THE UNITARY EXECUTIVE THEORY IS PLAINLY WRONG AND ANTI-AMERICAN: "PRESIDENTS ARE NOT KINGS"[1]

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President Trump clearly believes he was a king. He was not. Both the Constitution itself and Constitutional history make that abundantly clear. The kingship claim is made under the guise of the Unitary Executive Theory, a theory that lacks any historical grounding and a theory that is fundamentally at odds with why the American Revolution was fought. It is a very dangerous theory, as the Presidency under Trump illustrates. Its culmination: a physical assault on the Capital.[2]

This article will first examine the Constitutional history of the power of the president, and then turn to the rise of the doctrine of the Unitary Executive Theory. Its history from the Constitutional Convention and onwards will also be discussed, with particular attention to the impeachment of President Johnson. It will be suggested that history indicates that the framers thought the executive was subservient to Congress, which was the source of ultimate power because it embodied the will of the people. The

[1] Donald J. Trump v. Bennie G. Thompson, No. 21-cv-2769, 2021 U.S. Dist. LEXIS 216812, at *18 (D.D.C. Nov. 9, 2021).

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[2] *See, e.g.*, Kat Lonsdorf et. al., *A Timeline of How the Jan. 6 Attack Unfolded – Including Who Said What and When*, NPR (Jan. 5, 2022), https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when [https://perma.cc/4TZT-7QNW].

> Unitary executive theory is politically and culturally powerful because of its uncomplicated, unconditional certitude. In the words of two prominent proponents, "The Constitution grants the President the authority to superintend the administration of federal law. There are no caveats. There are no exceptions." Because of these same qualities, it is a philosophy for governing that contains no meaningful limits. Particularly in the rapidly changing complexity, and newly appreciated precariousness, of modern American life, this is comfort purchased at too dear a price.

Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 J. CONST. L. 357, 424 (2010).

framers' concept was that Congress legislated and, the president was simply charged with carrying out what Congress decreed.[3]

REVOLUTIONARY HISTORY

While unrest evidenced by fighting at Lexington and Concord predated it, the publication of Common Sense by Thomas Paine, gave focus to the revolutionary ideas of the colonists. That document, seldom mentioned in constitutional law treatises, was immensely popular at the time, with an estimated publication of hundreds of thousands during a period in which there were only about 2.5 million colonists living in North America.[4] Common Sense, while in style a religious sermon, featured a diatribe against monarchy as a form of government. Paine utilized selected portions of the Old Testament to establish that kingship was a sin, and anathema to God.[5]

The very first plan introduced in the Constitutional Convention of 1787 provided for no king but for a National Executive to be elected for a term of years.[6] The next time it was discussed was June 1, 1787, when a term of seven years was proposed.[7] Lengthy discussion then ensued on June 4, 1787.[8] According to James Madison's notes, "Mr. Sherman said he considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect."[9] Mr. Gerry favored a Council, and "Mr. Randolph strenuously

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[3] *See* Geoffrey Stone & William P. Marshall, *The Framers' Constitution*, DEMOCRACY J. (2011), https://democracyjournal.org/magazine/21/the-framers-constitution/ [https://perma.cc/HAB5-U4L5]. One crude measure of the recent presidencies from this model can be glimpsed by examining the number of executive orders, i.e. *Presidential law making for the executive branch*. *See Executive Orders*, THE HERITAGE FOUNDATION, https://www.heritage.org/political-process/heritage-explains/executive-orders#:~:text=An%20executive%20order%20is%20a,scope%20of%20the%20president's%20authority [https://perma.cc/PS3B-UK4W]. Until President Lincoln, the numbers of such orders per year did not reach double figures. *See Executive Orders*, THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/statistics/data/executive-orders [https://perma.cc/S96A-W9RA]. With the first Roosevelt the average jumped to 145 per year, and the second Roosevelt 307 per year. *See id.* Obama averaged 35 per year, and Trump 55 per year. *See id.*

[4] *See Thomas Paine: The Original Publishing Viral Superstar*, NAT'L CONST. CTR. (Jan. 10, 2022), https://constitutioncenter.org/blog/thomas-paine-the-original-publishing-viral-superstar-2 [https://perma.cc/V6AM-CHUD].

[5] *See generally* THOMAS PAINE, COMMON SENSE (1776).

[6] *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 21 (Max Farrand ed. 1911) [hereinafter VOL. I). The National Executive was to be ineligible to be elected a second time. *See id.* In a later vote, a 7 year limit was agreed to. *See id.* at 69.

[7] *See id.* at 64.

[8] *See id.* at 106–07.

[9] *Id.* at 65.

opposed a unity . . . as the f[e]tus of [a] monarchy."[10] The issue of a single executive was then postponed.[11] Alexander Hamilton provided very few notes about the convention. However, they are telling and include:

> "Randolph –I Situation of this Country peculiar –
> II – Taught the people an aversion to Monarchy
> III All their constitutions opposed to it –
> IV – Fixed character of the people opposed to it – . . .
> VI – Why cannot three execute?"[12]

Randolph unmistakably spoke against anything resembling a king. Pierce's notes from the convention report that Randolph was of the opinion that a unity of the executive would be too much of a monarchy.[13] Madison described elected monarchies as "turbulent and unhappy."[14] A few days later a vote was taken in favor of a unitary executive with Randolph absent.[15] That decision was ratified on July 17.[16]

Remarkedly few discussions of the presidency occurred during the convention. Such discussion as there was, focused primarily upon the manner of election, and the term of the president. After repeated discussions of the term, a motion was made and approved to make the national executive ineligible for a second term.[17] Eventually however, those who argued that it would be preferable to allow the president to seek reelection, thereby encouraging the president to do

[10] *Id.* at 66.
[11] *Id.* at 67.
[12] *Id.* at 72. Of note, how a three person executive would work was not discussed.
[13] *Id.* at 74.
[14] *Id.* at 72.
[15] *Id.* at 106–07.
[16] 2 THE RECORDS OF THE FEDERAL CONVENTION of 1787 22 (Max Farrand ed., 1911) [hereinafter VOL. II] (noting the vote was 10–0).
[17] *See id.* at 23. Various votes occurred regarding this issue, and the final result is murky but the constitution ultimately failed to include a term limitation. Later in the Convention a motion passed providing for a seven-year term of the executive, but making that person ineligible for reelection. *See id.* at 116. The Twenty Second Amendment imposed a limit of two terms, a proposal adopted in reaction to President Franklin Roosevelt's election to four terms. U.S. CONST. amend XXII, § 1; *see FDR's Third-Term Election and the 22nd Amendment*, NAT'L CONST. CTR. (Nov. 5, 2020), https://constitutioncenter.org/blog/fdrs-third-term-decision-and-the-22nd-amendment [https://perma.cc/G97A-97VL]. One of the illustrations mentioned in the convention of why reelection would be preferable, was the possibility that war might make it important to allow a president to be reelected. *See* VOL. I, *supra* note 6, at 376.

a good job prevailed, and reelection with a shorter period of four years was adopted.[18]

There was substantial discussion of the president in relationship to the Senate, particularly with regard to appointment of federal officers and the ratification of treaties negotiated by the president. Virtually no discussion was reported regarding the term of any officer's appointment, although brief references were made of appointments being "during pleasure," presumably of the president, but nothing reflecting this brief mention made itself into the Constitution.[19]

Limitations upon the president was primarily discussed when the impeachment remedy was contemplated, and ultimately adopted, as well as with regards to overriding presidential vetoes of legislation.[20] The text of the president's oath was briefly discussed.[21] More time was spent on discussing the oaths required of other federal or state officials, including members of the state legislatures.[22]

Powers of the president beyond the nomination of officials, and the veto power, were seldom discussed and then only briefly, including the duty to take care the laws be faithfully executed.[23] However, the limitation of funding the military to two years, was also explicitly a limitation on the ability of the president to ignore Congress.[24]

IMPEACHMENT

The Convention debated whether to make the chief executive subject to impeachment. Early in the convention, Mr. Williamson

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[18] *See The Debate Over the President and the Executive Branch*, CTR. FOR STUDY OF THE AM. CONST., https://csac.history.wisc.edu/document-collections/constitutional-debates/executive-branch/ [https://perma.cc/2PZ5-QZLN].

[19] *See* VOL. II, *supra* note 16, at 336. The text referred to the Committee of five including three references to "during pleasure" for each of the appointments of the Secretary of Commerce and Finance, the Secretary of foreign affairs, and the Secretary of war. *Id.* The eventual report from the Committee on Detail omitted not only all three positions, but also made no reference to "during pleasure." *See The Committee of Detail Report*, TEACHING AM. HIST., https://teachingamericanhistory.org/document/the-committee-of-detail-report/ [https://perma.cc/32HB-ZKA9].

[20] *See* VOL. II, *supra* note 16, at 100, 495.

[21] *See id.* at 422.

[22] *See id.* at 87–88.

[23] *See* VOL. I, *supra* note 6, at 171. That text first emerged from the Committee of Detail report. *See id.* The text stated, "(He shall take care to the best of his Ability, that the Laws) (It shall be his duty to provide for the due & faithful exec – of the Laws) of the United States (be faithfully executed) (to the best of his ability)." *Id.*

[24] *See* U.S. CONST. art I, § 8, cl. 12. "[T]he best possible precaution against danger from standing armies is a limitation of the term for which revenue may be appropriated to their support." THE FEDERALIST, No. 41 (James Madison).

moved that the executive "be removable on impeachment and conviction of mal-practice or neglect of duty."[25] James Madison,

> thought it indispensable that some provision should be made for defending the Community [against] the incapacity, negligence or perfidy of the chief Magistrate. The limitation of the period of his service, was not a sufficient security. He might lose his capacity after his appointment. He might pervert his administration into a scheme of peculation or oppression. He might betray his trust to foreign powers . . . loss of capacity or corruption [of the Executive, instead of the Legislative or any other public body] was more within the compass of probable events, and either of them might be fatal to the Republic.[26]

Doctor Benjamin Franklin was also in favor of impeachment, mentioning that the lack of impeachment was a problem, illustrated by the perfidy of the Stadtholder, the Prince of Orange, during the war in which the French and Dutch fleets were to unite, but the Dutch never appeared.[27] This was not the only such incident by a nation's leader mentioned; Governor Morris noted the bribery of Charles II of England by Louis XIV of France.[28] Morris advocated for impeachment for treachery or corruption stating, "[t]his Magistrate is not the King but the prime-Minister. The people are the King."[29] The vote favored impeachment by 8–2.[30]

The committee of Detail suggested impeachment for malpractice or neglect of duty and Treason, Bribery or Corruption.[31] The committee of Detail further provided that judgments in cases of impeachment "shall not extend further than to removal from Office & [disqualification] to hold & enjoy any place of [Honor,] Trust or Profit under the U.S. But the party convicted shall nevertheless be liable & subject to [Judicial] Trial & Punishment according to (the) law of

[25] *See* VOL. I, *supra* note 6, at 78.
[26] VOL. II, *supra* note 16, at 65–66. Some delegates had argued that the limitation of the president's period of service would be sufficient security. *See* VOL. I, *supra* note 6, at 778.
[27] *See* VOL. II, *supra* note 16, at 65, 67–68.
[28] *See id.* at 68–69.
[29] *Id.* at 69. The motion before the convention at that moment defined impeachment for "malpractice or neglect of duty." *Id.* at 64. Mr. Gerry argued that a bad leader ought to be kept in fear of impeachment, but a good leader would not fear it. *Id.* at 66. "He hoped the maxim would never be adopted here that the chief Magistrate could do (no) wrong." *Id.*
[30] *Id.* at 69.
[31] *See id.* at 145.

(the Land)."[32] On September 4, 1787, Governor Morris stated that "[a] conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachments, was that the latter was to try the President after the trial of the impeachment."[33]

Near the end of the convention Col. Mason asked why impeachment only covered Treason and bribery.[34] The British official, Warren Hastings, was not guilty of Treason.[35] He sought to include maladministration, but Madison thought the term was too vague and would mean the president would serve during the pleasure of the Senate.[36] Right after that interchange, Col. Mason substituted "other high crimes & misdemeanors ([against] the state),"[37] and that language was adopted, 8-3.[38] No discussion of that term was reported.

REJECTION OF A MONARCHY

The convention was replete with references against a monarchy. For example, Mr. Mason referenced the "Genius of our people wh[ich] is republican" and a Genius that will not accept a King.[39] Franklin referenced how the Prince of Orange became a declared hereditary and stated "we shall [be met] with the same misfortune."[40] Mason

[32] *Id.* at 173.
[33] *Id.* at 500.
[34] *See id.* at 550.
[35] *See id.* Warren Hastings was the de facto governor-general of India and was largely responsible for adding India to the British Empire. *See* John T. Noonan Jr., *The Bribery of Warren Hastings: The Setting of a Standard for Integrity in Administration*, 10 HOFSTRA L. REV. 1073, 1077–78 (1982). Upon his return to England he was impeached by the House of Commons and underwent a trial that lasted from 1787 to 1795 and ultimately acquitted of all 20 counts. *See id.* at 1073–74. His defense cost 71,000 pounds, but Parliament later awarded him 4,000 pounds a year (which he collected for nearly 29 years). *See id.* at 1075. He was accused of embezzlement, extortion, corruption, and an alleged judicial killing of Maharaja Nanda Kumar. *See id.* at 1082, 1089.
[36] *See* VOL. II, *supra* note 16, at 550.
[37] *See id.*
[38] *See id.* A later motion to clarify substituted "United States" for "State" with respect to misdemeanors "against" and this motion was voted in favor of unanimously. *See id.* at 551.
[39] *See* VOL. I, *supra* note 6, at 108. Mr. Mason stated,

> If strong and extensive powers are vested in the Executive, and that Executive consists only of one person, the government will of course degenerate (for I will call it degeneracy) into a monarchy—a government so contrary to the genius of the people that they will reject even the appearance of it.

Id. at 113.
[40] *See id.* at 108.

advocated not a single executive but a tripartite executive.[41] Mr. Gerry remarked that "our fellow citizens . . . [are] not [against]. every approach towards Monarchy."[42] Mr. Wilson repeatedly mentioned "the danger of monarchy."[43] Mr. Ghorum theorized that "an enterprising Citizen might erect the standard of Monarchy in a particular state, . . . and threaten to establish a tyranny over the whole [General government]" which unless it had the power to resist, would sit idle during its destruction.[44] Mentions of republic were abound during the discussions in the convention.[45] It was a republic that the convention opted for, with the one house elected by the people, the other house through the State Legislatures.[46]

POWER OF THE COURTS TO REVIEW CONSTITUTIONALITY

The records of the Constitutional Convention leave little doubt that the drafters of the constitution contemplated that the judiciary was to have the power of judicial review.[47] Mr. Luther Martin was quoted, "as to the Constitutionality of laws, that point will come before the Judges in their proper official character."[48] Colonel George Mason concurred stating "[t]hey could declare an unconstitutional law void."[49] James Madison considered that "[a] law violating a constitution established by the people themselves, would be considered by the Judges as null & void."[50] Mr. Roger Sherman

[41] *See id.* at 113–14. Mr. Rutledge cautioned against granting too much power to a single person for fear that "[t]he People [would] think we are leaning too much towards [a] Monarchy." *See id.* at 119.
[42] *Id.* at 425. "He hoped that the maxim would never be adopted that the chief Magistrate can do no wrong." VOL. II, *supra* note 16, at 66.
[43] VOL. I, *supra* note 6, at 483.
[44] VOL. II, *supra* note 16, at 48.
[45] *See* VOL. I, *supra* note 6, at 72–73. Mr. Hamilton was quoted as saying "[w]e are now forming a republican form of government." *Id.* at 432. "[Governor] Morris was as little a friend to monarchy as any gentleman . . . [h]e concurred" that the best way to keep out monarchy "was to establish such a [Republican government] as [would] make the people happy and prevent a desire of change." VOL. II, *supra* note 16, at 35–36.
[46] *Id.* at 590.
[47] *See id.* at 432. Of course, none of the records of the Convention contained in Farrand's texts were available at the time the Supreme Court decided *Marbury v. Madison*, as the convention had deliberated under a pledge of secrecy. VOL. I, *supra* note 6, at xi. Madison kept the most detailed records of the convention, but only permitted posthumous publication, dying in 1836. *Id.* at xv. *See id.* at xi-xxv for a detailed account of the individuals who participated in the convention and the means of recordation.
[48] VOL. II, supra note 16, at 76.
[49] *Id.* at 78.
[50] *Id.* at 92–93.

argued that "the Courts of the States would not consider as valid any law contravening the Authority of the Union."[51]

POSITIVE POWERS OF THE PRESIDENT

Oddly enough virtually no discussion during the convention focused upon the powers of the president. Some items were simply not discussed; for example, the ability of the president to remove an appointee from office. Similarly, discussion was absent of the ability of Congress to limit the president's power to remove an appointee. The term of any presidential appointee was apparently never discussed, and with the single instance of a passing single set of references to appointments "during pleasure"[52] there were no references to the terms of presidential appointees except for judges.

There was no discussion of presidential immunity from civil or criminal lawsuits with the sole exception of impeachment related prosecutions. Criminal prosecutions subsequent to an impeachment of the president were explicitly permitted.[53]

Immunities were discussed with respect to members of Congress.[54] Madison made a single reference in the notes to the Convention of privileges of the president,[55] but no presidential privileges were adopted and there are no accounts of discussion of such privileges. Charles Pickney stated in the Senate on March 5, 1800, that the omission was deliberate, explaining that the potential abuse of privileges was an issue, but the only ones conferred were limited "to what was necessary, and no more."[56]

All federal appointees were made subject to impeachment through virtually the same method as for impeaching the President.[57]

[51] *Id.* at 27.
[52] *Id.* at 335–37. The qualifier "during pleasure" was never mentioned again.
[53] *See id.* at 438.
[54] *See, e.g.*, *id.* at 180, 246, 254, 334, 502–03, 567, 593, 654.
[55] *See id.* at 503. The entire reference is, "[h]e suggested also the necessity of considering what privileges ought to be allowed to the Executive." *Id.*
[56] 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 384–85 (Max Farrand ed. 1937) [hereinafter VOL. III].
[57] *Compare* U.S. CONST. art. I, § 3, cl. 6, *with* U.S. CONST. art. II, § 4 (demonstrating the only difference is the requirement that the Chief Justice preside over presidential impeachment trials in the Senate).

WHY WAS THERE SO LITTLE FOCUS ON PRESIDENTIAL POWERS?

The conundrum of the lack of focus on presidential powers may be solved by reference to James Madison's essays in the Federalist Papers. In particular, in *Federalist 48*, Madison discusses the superiority of the legislative department in our government.[58] In particular he state,: "[i]ts constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes of the coordinate departments."[59]

In a struggle with the executive branch or the judicial branch, Madison thus posits the legislative branch the most powerful:

> On the other side, the executive power being restrained within a narrower compass, and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves. Nor is this all: as the legislative department alone has access to the pockets of the people.[60]

This declaration of his perception of the potential sources of excess power accords with the focus of the framers during the Constitutional Convention.[61] It also accords with much of the discussion in *the Anti-Federalist Papers*, which also never focus upon the potential of excessive exercise of executive power. Given that the presidents under the Articles of Confederation exercised little power and that only under strict Congressional supervision, one should not be surprised at this view. Indeed, Hamilton in *Federalist 77* states that "no objection has been made to this class of authorities [including 'faithfully executing the laws']; nor could they possibly admit of any."[62]

The *Anti-Federalist Papers* raise many issues objecting to the Constitution as proposed. Besides the absence of a Bill of Rights, the most trenchant of them are probably these:

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[58] THE FEDERALIST NO. 48, at 227 (James Madison).
[59] *Id.*
[60] *Id.* at 227–28. *See also* THE FEDERALIST NO. 51, at 238 (James Madison) ("[i]n republican government, the legislative authority necessarily predominates.").
[61] *See* discussion, *supra* pp. 4–7.
[62] THE FEDERALIST NO. 77, at 353 (Alexander Hamilton).

> The constitution has been opposed, because it gives to the legislature an unlimited power of taxation both with respect to direct and indirect taxes. . . .
> The opposers to the constitution have said that it is dangerous, because the judicial power may extend to many cases which ought to be reserved to the decision of the State courts, and because the right to trial by jury is not secured in the judicial courts of the general government, in civil cases. . . .
> The power of the general government to alter and regulate the time, place and manner of holding elections . . .
> The mixture of legislative, judicial, and executive powers in the Senate . . . [63]

Conspicuous by absence is any reference to presidential powers.

ORIGINS OF THE UNITARY EXECUTIVE THEORY

The doctrine of Unitary Executive Theory originated in the Supreme Court decision of *Myers v. United States*[64] which held it was unconstitutional to subject the president to Senate approval for removing a postmaster.[65] The dissent by Justice Brandeis, joined by Justice Holmes, along with a separate dissent by Justice McReynolds, have been long overlooked. Brandeis's dissent is an exhaustive account of the long-standing practice of conditioning removal of various executive officials on Senate approval with the single exception of the dispute that led to President Johnson's impeachment and trial.[66] This practice was unquestioned by either other presidents or by Congress. President Johnson objected to a restriction only with regards to a cabinet-level appointment, not to any other position, and thus the issue before the court in Myers was a first instance presentation.[67]

[63] Melancthon Smith, *Antifederalist No. 85; Concluding Remarks: Evils Under the Confederation Exaggerated*, *in* THE ANTI-FEDERALIST PAPERS 177, 180 (Pacific Publishing Studio ed., 2010).
[64] Myers v. United States, 272 U.S. 52 (1926).
[65] *Id.* at 176.
[66] *See id.* at 257–59 (Brandeis, J., dissenting).
[67] *See id.* at 166, 172–73.

The *Myers* Court recognized that no express provision in the Constitution spoke to removals except for removals by impeachment.[68] It recognized that Congress under the Articles of Confederation had removed executive officers from office.[69] The opinion written for the Court by Chief Justice Taft, formerly President Taft, was based on an analysis of the so-called Congressional "Decision of 1789," which regarded the appointment of three officials; one Foreign Affairs, one Treasury, and the third of War.[70] The Court found that Congress could not limit the Presidential removal power.[71] The House of Representatives first determined by a vote of twenty to thirty-four that the president alone could remove these officials.[72] Mr. Benson argued that a fair construction of the Constitution was that a legislative grant of the removal power was unnecessary as "it was fixed by a fair legislative construction of the Constitution."[73] Congressman Benson moved to strike out a reference in the draft to removal by the president, and that motion was carried by a vote of thirty-one to nineteen, and subsequently the House passed the bill by a vote of twenty-nine to twenty-two.[74] Justice Taft then stated that it was clear "that the exact question which the House voted upon was whether it should recognize and declare [the] power of the President under the constitution to remove the Secretary of Foreign Affairs without the advice and consent of the Senate."[75] However, that statement is exaggerated for there was no discussion of the Senate's potential role in the matter, and furthermore, there was no discussion of the extent of Congressional power under its constitutional grant of legislative power.[76] In particular there was no discussion of the constitutional power of Congress to lodge appointment (and impliedly removal) power in the Heads of Departments or the Courts–something the framers explicitly vested in Congress via the Constitution.[77]

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[68] *Id.* at 109.
[69] *Id.* at 110.
[70] *Id.* at 111.
[71] *See id.* at 111. Note that all three positions are now considered cabinet level positions. They are the Secretary of State, the Secretary of the Treasury, and the Secretary of Defense.
[72] *Id.* at 112.
[73] *Id.*
[74] *Id.* at 114.
[75] *Id.*
[76] *See id.* at 113-14.
[77] *See id.*; U.S. CONST. art. II, § 2 ("Congress may be Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.). That the Framers intended this as a limit on Presidential power must be

Thus the decision of 1789 at most applies to presidential appointments of the highest officers, with leave granted to Congress to legislate as it wishes for all inferior officers.[78] Yet, the Myers decision only considered a very inferior officer, a postmaster of the first class at Portland, Oregon.[79] Indeed, Mr. Justice McReynolds stated in his dissent that "only nine members [of Congress] said anything which tends to support the present contention [regarding presidential power], and fifteen emphatically opposed it."[80]

The dissent by Justice Brandeis points out in its first paragraph that Mr. Justice Story stated in his Commentaries on the Constitution that as to inferior officers, "the remedy for any permanent abuse is still within the power of [C]ongress, by the simple expedient of requiring the consent of the Senate to removals in such cases."[81] Justice Brandeis stated that the only question before the Supreme Court was whether "the President, having acted under the statute in so far as it creates the office and authorizes the appointment, [can] ignore, while the Senate is in session, the provision which prescribes the condition under which a removal may take place."[82] As Justice Brandeis asserted, nothing in the take care clause or the clause which states that the president shall commission all the Officers of the United States "impl[ies] a grant to the President of the alleged uncontrollable power of removal. [He did] not find in either clause anything which support[ed] [the] claim."[83] Further, he wrote "[t]here is no express grant to the President of incidental power resembling those conferred upon Congress by clause 18 of Article I, § 8."[84]

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inferred, since the placement of this Congressional power in Article II marks the only explicit power of Congress not conferred within Article I. *See* U.S. CONST. art. II, § 2.

[78] *Myers*, 272 U.S. at 111–12. The opinion by Justice Taft cited *Parsons v. United States*, which also relied upon the so-called decision of 1789. *Id.* at 142–43, 147. *Parsons* dealt with a U.S. Attorney who refused to leave his 4 years position midterm but was replaced by a person who had been confirmed by the Senate. Parsons v. United States, 167 U.S. 324, 327 (1897).

[79] *See Myers*, 272 U.S. at 106.

[80] *Id.* at 194 (McReynolds, J., dissenting).

[81] *Id.* at 240 (Brandeis, J., dissenting).

[82] *Id.* at 241. Justice Brandeis further wrote,

> Thus, the question involved in the action taken by Congress after the great debate of 1789 is not before us. The sole question is whether, in respect to inferior offices, Congress may impose upon the Senate both responsibilities, as it may deny to it participation in the exercise of either function.

Id. at 242.

[83] *Id.* at 246.

[84] *Id.* at 246.

> Justice McReynolds was even more emphatic in his dissent, [n]othing short of language clear beyond serious disputation should be held to clothe the President with authority wholly beyond [C]ongressional control arbitrarily to dismiss every officer whom he appoints except a few judges. There are no such words in the Constitution, and the asserted inference conflicts with the heretofore accepted theory that this government is one of carefully enumerated powers under an intelligible charter.[85]

Justice McReynolds further warned, "[a] masked battery of constructive powers would complete the destruction of liberty."[86]

During the Constitutional Convention as well as when drafting the Federalist Papers, James Madison frequently reviewed the practices of various states as justifications for including or excluding various elements in the Constitution.[87] It is in that tradition that Justice Brandeis stated that none of the chief executives of the thirteen states enjoyed the unlimited power of removal, and indeed, in only one of the forty-eight states was such power arguably ever conferred.[88] Moreover, Justice Brandeis observed that "Congress has, from the foundation of our Government, exercised continuously some measure of control by legislation [over removal from inferior civil offices]."[89] As early as 1789, Congress had enacted legislation providing that any person appointed to an office in the Treasury Department should be removed from office upon conviction for offending against any of its provisions.[90] A statute enacted in 1854 provided that registers and receivers should be removed from office if they charged more than authorized by law or received other rewards not authorized by law.[91] During the Convention, another

[85] *Id.* at 182.
[86] *Id.* at 183.
[87] *See* THE FEDERALIST NO. 47 (James Madison). On May 10, 1776, Congress passed a resolution recommending that any colony with a government that was not inclined towards independence should form one that was. *See* Jennifer Llewellyn & Steve Thompson, *State Constitutions*, ALPHA HIST. (Feb. 4, 2015), https://alphahistory.com/americanrevolution/state-constitutions/[https://perma.cc/A3EE-WU98]. Congress recommended in May that colonies draft their own constitutions, which had already been done by New Hampshire and South Carolina (both in March 1776). *Id.*
[88] *Myers*, 272 U.S. at 247–48.
[89] *Id.* at 250.
[90] *Id.*
[91] *Id.* at 252.

one of the founders, Mr. Roger Sherman, expressed his disagreement with the idea that removal was exclusively consigned to the President, for as he stated, "I do not believe the constitution vest the authority in him alone."[92]

Justice McReynolds observed that Congress has repeatedly regulated the nomination power of the president although nothing in the Constitution relates to such limitations.[93] Multiple statutes limited the president's power to nominate based upon a wide variety of requirements, including citizenship, residency, professional attainments, occupational experience, success on examinations, age, sex, race, property, habitual temperance in the use of intoxicating liquors, political affiliation, industrial representation, geographic representation, or limitation to a small number of candidates to be selected by others.[94]

Limitations on removals were also frequently adopted by Congress prior to those which led to the impeachment of President Andrew Johnson.

The scope of *Myers* was limited in a subsequent case, *Humphrey's Executor v. United States*,[95] when the presidential removal limitation applicable to a commissioner of the Federal Trade Commission was at issue.[96] In that case, the Court held that the combination of adjudicatory power and rulemaking power justified limitation of presidential removal powers.[97] *Myers* was limited to purely executive officials, and did not apply to quasi-legislative and quasi-judicial officials.[98] What is long overlooked is that a separate opinion in *Humphrey's Executor* by Justice McReynolds relied upon his dissent in *Myers*, i.e., that Congress has full power with few exceptions (such as the federal Judiciary).[99] Mr. Madison during that first session of Congress drew a distinction between the office of Comptroller of the

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[92] 1 ANNALS OF CONG. 559 (1789) (Gales & Seaton ed., 1834). Sherman was the only person to sign all four founding documents, the Continental Association of 1774, the Declaration of Independence, the Articles of Confederation, and the United States Constitution. Richard J. Werther, *Roger Sherman: The Only Man Who Signed All Four Founding Documents*, J. AM. REVOLUTION (Sept. 28, 2017), https://allthingsliberty.com/2017/09/roger-sherman-man-signed-four-founding-documents/[https://perma.cc/W7SP-2G8V].

[93] *Myers*, 272 U.S. at 179–81.

[94] *Id.* at 266–73.

[95] Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

[96] *Id.* at 630–32.

[97] *See id.* at 627–28.

[98] *Id.* at 630–31.

[99] *See id.* at 632 (1935) ("Mr. Justice McReynolds agrees that both questions should be answered in the affirmative. A separate opinion in Myers v. United States, states his views concerning the power of the President to remove appointees.").

Treasury regarding removal, because as he said, the office partook of a judicial capacity in addition to other duties.[100]

Other cases potentially supporting the Unitary Executive Theory include *United States v. Curtiss-Wright Exp. Corp*.[101] However, that case, which contemplated far larger presidential authority regarding international affairs, involved an explicit delegation of power to the president by Congress.[102]

TRIAL OF PRESIDENT ANDREW JOHNSON: A TRIAL CONCERNING REMOVAL POWERS

The first impeachment trial of a president ended with a failure to convict by one vote, a victory portrayed in President Kennedy's book *Profiles in Courage* as the result of a courageous vote of a senator, Edmund Ross.[103] However, the history is firmly to the contrary, the vote was secured either by immediate bribery from a fund of $150,000 raised on behalf of President Johnson, administered by a fixer named Perry Fuller, or by promises of other financial rewards through appointments to lucrative federal offices.[104]

While there is some dispute about that issue there is no dispute that an extraordinary number of representatives and senators voted

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[100] *See* 1 ANNALS OF CONG. 636 (1789) (Joseph Gales ed., 1834).

[101] *See* United States v. Curtiss-Wright Exp. Co., 299 U.S. 304, 312 (1936) (involving a grant of power to the president to impose an arms embargo).

[102] *See id.* at 319–20.

[103] *See* JOHN F. KENNEDY, PROFILES IN COURAGE 126–51 (1961).

[104] *See* DAVID O. STEWART, IMPEACHED 270, 297 (2009); *see also* Matthew Chapman, *Historian Fact-Checks Mike Pence's Revisionist History on Andrew Johnson's Impeachment Acquittal*, RAWSTORY, (Jan. 21, 2020), https://www.rawstory.com/2020/01/historian-fact-checks-mike-pences-revisionist-history-on-andrew-johnsons-impeachment-acquittal/[https://perma.cc/L6GC-F25N]; David O. Stewart, *Sloppy History: Mike Pence and JFK Praise Corrupt 1860s Senator Who Sold Impeachment Vote*, USA TODAY (Jan. 21, 2020), https://amp.usatoday.com/amp/4522658002?__twitter_impression=true [https://perma.cc/BC93-46SK]. Fuller scammed millions from Indian tribes and government programs and bribed enough Kansas legislators to get Ross elected. *See* STEWART, *supra* at 147. Ross spent the night before the vote with Fuller. *Id.* at 270. After the vote, Ross lobbied President Johnson for an appointment for Fuller, which took the form of a nomination to the position of leading the federal revenue service. *Id.* at 297. However, the Senate refused to concur and instead Fuller was named chief collector of revenue in New Orleans. *Id.* According to a grand jury indictment after in 7 months in that position Fuller stole $3 million. *Id.* Ross guaranteed the bond for Fuller's pretrial release, and it is thought that a fair chunk of the $3 million ended up in Ross's pocket. *Id.* at 298. Ross also breakfasted with Fuller on the morning of the first vote. *Id.* at 299. Ross had been elected to the Senate through bribes managed by Fuller. *Id.* at 264. Fittingly, he was replaced in the Senate by a person who paid more bribes, ($60,000) than Fuller had paid to get Ross elected, but that person was forced to resign because of the discovery of the blatant bribery. *Id.* at 299.

in favor of removing Johnson from office. The Senate voted on three articles of impeachment, including one that limited removal of certain officers without senate approval.[105] Congress had enacted the Tenure in Office Act,[106] which in turn, protected Secretary of War Edwin Stanton, a Lincoln holdover who had raised Johnson's ire by working with Congress.[107]

President Johnson did much to deserve his impeachment. He pardoned all but 1,500 Southerners and appointed numerous traitors to important positions in the South.[108] He vetoed the Freedmen's Bureau Act and the Civil Rights Act.[109] Massacres of dozens of former slaves and some White Republicans in New Orleans and Memphis elicited only a shrug from Johnson.[110] In the South, Black Codes were enacted that effectively reinstated slavery.[111] Johnson did nothing.

The House voted 126 to forty-seven to impeach Johnson and adopted eleven Articles of Impeachment.[112] The Senate, by one vote, acquitted Johnson, on the three articles they voted on–including the second article which featured Johnson's violation of the Tenure in Office Act– resulting in Johnson being acquitted, thirty-five to nineteen.[113] Had they waited until the newly elected senators from the South were seated, the new ten solid Republican senators would have produced a different result.

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[105] *Impeachment Trial of President Andrew Johnson, 1868*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-johnson.htm#3 [https://perma.cc/U9GT-JHND].

[106] *Id.* The Act required the Senate's advice and consent before dismissing any cabinet member or federal official whose initial appointment required senate approval. Tenure of Office Act of 1867, ch. 153, 154 Stat. 430, 430 (1867) (repealed 1887). Johnson dismissed Stanton, and after briefly making Ulysses S. Grant acting Secretary of War, appointed General Lorenzo Thomas to replace Stanton. *Impeachment Trial of President Andrew Johnson, 1868*, *supra* note 105. When Thomas went to the War Department, he found Stanton barricaded in his office. *Today in History - May 16, The Andrew Johnson Impeachment*, LIBR. CONG., https://www.loc.gov/item/today-in-history/may-16/ [https://perma.cc/7KUP-WS7X].

[107] *See Impeachment Trial of President Andrew Johnson, 1868, supra* note 105.

[108] *See Restoring the Union*, OPENED CUNY, https://opened.cuny.edu/courseware/lesson/389/overview [https://perma.cc/GPT2-6KMZ]; *"An Absolute Massacre" – The New Orleans Slaughter of July 30, 1866*, NATIONAL PARK SERVICE, https://www.nps.gov/articles/000/neworleansmassacre.htm [https://perma.cc/D22W-E728].

[109] *Impeachment Trial of President Andrew Johnson, 1868, supra* note 105. Johnson had 15 veto overrides, more than any other President. *Summary of Bills Vetoed*, U.S. SENATE, https://www.senate.gov/legislative/vetoes/vetoCounts.htm [https://perma.cc/QAF5-YLXN].

[110] *See "An Absolute Massacre" – The New Orleans Slaughter of July 30, 1866, supra* note 108.

[111] *See id.*

[112] *The Impeachment of President Andrew Johnson,* U.S. HOUSE REPRESENTATIVES, HIST., ART & ARCHIVES, https://history.house.gov/Historical-Highlights/1851-1900/The-impeachment-of-President-Andrew-Johnson/ [https://perma.cc/MM9D-L5ZW].

[113] CONG. GLOBE, 40th Cong., 2nd Sess. 414–15 (1868).

What is clear is that overwhelming numbers of both senators and representatives believed the Tenure in Office Act was constitutional and but for bribery, it would have resulted in removal of President Johnson. Thus, an overwhelming number of Congressmen and senators believed that Congress had the power to condition removal of officers upon Congressional restrictions. Surely this position refutes the "so called decision of 1789" itself but a decision of but a single house of Congress!

WHAT DIFFERENCE WOULD IT HAVE MADE?

At the time of publication, the most recent decision involving limitations upon presidential removal is *Collins v. Yellen*.[114] In *Collins v. Yellen*, the Court held (6-3) that the appointment of a sole executive to preside over the Federal Housing Finance Authority subject to removal only for cause violated the Constitution.[115]

The Finance Authority was to preside over the reorganization of Freddie Mac and Fannie May who collectively had mortgage portfolios of approximately $5 Trillion accounting for almost half of the nation's mortgage market.[116] These entities purchase mortgages and thus "relieve mortgage lenders of the risk of default and free up their capital to make more mortgage loans."[117] The Court described how "when the housing bubble burst in 2008, the companies took a sizeable hit," losing that year more than they had earned in the previous thirty-seven years combined.[118]

Extensive powers were granted to the Finance Authority associated with significant loans from the U.S. Treasury to ensure that both Freddie Mac and Fannie May could continue to operate.[119] These powers included "broad investigat[ory power] and enforcement authority to ensure compliance with [applicable] standards."[120] The Agency is charged with supervising virtually every aspect of their operations, including salaries, golden parachutes, product offerings,

[114] Collins v. Yellen, 141 S. Ct. 1761 (2021).
[115] *Id.* at 1770.
[116] *Id.* at 1770–71.
[117] *Id.* at 1771 (quoting Jacobs v. Fed. Hous. Fin. Agency, 908 F. 3d 884, 887 (3d Cir. 2018)).
[118] *Id.*
[119] *See* W. SCOTT FRAME ET AL., FED. RSRV. BANK N.Y., STAFF REPORT NO. 719, THE RESCUE OF FANNIE MAE AND FREDDIE MAC 1–2 (2015), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr719.pdf. [https://perma.cc/QF59-GMLY]; *see also* Collins v. Yellen, 141 S. Ct. 1761, 1771 (2021).
[120] *Collins*, 141 S. Ct. at 1772.

portfolio holdings, may order disposition of any asset, require regular reports, and conduct one on site examination of the companies each year and as appropriate hire outside firms to perform additional reviews.[121] "[T]he Recovery Act [also] authorizes the Agency to act as the companies' conservator or receiver for the purposes of reorganizing the companies, rehabilitating them, or winding down their affairs."[122]

It is interesting to compare the powers of the Finance Authority with those of the original Comptroller of the Treasury established in 1789. The duties of the original Comptroller of the Treasury (which Madison exempted from the Congressional decision of 1789) were similar, although confessedly lesser,[123] that those assigned by the Recovery Act. They included the power to "direct prosecutions for all delinquencies of officers of the revenue, and for debts that are, or shall be due to the United States."[124] The powers also included the power "to superintend the adjustment and preservation of the public accounts; to examine all accounts settled by the Auditor, . . . to countersign all warrants drawn by the Secretary of the Treasury, which shall be warranted by law . . .."[125] They also include the power "to report to the Secretary the official form of all papers to be issued in the different offices for collecting the public revenue, and the manner and form of keeping and stating the accounts of the several persons employed therein."[126] The power of the Comptroller also includes judicial power to hear appeals from entities dissatisfied with decisions of the Auditor.[127]

Thus, the original Comptroller of the Treasury conflicted with the first substantive reason of the majority opinion in *Collins v. Yellen*, it was as single person agency. Thus, the Congressional statute did have a "foundation in historical practice."[128]

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[121] *Id.* at 1771–72.
[122] *Id.* at 1772.
[123] Golden parachutes were unheard of in 1789!
[124] Act of Congress Establishing the Treasury Department, ch. 12 § 3, 1 Stat. 65, 66 (1789).
[125] *Id.*
[126] *Id.* This last power implies in effect the power to make rules. *See also* Act of Mar. 3, 1809, ch. 28 § 2, 2 Stat. 535. "The Comptroller of the Treasury has a right to direct the marshal to whom he shall pay money received on executions, and payment according to such directions is good." Act of Congress Establishing the Treasury Department, ch. 12. Such power sounds very "executive" in nature.
[127] *See* Act of Congress Establishing the Treasury Department, ch. 12, § 5.
[128] *Collins*, 141 S. Ct. at 1784 (quoting Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020)).

The core reasoning of the opinion is,

> [t]he President's removal power serves vital purposes even when the officer subject to removal is not the head of one of the largest and most powerful agencies. The removal power helps the President maintain a degree of control over the subordinates he needs to carry out his duties as the head of the Executive Branch, and it works to ensure that these subordinates serve the people effectively and in accordance with the policies that the people presumably elected the President to promote.[129]

Congress might legitimately reply that the most important policies are ones that it adopted, not the President.

Justice Kagan's opinion for three Justices concurring in part and concurring in the judgment, makes it clear that, only stare decisis justified the decision, one which is this core argument, despite "[t]he text of the Constitution, the history of the country, the precedents of this Court, and the need for sound and adaptable governance—all stand against the majority's opinion."[130] Moreover, Justice Kagan asserted that the majority "stra[yed] from its own obligation to respect precedent."[131] Justice Sotomayor went even further in her dissent, "[n]ever before, . . . has the Court forbidden simple for–cause tenure protection for an Executive Branch officer who neither exercises significant executive power nor regulates the affairs of private parties."[132] Justice Sotomayor identified several Congressional policy reasons, financial regulators are granted independence in order to bolster public confidence that financial policy is guided by long-term think, not short-term political expediency or tenure protection for officer who investigate other government actors and thus might face conflicts of interest if directly controlled by the President.[133]

Justice Sotomayor further noted that, "a long tradition of independence [has been] enjoyed by financial regulators, including

[129] *Id.* at 1784.
[130] *Id.* at 1800 (Kagan, J., concurring) (quoting *Seila Law*, 140 S. Ct. at 2226 (Kagan, J., dissenting)).
[131] *Id.* at 1801 (Kagan, J., concurring). The opinion of the majority makes any single headed agency subject to unrestrained executive removal, something its earlier precedent did not assert. *See id.* at 1802.
[132] *See id.* at 1804 (Sotomayor, J., dissenting).
[133] *See id.* at 1803–04 (Sotomayor, J., dissenting).

the Comptroller of the Treasury, the Second Bank of the United States, the Federal Reserve Board, the Securities and Exchange Commission, the Commodity Futures Trading Commission and the Federal Deposit Insurance Corporation."[134]

CONCLUSION

Thus, there is scant support for the entire case line recognizing the "unitary executive." And that support depends upon a single case, *Myers*, which was itself decided by the vote of a former president who clearly supported additional presidential power. Dissents by the great dissenters, Justices Holmes and Brandeis, and the dissent by Justice McReynolds are simply ignored.[135] As Robert Post states "[i]t is plain, therefore, that Taft did not approach the *Myers* case as a blank slate. He held definite and strong preconceptions about presidential removal power, which he viewed 'through executive colored glasses.' He would bring to *Myers* the entire weight of his considerable presidential experience."[136]

Not a single governor had unlimited power to remove state officials at the time of the drafting of the United States Constitution. It is, in the end, ahistorical to posit the framers intended such power would be vested in the executive.[137] The people, through Congress, not the president as a King surrogate, had ultimate power.[138]

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[134] *See id.* at 1807.

[135] *See Seila Law*, 140 S. Ct. at 2190 (explaining "this Court has already discounted the founding-era statements cited by amicus in light of their context.").

[136] *See* Robert Post, *Tension in the Unitary Executive: How Taft Constructed the Epochal Opinion of Myers v. United States*, J. SUP. CT. HIST. (forthcoming 2020).

[137] *See* Myers v. United States, 272 U.S. 52, 78 (1926).

[138] *See* Jed Handelsman Shugermen, *The Decisions of 1789 Were Anti-Unitary: An Originalism Cautionary Tale*, FORDHAM L. LEGAL STUD. RSCH. PAPER SERIES (2020).