment, which sought to delete the provision that the Secretary was "to be removable by the president."[195] Though this amendment ultimately passed by a vote of 31 to 19,[196] it caused much consternation. Justice Brandeis, Corwin, and other revisionists have argued that those who voted against the second amendment thereby signaled their opposition to the executive-power theory and their support for the congressional-delegation theory.[197]

If one focused on the arguments of Madison and Benson in isolation, the revisionists might seem correct. After all, Madison and Benson claimed the old language could be read to endorse the congressional-delegation theory.[198] At least some opponents of the House bill, such as Representatives Elbridge Gerry[199] and Thomas Tudor Tucker,[200] seemed to concur. Had everyone agreed that the original bill actually endorsed the congressional-delegation theory and that the amended bill better reflected the executive-power theory, the enigmatic faction's rejection of Benson's second amendment might have signaled their implicit repudiation of the executive-power theory.

But not everyone agreed that Benson's second amendment was the best means of vindicating the executive-power theory. To begin with, not even Madison and Benson believed that the original language clearly endorsed the congressional-delegation theory; they

---

193 Journal of the First Session of the House of Representatives of the United States (June 22, 1789), *reprinted in* JOURNAL, *supra* note 24, at 91, 92.

194 *See* The Congressional Register (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1028, 1030 (describing the comments of Representative Theodore Sedgwick that Benson's first amendment, "being only a repetition of the words in the first clause," "could do no harm"). In truth, the amendment was quite consequential: The combination of Benson's two amendments helped establish that the executive-power theory enjoyed majority support.

195 *See id.* at 1028.

196 Journal of the First Session of the House of Representatives of the United States (June 22, 1789), *reprinted in* JOURNAL, *supra* note 24, at 91, 93.

197 *See* Myers v. United States, 272 U.S. 52, 285 n.75 (1926) (Brandeis, J., dissenting); CORWIN, *supra* note 16, at 331–32 n.22; CURRIE, *supra* note 17, at 41.

198 *See supra* text accompanying notes 185–90.

199 *See* The Congressional Register (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1028, 1033.

200 *See id.* at 1034–35.

merely stated that it could be so read.[201] Hence, even under Madison and Benson's view of the original text, a vote to retain that text was not necessarily a vote against the executive-power theory. Nor was it a vote obviously favoring the congressional-delegation theory.

More importantly, when one focuses on what members of the enigmatic faction said, it becomes clear that a vote against Benson's second amendment hardly signaled opposition to the executive-power theory. Members of the enigmatic faction most likely concluded that whereas the original bill expressly declared that the President had a removal power, the amended bill left presidential removal to shadowy implication. For such members, voting against Benson's second amendment was actually a vote in favor of the executive-power theory. Others were surprised by Benson's motion and thought that it seemed an unwarranted and unnecessary concession to the opposition.[202]

Four members of the enigmatic faction criticized Benson's second amendment: Representative Elias Boudinot of New Jersey, Representative Thomas Hartley of Pennsylvania, Representative John Laurance of New York, and Representative Theodore Sedgwick of Massachusetts.[203] Boudinot said he was initially "against the motion, because the constitution vested all executive power in the president."[204] Benson had "inferred" that the President "*ex officio*" could "remove, without limitation; but as debates had arose, and the question being seriously agitated, he was clear for making a legislative declaration, in order to prevent future inconvenience."[205] Boudinot also argued that to switch positions so quickly "argued a fickleness which he hoped to never see affect this honorable body."[206] If the majority was right before, it ought to remain steadfast and retain the original text.

Far from opposing the executive-power theory, Boudinot favored it. He resisted Benson's second amendment because he believed that the original bill language was a *superior* expression of the executive-power theory; Benson's last minute appeal to delete the removal language that many had fought to preserve disturbed Boudinot. Consistent with this classification of Boudinot, neither Justice Brandeis nor Corwin considered him a congressional-delegation partisan even though he was a member of the enigmatic faction.[207]

---

201 *See supra* notes 185–90 and accompanying text.

202 *See,e.g.*, The Congressional Register (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1028, 1033–35.

203 *See id.*

204 *Id.* at 1034.

205 *Id.*

206 *Id.*

207 *See* Myers v. United States, 272 U.S. 52, 285 n.73 (1926) (Brandeis, J., dissenting); CORWIN, *supra* note 16, at 331 n.22.

This classification of Boudinot raises an extremely difficult question for the revisionist account. Apart from Boudinot, Justice Brandeis and Corwin treated the members of the enigmatic faction as congressional-delegation partisans.[208] They classified Boudinot differently because he expressed support for executive-power positions earlier in the debate.[209] But having admitted that at least one executive-power partisan voted against Benson's second amendment, Justice Brandeis and Corwin should have acknowledged the possibility that other executive-power partisans might have opposed it as well. In other words, Justice Brandeis and Corwin should have realized that other members of the enigmatic faction might have been "Boudinot executive-power partisans"—executive-power proponents who nonetheless opposed Benson's second amendment.

Yet Justice Brandeis and Corwin apparently never considered this prospect. Instead, they assumed that votes against Benson's second amendment must have been votes against the executive-power theory.[210] Perhaps their classification of some Representatives as pro-congressional delegation partisans can be justified based on what these Representatives said at earlier points in the debate. Indeed, Corwin asserted that seven delegates said something favoring the congressional-delegation theory.[211] But Corwin also claimed that there were nine "silent" Representatives who favored this position.[212] Because his only evidence for the views of these silent members comes from their votes on Benson's second amendment, however, Corwin has no evidence that these silent members actually favored the congressional-delegation theory.

In fact, the comments of other members of the enigmatic faction who spoke on June 22, 1789 suggest that, like Boudinot, they too endorsed the executive-power theory. Laurance stated that he believed the legislature "had power to establish offices on what terms they pleased."[213] He also said that Congress could abuse this power and "abridge the constitutional power of the president respecting the removal of such officers."[214] To avoid this possibility, Laurance sought to *retain* the original bill language.[215] Moreover, earlier in the debate,

---

208 *See Myers*, 272 U.S. at 285 n.73 (Brandeis, J., dissenting); CORWIN, *supra* note 16, at 331 n.22.

209 *See, e.g.*, CORWIN, *supra* note 16, at 333–34.

210 *See supra* note 197 and accompanying text.

211 *See* CORWIN, *supra* note 16, at 331 n.22 (citing Hartley, Laurance, Sedgwick, and Silvester as the principle speakers for this position).

212 *See id.*

213 The Congressional Register (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1028, 1034 (comments of Representative Laurance).

214 *Id.*

215 *See id.* ("To avoid this clashing of opinions [between Congress and the President, Representative Laurance] wished the words to remain in the bill.").

Laurance stated that he viewed the original language as a "legislative declaration"[216] because, like Boudinot, he believed that this language was an express congressional declaration in favor of the executive-power theory. Laurance's comments also indicate that, like Madison, he thought that the legislative-grant theory was problematic precisely because it permitted Congress to withhold removal authority from the President.[217] Consequently, Laurance arguably voted for the final bill for the same reason Boudinot did: because it endorsed the executive-power theory.[218]

Hartley, also a member of the enigmatic faction, advised that persons "not *fully convinced* that the power of removal [was] vested by the constitution in the president" should vote against Benson's second amendment.[219] He admitted that he had "some doubts" about this himself, but stated that he had no doubts about granting authority to the President.[220] Hartley's comments suggest that while he clearly preferred the original language, he was not opposed to the executive-power theory.

Certainly, Hartley's previous statements support this interpretation, as they evince no hostility toward the executive-power theory. On June 17, Hartley declared that a "fair construction of the constitution" required that the President control the business of the Department of Foreign Affairs.[221] Moreover, Hartley's subsequent writings suggest that while he might have preferred the original text, he nonetheless supported the executive-power theory.[222] Evidently, Hartley's misgivings about Benson's second amendment were insubstantial,

---

216 *Id.* at 1028.

217 *Cf. supra* notes 129–31 and accompanying text (outlining Madison's view of the legislative-grant theory).

218 Justice Brandeis and Corwin count Laurance among the defenders of the congressional-delegation theory. *See* Myers v. United States, 272 U.S. 52, 285 n.73 (1926) (Brandeis, J., dissenting); CORWIN, *supra* note 16, at 331–32 n.22. In fact, Laurance's comments are much more equivocal. Laurance clearly thought that in the absence of an express grant in the Constitution, Congress could delegate such authority. *See, e.g.*, The Congressional Register (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 904, 911. However, Laurance never took a firm position on the matter. At times he seemed to argue that the power of removal is lodged with the President. *See id.* at 908. At other times, he argued that the Constitution is silent on the removal issue. *See id.* at 908–09.

219 *See* The Congressional Register (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1028, 1035 (emphasis added).

220 *Id.*

221 *See* The Congressional Register (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 904, 904.

222 *See* Letter from Thomas Hartley to Jasper Yeates (Aug. 1, 1789), *in* CORRESPONDENCE, *supra* note 121, at 1209, 1209 (commenting on the meaning of the House vote on removal and the Senate's reluctance to endorse the executive-power principle in the Treasury bill); *see also* Letter from Thomas Hartley to Tench Coxe (Aug. 9, 1789), *in* CORRESPONDENCE, *supra* note 121, at 1261, 1261.

since he ultimately voted for the House bill that endorsed the executive-power theory.[223]

Of the four members of the enigmatic faction who spoke on June 22, Sedgwick is the closest to a die-hard legislative-grant partisan, but even he does not fit neatly within that category. During the June 22 debate, Sedgwick asserted that a delegation of removal authority was necessary because Congress had "complete power over the duration of the offices they created."[224] But he also claimed that the majority was divided into two factions: one that thought the President had a constitutional removal power and one that thought that Congress "must give it to the president on the principles of the constitution."[225] This latter comment suggests that Sedgwick believed that Congress was constitutionally obligated to grant the President removal authority, a position that closely borders on the executive-power theory.

Sedgwick also offered tactical reasons for keeping the original text. If the Constitution actually granted the President a removal power, as the executive-power partisans supposed, no harm would arise from keeping the reference to officers being removed by the President because the President would have removal authority regardless of what the bill said.[226] Sedgwick reasoned, however, that if the pure executive-power partisans' reading of the Constitution was mistaken and they succeeded in stripping the text that seemed to grant removal authority, the President would lack this important power.[227] Hence, Sedgwick claimed, prudence required retaining the original removal text.[228] Such reasoning might have explained the votes of others who voted against Benson's second amendment but still favored the executive-power theory.

Sedgwick's earlier comments further compound the difficulty of properly classifying him. In the early days of the debate, Sedgwick

---

223 Justice Brandeis and Corwin count Hartley as a congressional delegation proponent, presumably based on his earlier comments and on his statements regarding Benson's second amendment. *See Myers*, 272 U.S. at 285 n.73 (Brandeis, J., dissenting); CORWIN, *supra* note 16, at 331–32 n.22. As previously noted, Hartley's comments on Benson's amendments evince doubts about the executive-power theory, not hostility. Though Hartley asserted that Congress could delegate removal power if the Constitution was silent on the matter, he never clearly declared a belief that the Constitution in fact was silent. Hartley argued simply that if tbe Constitution was silent on the removal issue, Congress could remedy the defect. *See* Tbe Congressional Register (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 904, 904–07. Nothing in Hartley's earlier speeches indicated a clear endorsement of the congressional-delegation theory. Nor is there a clear opposition to the executive-power theory.

224 The Congressional Register (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, 1028, 1033.

225 *Id.* at 1029.

226 *See id.*

227 *See id.*

228 *See id.*

argued that because the government required a capable and effective removal power, "the power must be conferred upon the president by the constitution, as the executive officer of the government."[229] Later, Sedgwick claimed that although he favored the congressional-delegation theory, he thought "it was more plausibly contended that the power of removal was more constitutionally in the president[ ] than in the president and senate; but he did not say that the arguments on either side were conclusive."[230] He also argued that it would be absurd for the President to lack removal authority over the Secretary of Foreign Affairs, because the Secretary was, in essence, the President's instrument.[231] When one examines Sedgwick's earlier statements about the executive-power theory and the Secretary of Foreign Affairs, it appears that he voted for the House bill because, while not entirely happy with it, he felt comfortable endorsing the executive-power theory.

Thus, statements by members of the enigmatic faction show little actual hostility to the executive-power theory. Some, such as Boudinot and Laurance, thought the original language better reflected the executive-power theory; others, like Hartley, merely had some doubts about the executive-power theory; and still others, such as Sedgwick, favored the congressional-delegation theory but claimed that the Constitution required a legislative grant of removal power to the President. Most of these members said nothing that would prevent them from voting for the executive-power theory embodied in the final bill.

Some members who voted for Benson's second amendment, but against the final House bill, also thought that the original text better expressed the executive-power theory. Page accused the majority of abandoning the idea of an express declaration in favor of the executive-power theory: "[I]t was now left to be inferred from the constitution, that the president had the power of removal, without even a legislative declaration on that point. . . ."[232] The majority, Page declared, had "evacuated untenable ground" which they previously insisted upon.[233] Smith claimed that the majority had come to realize that they were wrong and asked whether they would "pretend to carry their point by a side blow, when they are defeated by fair argument on

---

229 The Congressional Register (June 16, 1789), *reprinted in* DEBATES, *supra* note 6, at 860, 866.

230 The Congressional Register (June 18, 1789), *reprinted in* DEBATES, *supra* note 6, at 951, 983.

231 *See* DAILY ADVERTISER (June 23, 1789), reprinted *in* DEBATES, *supra* note 6, at 945, 946 (noting Representative Sedgwick's statements that because of the "peculiar connection and privity between [the departments] and the President," the departments must be "his meer instruments, his agents and substitutes").

232 The Congressional Register (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1028, 1030 (comments of Representative Page).

233 *Id.*

due reflection."[234] Smith thought it "more candid and manly" to make a declaration in "direct terms [rather] than by an implication."[235]

Understanding that changing tactics midstream might cause problems, Madison tried to assuage his coalition. The opposition, Madison argued, "cannot fairly urge against us a change of ground, because the point we contended for is fully obtained by the amendment."[236] He also claimed that the amendment "had no other effect than varying the declaration which the majority were inclined to make" and was not a "dereliction of the principle hitherto contended for."[237] Madison clearly felt that the executive-power theory had a majority all along, and that Benson's two amendments would result in text that more clearly affirmed that theory.[238] Given the votes of the enigmatic faction and statements by Boudinot and others, Madison's assurances apparently were unpersuasive, at least on the vote on Benson's second amendment.

Newspaper summations of the debate indicate that votes against Benson's second amendment were not votes against the executive-power theory. The *Gazette of the United States* claimed that those opposing Benson's second amendment supposed "that retaining the words[ ] would be an *additional evidence* of the sense of the House that the power *was vested* in the President."[239] Hence, members of the enigmatic faction voted against Benson's second amendment because they believed the original language more clearly favored the executive-power theory. The *New York Daily Gazette* stated that some Representatives voted against the second amendment "with a view of obviating any charge of inconsistency."[240] In other words, some members were influenced to vote against Benson's second amendment by the opposition's charge that Benson's amendments were an overdue and welcome admission of the weaknesses in the executive-power theory.

Firsthand accounts of Representatives tell a similar story. Ames, writing one day after the vote on Benson's amendments, claimed that those who opposed the second amendment regarded the original lan-

---

234 *Id.* at 1029 (comments of Representative Smith).

235 *Id.*

236 *Id.* at 1032 (comments of Representative Madison).

237 *Id.* at 1030.

238 *See, e.g., id.* at 1029.

239 Gazette of the United States (June 24, 1789), *reprinted in* DEBATES, *supra* note 6, at 1026, 1028 (emphasis added).

240 *Id.* at 1028 n.39 (citing the June 23, 1789 *New York Daily Gazette*, noting that "many gentlemen offered their reasons for voting in the manner they intended to do, with a view of obviating any charge of inconsistency").

guage as a superior expression of the executive-power theory.[241] The original language, he wrote, "operate[d] as a declaration of the Constitution, and at the same [time] expressly dispose[d] of the power."[242] Some representatives, Ames wrote, opposed Benson's proposal to delete the original language because they worried that "any change of position" might divide the majority and endanger the final vote.[243] Finally, Ames declared that he was satisfied that the President could exercise the removal power, "either by the Constitution or the authority of an act. The arguments in favor of the former fall short of full proof, but in my mind they greatly preponderate."[244] Ames's comments suggest that some who voted against Benson's second amendment not only believed that the original bill language was a better declaration of executive-power principles, but also that, should the executive-power theory prove to be wrong, the original bill could also be read as a *delegation* of removal power. Ames's comments raise the possibility that some Representatives might have favored both the executive-power and the legislative-delegation theories, but ultimately opted for the former on the final vote.

Echoing Ames, Representative Peter Muhlenberg wrote that the majority had been divided over whether to make an express removal declaration.[245] Though a "Considerable Majority of The House have determined that the power of removal is vested solely in The President as The Chief Executive Magistrate," this majority was divided.[246] According to Muhlenberg, one group thought it was the "duty of the Legislature to declare by Law where this power is Lodgd, in order to prevent Confusion hereafter."[247] Presumably, these were the executive-power partisans who voted to reject Benson's second amendment. The rest of the majority thought an express declaration regarding removal "would imply a doubt, [and] that nothing more was . . . necessary than something of the Declaratory kind expressive of the sense of

---

241 *See* Letter from Fisher Ames to George R. Minot (June 23, 1789), *in* CORRESPONDENCE, *supra* note 121, at 840, 840–41.

242 *Id.*

243 *Id.* at 841.

244 *Id.*

245 *See* Letter from Peter Muhlenberg to Benjamin Rush (June 25, 1789), *in* CORRESPONDENCE, *supra* note 121, at 855, 856. Though Muhlenberg's letter is dated June 25, 1789, it is unclear whether Muhlenberg wrote it before or after the vote on Benson's amendments. If, as is more likely, he wrote about the majority that voted for the original bill in the Committee of the Whole, Muhlenberg's letter confirms that this majority consisted of executive-power partisans. If, however, he wrote after the House vote on the final bill, the letter confirms that the majority on the final bill was united in believing that the President had a constitutional removal power, but divided about the best way of expressing that belief.

246 *Id.*

247 *Id.*

The House on the subject."[248] These members supported Benson's second amendment, which clearly implied a removal power.

In another letter, Ames suggested that an additional reason for the division in the executive power camp was a lack of "caucusing and cabal."[249] The House was not

> sufficiently preconcerted. . . . Mr. [*Benson's*] amendment was such, and it had some effect to divide those whom zeal for the *right interpretation of the Constitution had united into a corps.* It was a good amendment. Some voted against it from the vexation they felt in having the ground changed.[250]

Ames's letter suggests two things: first, that a majority favored the executive-power theory, and second, that it was divided because many of its members did not understand Benson's surprising second amendment.[251]

Finally, even members who saw merit in the congressional-delegation theory still voted for the executive-power theory because they believed the former theory was the superior of the two.[252] During the debates, Ames declared that when gentlemen who thought the Constitution was silent on the matter "revert to the principles, spirit, and tendency of the constitution," they will see that there is the "highest degree of probability" that the President has a removal power.[253] Ames's public comments mirror those in his letter to George Minot, wherein he claimed that the arguments for the executive-power theory "greatly preponderate."[254] Likewise, Representative John Vining declared in the debates that he conceived the removal power to be granted either "incidental to the executive department, or under that clause which gives to congress all powers necessary and proper to

---

248 *Id.*

249 Letter from Fisher Ames to George R. Minot (July 8, 1789), *in* CORRESPONDENCE, *supra* note 121, at 978, 978.

250 *Id.* at 978–79 (emphasis added) (second alteration in original).

251 *See id.* Although Benson had declared on June 17 that he would propose an amendment clarifying that there was a majority in favor of the view that the Constitution granted a removal power to the President, he did not actually propose this amendment until June 22, after the Committee of the Whole's vote on the original bill. *See supra* Part II.B.1. Thus, even though Benson had said he would propose an amendment, he did so well after this declaration. Moreover, he did not reveal that he planned to propose deleting the removal language that many had fought to retain. It is therefore not surprising that Benson's amendments caught members by surprise. His June 17 declaration, which only briefly discussed why he would propose an amendment, was evidently insufficient notice.

252 *See, e.g.*, The Congressional Register (June 18, 1789), *reprinted in* DEBATES, *supra* note 6, at 951, 978 (comments of Representative Ames).

253 *Id.*

254 *See id.*; Letter from Fisher Ames to George R. Minot (June 23, 1789), *in* CORRESPONDENCE, *supra* note 121, at 840, 841.

carry the constitution into effect."[255] Vining's comments suggest that he believed that the Constitution granted the President a removal power, but if that was not the case, Congress could delegate that power to him. Delegates whose comments seemed to favor the congressional-delegation theory may have concluded that they also could support the executive-power theory. Although the executive-power theory was not without its flaws, it had the better arguments.

Taken together, these debates and letters suggest that members of the enigmatic faction did not vote against Benson's second amendment because they opposed the executive-power theory, as Justice Brandeis and Corwin have claimed.[256] Instead, those who voted against the second amendment regarded the original language as superior for several reasons: 1) they believed that it more clearly expressed the House's position that the President had a constitutional removal power, as opposed to leaving it to implication;[257] 2) they were surprised at being asked to delete language that they had successfully retained; 3) they were irritated, and perhaps chagrined, that they were being asked to vote for an amendment that seemed to them to be a concession to the opposition; 4) they were afraid (wrongly, it turned out) that this amendment would split the majority on the final bill because it might be viewed as a capitulation that amounted to snatching defeat from the jaws of victory;[258] and 5) they supposed that if the majority's reading of the Constitution was wrong, the original language could be read to delegate a removal power, whereas the final bill could not.

Determining which faction of the executive-power camp was correct is hard to say. Representative Lambert Cadwalader, a member of the enigmatic faction, noted that the final language was "scarcely declaratory" of the removal power "being vested in the President by the

---

255 The Congressional Register (June 17, 1780), *reprinted in* DEBATES, *supra* note 6, at 904, 939.

256 *See, e.g.*, *supra* note 197 and accompanying text.

257 *Cf.* Letter of Thomas Hartley to Tench Coxe (June 24, 1789), *in* CORRESPONDENCE, *supra* note 121, at 848, 848. Hartley states that several Representatives "would be better pleased" had the original removal clause been left in the bill. *See id.* Although Hartley has been regarded as a congressional delegation proponent, *see, e.g.*, CORWIN, *supra* note 16, at 331–32 n.22, he hardly sounds like one in this letter. Instead of opposing the executive-power theory, Hartley merely expresses a preference for certain language, presumably because this language better incorporated the executive-power theory. Recall that Hartley, during the debates, admitted that he had "some doubts" about the executive-power theory, which suggests that his opposition to the second amendment was not based on complete opposition to the executive-power theory. *See supra* note 223.

258 Indeed, there is evidence that opponents of presidential removal regarded the deletion of the original removal language as a victory of sorts. *See, e.g.*, Letter of James Sullivan to Elbridge Gerry (June 28, 1789), *in* CORRESPONDENCE, *supra* note 121, at 878, 878 ("I rejoice with joy unspeakable and full of security, that the point is carried [against] giving the President the power contended for.").

Constitution,"[259] suggesting that he favored the earlier language precisely because he regarded it as an express declaration in favor of the executive-power theory. Ames, who voted for and initially praised Benson's second amendment,[260] later claimed that "the very best method of trying [the strength of those who opposed the executive-power theory] was blundered upon, and finally not perceived to be the best."[261] Ames may have been right. While Benson succeeded in getting the House to adopt language that endorsed the executive-power theory, he certainly could have proposed language that made that endorsement absolutely clear, not to mention wholly impervious to the arguments made by modern revisionists.[262]

2. *The Vote on the House Foreign Affairs Bill*

Once the House approved Benson's two amendments, Representatives faced a simple choice. They could vote for the bill with its implication in favor of the executive-power theory or they could vote against the bill. Faced with this choice, most Representatives reverted to their original groups.[263] Many who had voted for Benson's second amendment now voted against the bill in order to avoid endorsing the executive-power theory.[264] More significantly, some who voted against Benson's second amendment now voted for the House bill and thereby endorsed the executive-power theory.[265] Many of these members, including Boudinot and Laurance, favored the executive-power theory all along.[266] This group preferred the original language either because it was an apt declaration of constitutional principles or because they viewed a vote for Benson's amendment as an admission that they were wrong to fight to keep the original removal language. Others, including Hartley and Sedgwick, voted for the House bill because they were not implacably opposed to the executive-power theory; they merely had a few doubts.[267]

---

259 Letter from Lambert Cadwalader to James Monroe (July 5, 1789), *in* CORRESPONDENCE, *supra* note 121, at 946, 946.

260 *See* Letter from Fisher Ames to George R. Minot (July 8, 1789), *in* CORRESPONDENCE, *supra* note 121, at 978, 979.

261 Letter from Fisher Ames to George R. Minot (July 9, 1789), *in* CORRESPONDENCE, *supra* note 121, at 983, 985.

262 In hindsight, perhaps Benson should have proposed a stand-alone resolution that merely declared the sense of Congress that the President enjoyed a power of removal arising from his executive power. This would have satisfied those who sought a legislative declaration on removal and simultaneously left no doubt as to what Congress was attempting to convey. In the face of evidence that Congress endorsed the executive-grant theory, however, Benson's failure to propose such an amendment seems rather insignificant.

263 *See infra* Appendix I.

264 *See id.*

265 *See id.*

266 *See supra* notes 207, 213–18 and accompanying text.

267 *See supra* notes 219–23, 225–31 and accompanying text.

Consistent with reading the House bill as an endorsement of the executive-power thesis, the vote itself was relatively undramatic. The opponents knew the "fate of the bill": it would pass.[268] Yet if many Representatives who had voted to retain the original removal language were congressional-delegation partisans, as Chief Justice Taft's critics have insisted, the bill's opponents *should not* have known the bill's fate. Had there been more than a dozen members who opposed the executive-power theory and favored the congressional-delegation theory, the vote should have been quite suspenseful. With the help of the Representatives favoring the impeachment and advice-and-consent theories, these supposed opponents of the executive-power theory could have rejected the amended bill and reintroduced the original bill. Because there was no foreign affairs crisis that demanded urgent attention, there was no pressing need for an immediate resolution of the removal issue.[269] If the congressional-delegation proponents enjoyed the strength that Justice Brandeis and Corwin attributed to them, these Representatives could have secured a bill more to their liking.[270] In fact, one member apparently motioned to reconsider the votes on Benson's amendments.[271] This motion failed, most plausibly because a majority of the House was comfortable with a bill that implicitly endorsed the executive-power theory.[272]

The opponents of the bill knew its fate because they recognized that a majority of the House favored the executive-power theory. Indeed, Madison and Benson had claimed as much *before* the vote on Benson's amendments.[273] The existence of an executive-power majority explains why no Representative was able to extend the debate prior

---

268 *See* The Congressional Register (June 24, 1789), *reprinted in* DEBATES, *supra* note 6, at 1043, 1043 (comments of Representative Page); *see also id.* (noting Representative Sumter's statement: "This bill appears to my mind so subversive of the constitution, and in its consequences so destructive to the liberties of the people, that I cannot consent to let it pass, without expressing my detestation of the principle it contains . . . .").

269 John Jay served as acting Secretary of Foreign Affairs, a holdover from the Articles of Confederation period. He continued to serve in that post well after the Foreign Affairs bill was signed into law. *See, e.g.*, Prakash & Ramsey, *The Executive Power over Foreign Affairs*, *supra* note 39, at 298, 305–06.

270 It seems likely that many opponents of presidential removal power shared the preferences of Representative Tucker, whose least favorite alternative was a bill that implied a constitutional grant. His second least favorite alternative was a bill that delegated removal authority. *See* The Congressional Register (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1028, 1034–35. If others shared his preferences, and if there were more than a dozen legislative-grant partisans, they should have been able to garner a majority for their favored position by soliciting the votes of those most opposed to the executive power.

271 *See* Gazette of the United States (June 23, 1789), *reprinted in* DEBATES, *supra* note 6, at 1036, 1036 (comments of Representative White); *see also id.* at 1036 n.40 (quoting the *New York Daily Advertiser*'s statement that "it was contended that by the decision of the house upon it on Monday the principles of the bill were materially altered, and that it was important that such a subject should undergo the most thorough canvass [sic]").

272 *See id.*

273 *See supra* notes 190, 193 and accompanying text.

to the vote on the House bill. The existence of such a majority also explains why no one was surprised that the House bill passed by a vote of 29 to 22.[274]

3. *The Aftermath*

Another means of making sense of the House vote on the Foreign Affairs bill is to examine its immediate aftermath. Was any principle it possibly established repudiated by subsequent decisions? Did reflection lead to the realization that members of the enigmatic faction had been wrong to vote for the final bill because of its implications regarding removal? How did contemporary observers describe the vote? Was it deemed a muddled vote for presidential removal, lacking constitutional implications due to the divided forces behind it, as Corwin and Justice Brandeis believed? Or did contemporaries perceive it to be a vote for the executive-power theory, as Chief Justice Taft supposed?

Once again, the evidence supports Chief Justice Taft. Subsequent "Decisions of 1789" support the view that the vote on the House bill was an endorsement of the executive-power theory. Both the War and Treasury Department bills contained the same implicit endorsement of the executive-power theory.[275]

On the same day that the House voted on the Foreign Affairs bill, Benson proposed an amendment to the proposed War Department bill that paralleled his amendments to the Foreign Affairs bill.[276] One opponent of the earlier bill said that Benson's War Department amendment was "unnecessary" because Benson "ought to be satisfied with having had the principle established in the other bill."[277] Another claimed that Benson's new amendment "argued a doubt" about the majority's convictions.[278] The likely explanation for the proposed amendment was that Benson believed it necessary to reinforce the principle established in the Foreign Affairs bill. Benson wanted to make it clear that Congress believed that the executive-power theory applied to the War and Treasury Departments as well. Benson and his allies thus sought consistent removal text in all three departmental acts. Benson's amendment passed by a vote of 24 to 22, thus creating a War Department bill that also endorsed the executive-power theory.[279]

---

274 *See* Journal of the First Session of the House of Representatives of the United States (June 24, 1789), *reprinted in* JOURNAL, *supra* note 24, at 94, 95.

275 *See supra* note 7.

276 *See* The Congressional Register (June 24, 1780), *reprinted in* DEBATES, *supra* note 6, at 1043, 1044.

277 *Id.* (comments of Representative Sherman).

278 *Id.* (comments of Representative Page).

279 *See id.*

Though this vote was much closer than the vote on the Foreign Affairs bill, it still was a vote in favor of the executive-power theory. The brief discussion preceding the vote suggested that the losing side understood that the executive-power principle had already been established.[280] Had Representatives believed that the removal language in the Foreign Affairs bill was a *grant* of removal authority rather than an *acknowledgement* of its constitutional basis, Benson's opponents would not have claimed that he already had established that principle. Nor would they have regarded his War Department amendment as unnecessary.

Similar removal language found its way into the House's Treasury Department bill,[281] and the ensuing fight over the inclusion of that language supports the view that the final Treasury Act endorsed the executive-power theory. After the Senate deleted the removal language, the House refused to recede.[282] When the Senate insisted upon its version,[283] the chambers appointed a conference committee that proved unable to resolve the conflict.[284] Members of the House committee made a remarkable demand: The Senate was "called upon by [the House conferees] to restore the Clause which they struck out, or by an explicit Resolution acknowledge the Power of removal in the President."[285]

Speaking on behalf of the House members of the committee, Madison stated before the House that "it would not be right for the house to" accede to the Senate's deletion.[286] The House thereafter resolved that it "doth adhere to their [previous] disagreement" to the Senate's attempt to delete the removal language.[287] Based on the tenacity of their fight, Madison and the House majority must have understood that deleting the removal language would suggest that the President lacked a constitutional removal power over the Treasury

---

280 *See, e.g., id.* (noting Representative Sherman's argument that it was "unnecessary to load this bill with [removal language]," and that Representative Benson "ought to he satisfied with having had the principle established in the other bill").

281 *See* Treasury Bill, H.R. 9, 1st Cong. § 7 (1789), *reprinted in* HISTORIES II, *supra* note 84, at 1983, 1985.

282 *See id.* at 1985 n.9. Nineteen Representatives voted to accept the Senate's amendments. *See id.* (citations omitted).

283 *See* Treasury Act, H.R. 9, 1st Cong. (1789), *reprinted in* HISTORIES II, *supra* note 84, at 1975, 1979.

284 *See id.* at 1979; Treasury Bill, H.R. 9, 1st Cong. (1789), *reprinted in* HISTORIES II, *supra* note 84, at 1983, 1985 n.9.

285 *See* Letter from Thomas Hartley to William Irvine (Aug. 17, 1789), *in* CORRESPONDENCE, *supra* note 121, at 1337, 1337. The Congressional Register reported that Madison stated that the House conferees had "submitted certain propositions" to the Senate conferees. The Congressional Register (Aug. 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1319, 1324. Apparently, among those propositions was an executive-power ultimatum.

286 *Id.*

287 Journal of the First Session of the House of Representatives of the United States (Aug. 24, 1789), *reprinted in* JOURNAL, *supra* note 24, at 165, 167.

Secretary, a suggestion that would be underscored by the departure from the language of the first two bills.

Faced with the steely resolve of the House and the options presented by the House conferees—adopting an extra resolution endorsing the executive-power theory or receding from their favored amendment—the Senate backed away from their amendment on a vote of 10–10, with the Vice President breaking the tie.[288] Thus, when confronted with a House resolutely in favor of language implicitly endorsing an executive-removal power, the Senate narrowly conceded the point. As with the prior two bills, it is hard to escape the conclusion that the votes in favor of the Treasury bill were votes in favor of the executive-power theory.

Contemporaneous private letters support Chief Justice Taft's assertions. In numerous letters, Madison declared that the House had endorsed the executive-power theory.[289] In a letter to Jefferson, Madison wrote that the House decided that the President had a removal power arising out of the executive power on the grounds that this was "most consonant to the text of the Constitution, to the policy of mixing the Legislative and Executive Departments as little as possible, and to the requisite responsibility and harmony in the Executive Department."[290] In a letter to Leven Powell, Representative Richard Bland Lee wrote that it "was determined in the affirmative" that the President "had, or ought to have, from a fair Construction of the constitution," a removal power.[291] In discussing the troubled Treasury bill, Representative Thomas Fitzsimons—who voted against Benson's second amendment but for the House's Foreign Affairs bill—stated that he believed the disagreement turned on the "Constitutional power of the President to remove."[292]

Contemporaries saw the Senate vote to retain the House's removal language as a vindication of the executive-power position. Senator Paine Wingate, who voted to strip the removal language from the Foreign Affairs bill, described the Senate vote as turning on "whether the President had a constitutional right to remove; [and] not on the

---

288 *See* Treasury Act, H.R. 9, 1st Cong. (1789), *reprinted in* HISTORIES II, *supra* note 84, at 1975, 1979–80.

289 *See* Letter from James Madison to Thomas Jefferson (June 30, 1789), *in* CORRESPONDENCE, *supra* note 121, at 890, 890; Letter from James Madison to Tench Coxe (June 24, 1789), *in* CORRESPONDENCE, *supra* note 121, at 852, 852; Letter from James Madison to George Nicholas (July 5, 1789), *in* CORRESPONDENCE, *supra* note 121, at 952, 954.

290 Letter from James Madison to Thomas Jefferson (June 30, 1789), *in* CORRESPONDENCE, supra note 121, at 890, 893.

291 Letter from Richard Bland Lee to Leven Powell (June 27, 1789), *in* CORRESPONDENCE, *supra* note 121, at 866, 866–67.

292 Letter from Thomas Fitzsimons to Samuel Meredith (Aug. 24, 1789), *in* CORRESPONDENCE, *supra* note 121, at 1389, 1390.

expediency of it."[293] Representative William Smith of Maryland described the Senate vote as favoring the President's "right of removal from office as chief Majistrate [sic]."[294] Similarly, the *Massachusetts Centinel* printed a post from New York declaring that the "President of the Senate gave the casting vote in favour of the clause as it came from the House, by which the power of the President, to remove from office (as contained in the Constitution) is recognized."[295] The Vice President himself complained that his "Vote for the Presidents [sic] Power of Removal, according to the Constitution, has raised from Hell an [sic] host of political and poetical Devils."[296] These accounts indicate that the removal language was generally understood to endorse the "construc[c]tion of the Constitution, which vests the power of removal in the President."[297]

Finally, subsequent Presidents clearly believed that they had the power to remove officers by virtue of the Constitution itself. Washington removed 23 officers, Adams 27, and Jefferson 124.[298] These Presidents apparently did not cite the Decision of 1789 as the basis for these removals, so it is possihle that each of them concluded that they had a constitutional removal power independent of the Decision of

---

293 Letter from Paine Wingate to Nathaniel P. Sargeant (July 18, 1789), *in* CORRESPONDENCE, *supra* note 121, at 1069, 1069. Richard Henry Lee, who also voted against the bill in the Senate, wrote to Samuel Adams that "it is an erroneous construction of the constitution to suppose it gives the [President] a right of removal at pleasure . . . ." Letter from Richard Henry Lee to Samuel Adams (Aug. 15, 1789), *in* CORRESPONDENCE, *supra* note 121, at 1320, 1321. Although Lee does not explicitly claim to be discussing any of the departmental bills, it seems fair to assume that he was not speaking of the executive-power theory in the abstract. He likely was condemning the fact that the bills endorsed the theory. *See also* Letter from Richard Henry Lee to Patrick Henry (Sept. 27, 1789), *in* CORRESPONDENCE, FIRST SESSION: SEPTEMBER–NOVEMBER 1789, 17 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789–1791, at 1625, 1625 [hereinafter CORRESPONDENCE II] (stating that those favoring the bills contended that "the Constitution gave the power"). Apparently, Samuel Adams agreed with Lee. *See* Letter from Samuel Adams to Richard Henry Lee (Aug. 29, 1789), *in* CORRESPONDENCE, *supra* note 121, at 1418, 1418. Adams complained that if the Constitution actually granted the President removal authority, it was unnecessary to say anything about this issue, suggesting that Adams too regarded the Foreign Affairs bill as endorsing the executive-power theory. *See id.*

294 Letter from William Smith (Md.) to Otho H. Williams (July 27, 1789), *in* CORRESPONDENCE, *supra* note 121, at 1150, 1150.

295 MASSACHUSETTS CENTINEL (July 25, 1789), *reprinted in* CORRESPONDENCE, *supra* note 121, at 1077, 1077.

296 Letter from John Adams to John Lowell (Sept. 14, 1789), *in* CORRESPONDENCE II, *supra* note 293, at 1538, 1538. What Adams meant by "political and poetical Devils" is unclear.

297 Letter from David Stuart to George Washington (Sept. 12, 1789), *in* CORRESPONDENCE II, *supra* note 293, at 1519, 1519.

298 *See* Carl Russell Fish, *Removal of Officials by the Presidents of the United States*, *in* 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1899, at 65, 69–70 (1900). Because no statute ever authorized presidential removal, these removals arguably were based on the understanding that the Constitution granted the President removal authority.

1789. In any event, there is no evidence that anyone challenged these Presidents' removals despite the fact that no statute authorized them. People of the era must have either believed that the Constitution authorized presidential removals or, if they doubted the executive-power theory, at least thought that Congress had settled the question in the first three departmental acts.

* * *

The three departmental bills implicitly endorsed the executive-power theory. This was what the language was designed to accomplish, and, judging by what was said in Congress and written in private letters and newspapers, contemporaries understood the removal language to accomplish this goal. Although Justice Brandeis and Corwin have contested the claim that the language endorsed the executive-power theory, neither of them has offered an alternative explanation of the bills' texts. Instead, Justice Brandeis and Corwin have focused on the votes of the enigmatic faction.

Explaining the votes of the enigmatic faction is rather simple. Some members thought that the original bill language was an express—and therefore superior—congressional declaration of the Constitution's meaning. Others were surprised by Benson's amendments and voted against the second because they did not want to concede ground that they had fought fiercely to retain. Still others may not have understood the import of Benson's amendment. Finally, some Representatives might have favored both the executive-power and the congressional-delegation theories, allowing them to freely vote for a bill that endorsed the former.

One cannot conclusively declare that all members of the enigmatic faction believed wholeheartedly in the executive-power theory. But it seems likely that all of them felt comfortable with the executive-power theory, at least to the extent of voting for bills that apparently endorsed it. Indeed, when the Senate repeatedly tested the resolve of the House majority during the creation of the Treasury bill, the House stood its ground. When presented with an obvious opportunity to reconsider or repudiate the Decision of 1789, a sufficient number of the enigmatic faction apparently voted to affirm it. Faced with a resolute House, the Senate backed down, reinstating removal language that implied a constitutional power of removal.

III
DECIPHERING THE DECISION OF 1789

After a great deal of high-level debate leading to the Decision of 1789, Congress decided that the President had a constitutional right to remove the Secretary of Foreign Affairs. Congress made identical

decisions regarding the Secretaries of War and the Treasury, though not without further controversy. In short, Congress held that the Constitution granted the President the power to remove secretaries of the executive departments.

Yet to describe the Decision in this way is to adopt the narrowest reading of the Decision of 1789. This Part considers other issues the Decision may have resolved. Did the Decision address other types of officers, including inferior executive officers or nonexecutive officers? Did Congress leave open the possibility that it might constrain or even eliminate the President's removal authority? Finally, did members of Congress believe that their decision would "settle" the question of removal, in the way that a court case settles a dispute between two parties?

Answering these questions decisively is not possible. Nevertheless, it is appropriate to discuss these issues precisely because much has been said, and continues to be said, about what the Decision did and did not decide.

A. The Removal of Executive Officers

Some scholars have suggested that the Decision of 1789 related only to "high political office,"[299] and that Congress said nothing about the removal of other noninferior executive officers such as the early Attorney General.[300] Justice Joseph Story made the more limited claim that the Decision did not relate to inferior offices.[301] Justice Story argued that because Congress could decide who could unilaterally appoint inferior officers, it also could decide who would have the power to remove these officers.[302]

In one sense, the debate preceding the Decision was only about the Secretaries of Foreign Affairs, War, and the Treasury. There was little discussion of inferior officers such as collectors, surveyors, and the postmasters, and little discussion of noninferior officers such as ambassadors.

Yet the Decision's *ratio decidendi* was that the President had a removal power by virtue of the executive power clause.[303] As Madison declared, "if any power whatsoever is in its nature executive it is the power of appointing, overseeing, and controling[sic] those who exe-

---

299 *See, e.g.*, CORWIN, supra note 16, at 338 ("[The Decision of 1789] related to a high political office, to an office created to be the organ of the President in the principal field of executive prerogative, to an office whose tenure was left indeterminate.").

300 The early Attorney General was neither a department head nor an inferior officer. *See generally* Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 533–34 (2005) (claiming as much).

301 *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §1531.

302 *See id.*

303 *See supra* Part I.B.4.

cute the laws."[304] This logic applied equally well to officers meant to execute the President's foreign policies, such as the Secretary of Foreign Affairs and the nation's envoys. Madison and others made their removal arguments in the course of the debate over the Foreign Affairs bill. Because removal of executive officers was an executive power, and because the Constitution did not constrain or abridge removal authority, the President had the power to remove all executive officers unilaterally.[305]

The debates surrounding the Decision reflected this understanding of the President's removal authority. Madison noted that if the President had removal power, "the chain of dependence [will] be preserved; the lowest officers, the middle grade, and the highest will depend, as they ought on the President." The dependence of the executive officers on the President followed precisely because the President could remove those officers.

Similarly, Representative Samuel Livermore of New Hampshire thought the majority's argument absurd, because it made all executive officers, such as ambassadors and military officers, subject to presidential removal.[306] No one in the majority bothered to refute Livermore's claim, presumably because they agreed that the President could remove all executive officers.

Had the majority believed that the President's removal authority arose from his power to appoint, Story's argument might have had traction. But the majority did not endorse this argument. Instead, it determined that the President had removal authority by virtue of the grant of executive power. Representatives made the appointment argument as a fallback: Even on the premises of the advice-and-consent partisans, the President had a constitutional right to remove, at least as to superior officers. These Representatives argued that if one thought that appointment power were crucial to locating removal authority, then because the Senate had no role in the actual act of appointing, the President could remove because he alone appointed.[307]

---

304 The Congressional Register (June 16, 1789), *reprinted in* DEBATES, *supra* note 6, at 860, 868 (comments of Representative Madison).

305 The best reading of the Decision is that it applies to all executive officers, however appointed. Hence, assuming that cross-branch appointments are constitutional, the President should be able to remove executive officers appointed by judges. Inferior executive officers, however appointed, assist the President in employing his executive power.

306 *See* The Congressional Register (June 16, 1789), *reprinted in* DEBATES, *supra* note 6, at 860, 884–85.

307 *See e.g., id.* at 860, 871 (noting John Vining's comment: "It may be contended . . . that the president shall have the power of removal; because it is he who appoints. . . . The senate do not appoint; their judgment only is required to acquiesce in the president's nomination."); DAILY ADVERTISER (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 895, 903 (noting Egbert Benson's argument that the Senate and President acted "as distinct bodies" in the appointment process; "the senate had only a simple negative or affirmative, and no member had a power to offer an original proposition").

Hence, executive-power proponents argued that the appointment argument made by advice-and-consent proponents actually supported unilateral presidential removal.[308]

In any event, the appointment arguments made by some executive-power proponents do not diminish the many instances in which Representatives invoked the executive-power theory. Those Representatives concluded that the Chief Magistrate, so titled because of the executive power he wielded, had the authority to remove executive officers. First, the grant of executive power included a power to remove. Second, it was inconceivable that the Constitution would make the President the Chief Magistrate, hold him responsible for the conduct of the executive branch, and yet grant him no power to remove executive officers. To paraphrase Madison, the removal power was the *sine qua non* of a Chief Executive empowered with executive authority.[309]

B. The Removal of Nonexecutive Officers

A colloquy conducted shortly after the Decision of 1789 suggests that the Decision did not reach the removal of nonexecutive officers. While discussing the Treasury bill, James Madison argued that the Comptroller ought to have a greater permanency in office, because the Comptroller would have both executive and judicial qualities.[310] Notwithstanding its judicial features, Madison argued that the Comptroller should be responsible to both Congress and the President, and proposed that the officer serve a set number of years, "unless sooner removed by the president."[311]

Madison's proposal baffled his colleagues.[312] If his goal had been to make the Comptroller independent of the President, why was

---

308 Corwin argued that Representatives who favored the view that the Constitution granted the President a removal power were split between executive-power partisans, those favoring the appointment-power-yields-a-removal-power theory, and those who made arguments from "convenience." *See* CORWIN, *supra* note 16, at 332. As we have seen, many Representatives described the vote as a vindication of the view that the Constitution's grant of executive power ceded the President a removal power. *See supra* Part I.B.4. Others described it as a vote in favor of the view that the President as "chief magistrate" had a removal power, a position that clearly supports the executive-power theory. *See supra* note 295 and accompanying text. Apparently, no one described the vote as a vindication of the view that the appointing power may remove as well.

309 *See* The Congressional Register (June 16, 1789), *reprinted in* DEBATES, *supra* note 6, at 860, 868.

310 *See* The Congressional Register (June 29, 1789), *reprinted in* DEBATES, *supra* note 6, at 1079, 1080 ("The principal duty [of the Comptroller] seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and the particular citizens; this partakes strongly of the judicial character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the government.").

311 *Id.*

312 *See id.* at 1081–83 (comments of Representatives Stone, Sedgwick, and Benson).

Madison suggesting that the President had a constitutional power to remove the Comptroller? As in the departmental acts, Madison's language assumed a removal power and did not convey one. Moreover, even though Madison had claimed the Comptroller ought to be more secure in office, his proposal made the Comptroller less secure, at least as compared to the Secretaries. A Comptroller might be beholden to the Senate because he might be anxious to secure the Senate's concurrence for a reappointment.

Madison's allies during the earlier debates were critical. Sedgwick argued that the Comptroller was an executive officer, and therefore ought to be removable by the President.[313] Benson argued that the House had already decided that all nonjudicial officers held tenure at the pleasure of the President.[314]

Madison denied Benson's assertion.[315] He insisted that the earlier decision related only to purely executive officers, whereas the Comptroller was partly executive and partly judicial.[316] When it came to offices with this judicial character, Madison maintained that Congress had the authority to modify the officer's tenure.[317]

The next day, Madison withdrew his motion.[318] He never explained this withdrawal, and so we cannot know his reasons with any certainty.[319] Yet it is possible that Madison realized that his proposal was at odds with his comments about the judicial nature of the Comptroller. He may have understood that he could not get majority support for his proposal. Or perhaps he came to the same conclusion his erstwhile allies already had: He was wrong.

Despite the equivocal nature of this episode, it suggests that the Decision of 1789 did not encompass the conclusion that the President had the power to remove *all* officers of the United States lacking constitutionally granted tenure. The original Decision had focused on officers that were clearly executive (at least in the eyes of the majority coalition). There was no discussion of how to treat officers who could not be classified as purely executive. Though we cannot say how many members of the majority would have sided with Madison on this issue, there is no doubt that a split existed. Given the division on Madison's withdrawn motion, it is impossible to say that the Decision resolved

---

313 *See id.* at 1082 (noting Representative Sedgwick's statement that the Comptroller would carry out "important executive duties, and the man who has to perform them, ought . . . to be dependent upon the president").

314 *See id.*

315 *See id.* at 1083.

316 *See id.* ("I do not say the office is either executive or judicial; I think it rather distinct from both, tho' it partakes of each . . . .").

317 *See id.*

318 *See id.*

319 *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 653 n.516 (1994).

the removal question regarding officers who are neither Article III judges nor executive officers.[320]

C. The Possibility of a Defeasihle Removal Power

During the debates leading up to the Decision of 1789, the majority believed that the Constitution granted the President the power to remove executive officers. They therefore wrote the departmental bills to convey Congress's sense that the President already enjoyed this power. But did the majority also decide that this removal power was beyond the reach of congressional regulation? Could Congress, by statute, limit or eliminate the Constitution's grant of removal authority? Justices McReynolds and Brandeis, as well as Corwin, insisted that the Decision of 1789 left this question open.[321]

Although the better view is that the President's constitutional powers are not default powers that Congress may limit or eliminate, the reading of the Decision of 1789 advanced by Chief Justice Taft's critics would seem to be correct.[322] Because the question of a default removal power was never squarely addressed, it is difficult to conclude that a majority of the House implicitly opposed the idea. Although Madison asserted that the President's constitutional powers were "unabateable" and that Congress could not extend the Constitution's exceptions to the executive power, these assertions were never really contested.[323] Because Madison's opposition refused to concede that the removal power was an executive power, these Representatives did not address whether it was a power that Congress could modify or abridge.

To be sure, there were many Representatives, among them Benson and Madison, who sought a public repudiation of the congressional-delegation theory.[324] Their concern was that this theory permitted Congress to modify or abridge the President's removal power and that Congress conceivably could decide not to grant a removal power at all.[325] But repudiating the congressional-delegation theory is not identical to repudiating a default removal power. One

---

320 While Madison's proposal was premised on the controversial idea that Congress can create nonexecutive, nonjudicial offices, there are reasons to doubt whether Congress can create such offices. *See id.* at 567–68.

321 *See* Myers v. United States, 272 U.S. 52, 194–95 (1926) (McReynolds, J., dissenting); *id.* at 283–84 (Brandeis, J., dissenting); CORWIN, *supra* note 16, at 334.

322 *See, e.g.*, CORWIN, *supra* note 16, at 334.

323 *See* The Congressional Register (June 16, 1789), *reprinted in* DEBATES, *supra* note 6, at 860, 868 (comments of Representative Madison).

324 *See* The Congressional Register (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1028, 1030 (comments of Representative Benson); *id.* at 1032 (comments of Representative Madison).

325 *See id.* at 1030 (comments of Representative Benson); *id.* at 1032 (comments of Representative Madison).

could conclude that Congress lacked authority to delegate a removal power and still believe that, by statute, Congress could limit or retract the Constitution's grant of removal authority to the President.

Because the logic of the executive-power partisans did not necessarily preclude the idea of a default power, and because there was neither much discussion of the idea nor a decisive vote against it, the Decision of 1789 did not endorse the view that Congress lacked authority to modify the Constitution's grant of removal power to the President. While there are sound reasons to doubt that Congress has some generic power to treat constitutional grants of power as grants that Congress can modify or abridge,[326] the Decision of 1789 is not one of them.

D. The Legitimacy and Effect of the Decision of 1789

Throughout the debates preceding the Decision of 1789, some opponents of the removal language argued that it was inappropriate for Congress to declare its view of the Constitution's meaning.[327] Some feared that, if done regularly, congressional interpretation would usurp the judiciary's role as arbiter of the Constitution's meaning.[328] Other Representatives feared that in construing the Constitution, Congress would amend it so as to expand congressional powers.[329] To avoid this, some Representatives believed Congress should adopt a policy of saying nothing about the Constitution. If executive-power partisans were correct, Presidents might remove officers and the courts would decide whether this was proper.[330] There was no need for a legislative declaration of the Constitution's meaning.

---

326 *See* Saikrishna Prakash, *Regulating Presidential Power*, 91 CORNELL L. REV. 215 (2005) (reviewing HAROLD J. KRENT, PRESIDENTIAL POWER (2005)) (arguing the same).

327 *See, e.g.*, DAILY ADVERTISER (June 18, 1789), *reprinted in* DEBATES, *supra* note 6, at 845, 849.

328 *See id.* (describing Representative Smith's claim that the Foreign Affairs bill's construction of the constitution infringed on the judiciary's "right to expound the constitution"); *see also* The Congressional Register (June 18, 1789), *reprinted in* DEBATES, *supra* note 6, at 951, 991 (noting Representative Page's statement that Congress should say nothing about removal and leave the "constitution to the proper expositors of it").

329 *See, e.g.*, The Congressional Register (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 904, 930 (noting Representative Gerry's argument that "[b]y this very act the house are [sic] assuming a power to alter the constitution. The people of America can never be safe, if congress have [sic] a right to exercise the power of giving constructions to the constitution different from the original instrument. . . . If the people were to find, that congress meant to alter it in this way, they would revolt at the idea . . . .").

330 *See* The Congressional Register (June 16, 1789) *reprinted in* DEBATES, *supra* note 6, at 860, 873 (quoting Representative White's comment: "Let us then leave the constitution to a free operation, and let the president, with or without the senate, carry it into execution: Then, if any one supposes himself injured by their determination, let them have recourse to the law, and its decision will establish the true construction of the constitution.").

A majority of the House, however, refused to accept the notion that the courts enjoyed a monopoly over constitutional interpretation. All branches had the power to say what the Constitution meant.[331]

Some members of the majority went further, arguing that the courts had no superior power to establish the Constitution's meaning. Madison, in particular, denied that the courts had a special role:

> I acknowledge, in the ordinary course of government, that the exposition of the laws and constitution devolves upon the judicial. But, I beg to know, upon what principle it can be contended, that any one department draws from the constitution greater powers than another, in marking out the limits of the powers of the several departments. The constitution is the charter of the people to the government; it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the constitutional boundary of either be brought into question, I do not see that any one of these independent departments has more right than another to declare their sentiments on that point.[332]

Madison argued that because courts had no unique authority to decide the Constitution's meaning,[333] each branch ought to voice its own interpretation.

A few members of the majority questioned whether the removal issue could even be heard by the courts. If the President removed an officer, a court might not hear the case because the President was probably not subject to civil process.[334] That being so, a congressional decision on the locus of removal power would be the last word for all intents and purposes. Indeed, Madison suggested, somewhat crypti-

---

331 *See, e.g., id.* at 883–84 (quoting Representative Ames's comment: "It therefore appears to me proper for the house to declare what is their sense of the constitution."); *see also* DAILY ADVERTISER (June 19, 1789), *reprinted in* DEBATES, *supra* note 6, at 886, 888 (noting Representative Laurance's comment: "[People] naturally supposed that where any provisions were necessary to be made constructive and declarative of the constitution that from this source and this alone they ought to spring. . . . [I conclude] that the Congress had the right and that it was their duty to supply the deficiency in the constitution."); The Congressional Register (June 19, 1789), *reprinted in* DEBATES, *supra* note 6, at 999, 1007 (comments of Representative Baldwin stating the same).

332 The Congressional Register (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 904, 926–27 (comments of Representative Madison).

333 For an argument against interpretive supremacy, see Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539 (2005) (reviewing LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004)).

334 *See* DAILY ADVERTISER (June 23, 2789), *reprinted in* DEBATES, *supra* note 6, at 945, 946 (comments of Representative Sedgwick). *But see* The Congressional Register (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 904, 936 (noting Representative Smith's declaration that where there is a right to an office, there is a damage remedy). Smith's comments foreshadow Chief Justice Marshall's reasoning in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 142–43 (1803).

cally, that the "decision . . . made will become the permanent exposition of the constitution."[335]

All Representatives must have recognized that being first to declare a judgment about removal had its advantages. Some Representatives, sensing that they would ultimately triumph, undoubtedly argued that their judgment might be entrenched. Others, sensing that they would lose, asserted that Congress ought to refrain from saying anything that might serve as a precedent for posterity. But these were the arguments of the extremes. The vast majority of Representatives understood that Congress could express its views about the Constitution's meaning and that, while the Decision of 1789 would be deserving of some deference, it would not decide the removal question for all time.

The Decision of 1789 demonstrates that departmentalism has deep roots extending back to the first months of the new republic. Whatever their view of the courts' role in determining the constitutional meaning, Representatives who voted for the Foreign Affairs Act did not doubt that they could enact legislation that reflected their own reading of the Constitution. Given the oath that Representatives took to uphold the Constitution, an oath that required them to consider the constitutionality of legislation, it is difficult to see how any contrary view was plausible.

CONCLUSION

Before there was *Brown*, before there was *Dred Scott*, before there was *Marbury*, there was the Decision of 1789. While creating the three great executive departments, Congress approved three bills, each of which assumed that the Constitution granted the President a removal authority. Members who voted for the three bills knew that they were endorsing the President's right to remove these officers by virtue of his executive power. All members understood that the removal decisions of Congress were exceedingly important. As one member said during the debate, "the day on which this [removal] question shall be decided, will be a memorable day, not only in the history of our own times, but in the history of mankind; that on a proper or improper decision will be involved the future misery or happiness of the people of America."[336] This speaker can be charged with only a slight exaggeration.

---

335 The Congressional Register (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 904, 921 (comments of Representative Madison); *see also* Gazette of the United States (July 1, 1789), *reprinted in* DEBATES, *supra* note 6, at 993, 996 (noting Representative Baldwin's assertion that the judiciary will "consider themselves obliged by our decision").

336 The Congressional Register (June 18, 1789), *reprinted in* DEBATES, *supra* note 6, at 951, 962 (comments of Representative Lee).

Contrary to the views of some, the majority in favor of the three House bills was not split between congressional-delegation and executive-power partisans. Instead, prior to the vote on Benson's second amendment, the executive-power majority was split into two factions: one favoring language that implied a constitutional removal power, and one favoring a forceful congressional declaration of the executive-power theory. This was a tactical split, not a division grounded in differences on constitutional principle. Once the House adopted Benson's second amendment, the factions closed ranks and pushed through three bills, each of which assumed the President had the constitutional authority to remove the Secretaries. When it comes to whether the Constitution grants the president a removal power, the Decision of 1789 was not a "nondecision."

At a time when some scholars search for means of ensuring that Congress take its constitutional responsibilities more seriously and others argue that the political branches ought to take a dominant role in constitutional interpretation, the Decision of 1789 stands as a beacon, inviting us to gaze in admiration at an episode when Congress approached its constitutional duties with deliberation, sincerity, and sophistication.

APPENDIX I

IMPORTANT HOUSE VOTES ON THE FOREIGN AFFAIRS BILL[337]

Last Name	First Name	Amendment 1[338]	Amendment 2[339]	House Bill
Ames	Fisher	Y	Y	Y
Baldwin	Abraham	Y	Y	
Benson	Egbert	Y	Y	Y
Boudinot	Elias		N	Y
Brown	John	Y	Y	Y
Burke	Aedanus	Y	Y	Y
Cadwalader	Lambert	N	N	Y
Carroll	Daniel	Y	N	Y
Clymer	George	Y	Y	Y
Coles	Isaac	N	Y	N
Contee	Benjamin	Y	N	Y
Fitzsimons	Thomas	Y	N	Y
Gerry	Elbridge	N	Y	N
Gilman	Nicolas	Y	N	Y
Goodhue	Benjamin	Y	Y	Y
Griffin	Samuel	Y	Y	Y
Grout	Jonathan	N	Y	N
Hartley	Thomas	Y	N	Y
Hathorn	John	N	Y	N
Hiester	Daniel	Y	N	Y
Huger	Daniel			Y
Huntington	Benjamin	N	Y	N
Jackson	James			N
Laurance	John	Y	N	Y
Lee	Richard Bland	Y	N	Y
Leonard	George	Y	Y	N
Livermore	Samuel	N	Y	N
Madison, Jr.	James	Y	Y	Y
Mathews	George	N	Y	N

337 The votes in this table are taken from the *Documentary History of the First Federal Congress*. *See* Journal of the First Session of the House of Representatives of the United States (June 22, 1789), *reprinted in* JOURNAL, *supra* note 24, at 91, 92–95.

338 Vote on Benson's first amendment to the House Foreign Affairs bill, which added that the Chief Clerk in the Department of Foreign Affairs would have custody of papers "[w]henever the said principal officer shall be removed by the President." *See supra* text accompanying notes 68–69.

339 Vote on Benson's second amendment to the House Foreign Affairs bill, which deleted language providing that the Secretary was "to be removable by the president." *See supra* text accompanying note 74.

IMPORTANT HOUSE VOTES ON THE FOREIGN AFFAIRS BILL

Last Name	First Name	Amendment 1	Amendment 2	House Bill
Moore	Andrew	Y	Y	Y
Muhlenberg	Peter	Y	Y	Y
Page	John	N	Y	N
Parker	Josiah	N	Y	N
Partridge	George	N	Y	N
Schureman	James		N	Y
Scott	Thomas	Y	Y	Y
Sedgwick	Theodore	Y	N	Y
Seney	Joshua	Y	N	Y
Sherman	Roger	N	Y	N
Silvester	Peter	Y	N	Y
Sinnickson	Thomas	Y	Y	Y
Smith (MD)	William	Y	N	N
Smith (SC)	William	N	Y	N
Stone	Michael Jenifer			N
Sturges	Jonathan	N	Y	N
Sumter	Thomas	N	Y	N
Thatcher	George	Y	N	N
Trumbull	Jonathan	Y	N	Y
Tucker	Thomas Tudor	N	N	N
Van Rensselaer	Jeremiah	N	Y	N
Vining	John	Y	Y	Y
Wadsworth	Jeremiah	Y	N	
White	Alexander	N	Y	N