

New Light on the Decision of 1789

By Saikrishna Prakash*

Abstract

In the Constitution's earliest days, members of the House engaged in one of the nation's most momentous constitutional debates. While deliberating on the Department of Foreign Affairs bill, representatives considered the mechanisms for removing executive officers. The final Act conveyed no removal authority but discussed what would happen when the president removed the Secretary of Foreign Affairs. The traditional view of the Decision, voiced by James Madison, Alexander Hamilton, and William Howard Taft, is that because the Act conveyed no removal authority and laid out what would happen when the president removed, the Act presumed that the president had a preexisting constitutional power to remove executive officers. But there has long been a revisionist view that the Decision did not decide any constitutional question, certainly not in any definitive way. Citing a split in the House majority on a crucial amendment, Louis Brandeis, Edward Corwin, and others have claimed that the majority coalition that voted for the Foreign Affairs Act was deeply divided on constitutional principles. In particular, revisionists have asserted that about half of the majority that approved the Foreign Affairs bill rejected the view that the Constitution granted the president a removal power. Using evidence recently made accessible, this article argues that the traditional reading of the Decision is the correct one. A majority in the House and the Senate concluded that the Constitution's grant of executive power enabled the president to remove executive officers. Moreover, on two subsequent departmental bills, majorities in the House and the Senate voted to reaffirm the view that the executive power granted the president a removal power. The Decision of 1789 thus stands as the first significant legislative construction of the Constitution and as an exemplary episode when Congress approached its constitutional obligations with sophistication, sincerity, and deliberation.

* Herzog Professor of Law, University of San Diego. 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.

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America's most famous constitutional law decisions—cases like *Marbury*, *Brown*, and *Roe*—were all decided by judges. Judicial decisions virtually monopolize constitutional law casebooks and, one supposes, classroom discussions. Given the content of casebooks and classroom discourse, the unwary student might wrongly infer that determining the Constitution's meaning involves little more than discerning what judges have said about it and that other institutions inevitably look to the courts, never making their own constitutional decisions.

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 Obviously, one could cite many more examples.

Perhaps one of the most significant and yet unfamiliar and murky 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 exhaustive, erudite, and edifying constitutional debates. While discussing the Department of Foreign Affairs bill, representatives discussed how executive officers could be removed from office. Some representatives claimed that the grant of executive power vested the president with a power to remove executive 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 claimed that since the Constitution did not expressly grant removal authority, Congress could vest a removal power with the president (the "congressional delegation theory"); and finally, a handful of

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¹ See *The Kentucky and Virginia Resolves in 5 THE FOUNDERS' CONSTITUTION* 131-36 (Phillip B. Kurland and Ralph Lerner eds., 1987).

² See DANIEL FARBER, *LINCOLN'S CONSTITUTION* 146-147, 170 (2003).

³ See Exec. Order 10,340, 16 Fed. Reg. 1407 (1952).

⁴ Apparently, this appellation for the 1789 decision of Congress regarding the removability of the Secretary of Foreign Affairs has been used at least since 1835. See *Myers v. United States*, 272 U.S. 52, 151 (1926) (quoting Daniel Webster's speech of February, 1835).

representatives asserted that impeachment was the only permissible means of removing any officer of the United States (the “impeachment theory”). Even at the time, members noted how important the issue was and that it would set a precedent for future cases.⁵

At the end of a debate that spanned over a month, Congress enacted nearly identical text in three departmental acts.⁶ None of these acts conferred a removal power upon the president.⁷ Rather, each discussed who would have custody of departmental papers when the president removed a secretary.⁸ In the minds of many at the time and since, the bills’ discussion of who would have custody of departmental papers upon presidential removal of a secretary implied that the first Congress believed that the Constitution granted the president a removal power.

Indeed, advocates of broad presidential power have consistently cited the Decision of 1789 as revealing that the first Congress decided that the Constitution’s grant of executive power empowered the president to remove executive officers. Alexander Hamilton, writing as Pacificus in 1793, had no doubts that the first Congress had endorsed the executive power theory.⁹ 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.¹⁰ William Howard Taft, the only Chief Justice to also have served as Chief Executive, likewise read the Decision of 1789 in his comprehensive majority opinion in *Myers v. United States*.¹¹

Conversely, an impressive array of judges and scholars has long denied that there really was a Decision of 1789, at least as Hamilton, Marshall, and Taft described it.

⁵ See, e.g., 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, 921 (1992) (comments of James Madison) (noting that he felt “the importance of the question, and know that our decision will involve the decision of all similar cases”).

⁶ Compare An Act for Establishing an Executive Department, to be denominated the Department of Foreign Affairs, 1 Stat. 28, 29 § 2 (1789) (providing that the chief Clerk would have custody of all departmental papers “whenever the principal Officer shall be removed from Office by the President of the United States”) with An Act to Establish the Treasury Department, 1 Stat. 65, 67 § 7 (1789) (providing that 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”) with An Act to Establish an Executive Department, to be Denominated the Department of War, 1 Stat. 49, 50 § 2 (1789) (providing that inferior officer could have custody of all departmental papers “whenever the said principal officer shall be removed from Office by the President of the United States”).

⁷ See *supra* note 5.

⁸ See *supra* note 5.

⁹ Pacificus No. 1, reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON 33-43 (Harold C. Syrett ed., 1969).

¹⁰ JOHN MARSHALL, 5 THE LIFE OF GEORGE WASHINGTON 200 (1807).

¹¹ *Myers v. United States*, 272 U.S. 52, 115 (1926).

Dissenting in *Myers*, Justice Louis Brandeis emphatically claimed that the “facts of the record” do not warrant the conclusion that a House majority supported the executive power theory.¹² The final text of the Foreign Affairs Act that implied a constitutional removal power “was due to a strategy of dividing the opposition and not to unanimity of constitutional conceptions,” Brandeis insisted.¹³ In the aftermath of *Myers*, the renowned constitutional scholar Edward Corwin built upon Brandeis’ assertions. Corwin claimed that less than a third of the House actually favored the view that the president had a constitutional removal power.¹⁴ More recently, well respected scholar David Currie made a similar claim.¹⁵ 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.”¹⁶

As evidence for their claims, both Corwin and Currie cited a revealing vote on a crucial amendment offered in the House.¹⁷ Though a majority of the House ultimately voted for the final bill, this majority coalition first split on the key amendment.¹⁸ The amendment sought to strike out a provision that the Secretary of Foreign Affairs was “to be removable from office by the president of the United States.”¹⁹ The amendment’s sponsor, Representative Egbert Benson of New York, believed that a House majority actually favored the executive power theory. Because the provision could be read as a grant of removal authority and thus an endorsement of the congressional delegation theory, Benson claimed that the House ought to delete it.²⁰ Some of those who ultimately voted for the House bill, such as James Madison, first voted for Benson’s crucial

¹² *Myers*, 272 U.S. 285 n.75 (Brandeis, J., dissenting). Somewhat contradictorily, 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.

¹³ *Id.* at 285 n.75. As Brandeis points out, he was not the first to deny that there was majority House support for the executive power theory. Brandeis notes that Justice Samuel Lockwood, of the Illinois Supreme Court, made the argument in 1839. *See id.* at 285 n.74 (*citing* *Field v. People*, 3 Ill. 79, 162-173 (1839)). Brandeis also cites Senator George F. Edmunds as making the same claim during the impeachment of Andrew Jackson. *See id.* at 285 n.74 (*citing* 3 *IMPEACHMENT OF ANDREW JOHNSON* 84).

¹⁴ 1 EDWARD CORWIN, *CORWIN ON THE CONSTITUTION* 332 (Richard Loss ed., 1981).

¹⁵ DAVID CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1890*, 41 (U. of Chicago Press, 1997).

¹⁶ *Id.* at 41. Relying upon the works of Corwin and Currie, other scholars have recently reiterated the claim that the executive power theory lacked majority support in the House. *See* Curtis Bradley & Martin Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 *MICH. L. REV.* 545, 662-63 (2004).

¹⁷ *Id.* at 41 n.240; Corwin, *supra* note 13, at 331 n.22.

¹⁸ To see how representatives voted on Benson’s crucial amendment and the House bill, *see infra* Appendix I.

¹⁹ 11 *DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791*, at 1028 (Charlene Bangs Bickford et al. eds., 1992).

²⁰ *Id.*

amendment to delete this provision. By voting to delete text that might be read as endorsing the congressional delegation theory, such representatives revealed their desire for a House bill that endorsed the executive power theory. These were true executive power partisans, said Corwin.²¹

Other representatives who eventually voted for the House bill first voted *against* Benson's amendment.²² Corwin concluded that these members must have desired a bill that endorsed the congressional delegation theory because they voted to retain text that could be read as delegating removal power to the president.²³ In other words, those who voted for the final bill but against Benson's amendment must have been congressional delegation partisans. By dividing on Benson's amendment, the majority that eventually approved the House bill supposedly revealed that it was divided, almost equally, between executive power and congressional delegation proponents.²⁴

These detailed critiques seemed to utterly devastate Chief Justice Taft's claims about the meaning of the Decision of 1789. If Brandeis and Corwin are right, no majority ever regarded the Constitution as granting a presidential removal power. Instead, there was a majority united on the text of the Foreign Affairs bill, but evenly divided as to constitutional principle. The revisionists depict the Decision of 1789 something of a "Non-Decision," insofar as the Constitution's meaning is concerned.

Using materials only recently made accessible by the scholars at the First Federal Congress project,²⁵ this article argues that Chief Justice Taft was right all along. Taft's critics have regarded shifting majority coalitions and a split on a particular amendment as evidence that there was no majority in favor of any constitutional principle.²⁶ His critics are wrong. In passing three departmental acts that assumed the president enjoyed a preexisting removal power, majorities in the House and Senate affirmed the executive power theory on three separate occasions. Members of Congress understood that votes in

²¹ Corwin, *supra* note 13, at 331 n.22.

²² See *infra* Appendix I.

²³ Corwin, *supra* note 13, at 331 n.22.

²⁴ *Id.*

²⁵ The First Federal Congress Project has produced 17 volumes of THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791 (Various eds., 1972-2004) [hereinafter DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS]. The materials relating to the Decision of 1789 are scattered throughout these volumes, but some of the most revealing material (congressional correspondence) was published only in 2004.

The best existing treatments of the Decision of 1789 are to be found in Edward Corwin, CORWIN ON THE CONSTITUTION 317-71 (Richard Loss ed., 1981); James Hart, THE AMERICAN PRESIDENCY IN ACTION 1789, at 155-89 (1948); Charles C. Thach, THE CREATION OF THE AMERICAN PRESIDENCY, 1776-1789, at 140-65 (1922); and David Currie, *supra* note 14, at 36-41. Of course, the various opinions in *Myers*, also discuss the Decision of 1789. See *Myers v. United States*, 272 U.S. 52 (1926).

²⁶ See *supra* notes 16-20 and accompanying text.

favor of the acts were votes favoring the executive power theory. Moreover, in the aftermath of three votes, members of Congress and newspaper accounts described the House and Senate votes on the Foreign Affairs bill and the subsequent departmental bills as an endorsement of the theory that the Constitution granted the president a removal power.

Part I of this article sketches a timeline across all three departmental acts and acquaints the reader with the various removal positions. Part II attempts to answer two mysteries never adequately resolved (much less addressed) by either Taft or his critics. If all the representatives who voted for the House Foreign Affairs bill were true executive power partisans, as Taft and others have assumed, why did a sizable number of these same members first vote against Benson's amendment (*i.e.*, vote to retain text understood by some as granting the president a removal power)? In other words, why would supposed executive power partisans vote to retain text that could be read as endorsing the congressional delegation theory? Neither Taft nor anyone else has ever explained this conundrum.

Taft's detractors have their own mystery to solve. Why did supposed congressional delegation partisans vote for three acts that assumed that the president had a pre-existing removal authority? If such representatives truly rejected the executive power theory (as evidenced by their vote on Benson's crucial amendment) their votes to approve the three bills is confounding. After all, these representatives voted for bills that assumed that the president had a constitutional removal power, when they supposedly believed he had none. If they truly opposed the executive power theory, their votes for these bills was akin to voting for three bills each of which spelled out what would happen when the president removed a federal judge. No sensible Representative could ever vote for a bill that wrongly assumed that the president may remove Article III judges. 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.

After posing solutions to these related mysteries, this article ends 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 non-executive officers, such as the Commissioners of the Securities and Exchange Commission? Moreover, what does the Decision of 1789 mean for whether Congress has the right to constrain the president's constitutional right of removal? 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. To begin with, there is a burgeoning "departmentalist" perspective asserting that divining the

Constitution's meaning is not the peculiar province of the courts—that the other branches have an equal role in divining the Constitution's meaning.²⁷ The Decision stands as perhaps the first meaningful instantiation of the departmentalist theory. Well before judges began regularly interpreting the Constitution, members of Congress engaged in an impressive and learned debate about the constitution's meaning. If one is a departmentalist or has sympathies for departmentalism, one should not overlook perhaps the first major post-ratification debate about the Constitution's meaning.

Even those who look only to the judiciary to establish the Constitution's meaning have reason to consider these debates. The Supreme Court has indicated that early constitutional interpretations, including the Decision of 1789, are “weighty evidence” of the Constitution's true meaning.²⁸ Indeed, *Myers v. United States* and *Bowsher v. Synar*²⁹ have asserted that the Decision helps prove the correctness of the executive power theory. If Justices Brandeis and Corwin are correct, however, the Court has drawn the wrong conclusions from the Decision of 1789.³⁰

Finally, the Decision of 1789 belies those who suppose that constitutional decisions rendered by the political branches must be inferior to those rendered by the courts. The earnestness and erudition with which members of the House debated the question of removal confirms that elected politicians are capable of staying true to their constitutional oaths and need not be consumed by the desire to get reelected. For those who want members of Congress to take their constitutional responsibilities seriously,³¹ and for those who want to take the Constitution away from the Courts in order to leave it

²⁷ For a review of the departmentalist literature, see Dawn E. Johnson, *Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROB. 105 (2004). The scholar most responsible for reviving departmentalism was Michael Stokes Paulsen. See *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994). Since Paulsen's article, others have defended departmentalism, although usually a less extreme strain of it. See, e.g., Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1270 (1996).

²⁸ See *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986) (quoting *Marsh v. Chambers*, 463 U.S. 783, 789 (1983)). In *Wisconsin v. Pelican Ins. Co.*, the Court said 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 its true meaning.” See 127 U.S. 265, 297 (1888).

²⁹ 478 U.S. 714 (1986).

³⁰ 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 (1855); *Ex parte Hennen*, 38 U.S. 230 (1839).

³¹ See Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L. J. 1277 (2001).

with the political branches,³² the Decision of 1789 is an exemplar of congressional constitutional deliberation.

I. THE CREATION OF THE THREE GREAT DEPARTMENTS

The Articles of Confederation lacked an independent executive branch of government.³³ No separate Chief Executive or Executive Council superintended foreign affairs and war powers; nor did any direct the execution of federal law. Instead, from 1776 onwards, the Continental Congress enjoyed the executive power over foreign affairs, war, and law execution.³⁴ In 1780-81, Congress abandoned its unworkable practice of using internal congressional committees to handle these tasks and created executive Departments of Foreign Affairs, War, and Treasury.³⁵ Because these departments helped implement Congress' executive powers, they were completely under congressional control.³⁶

With the Constitution's enactment, these departments became obsolete. It no longer made sense to treat these departments as if they helped exercise congressional powers. Under the Constitution, the president had many of the executive powers formerly lodged with Congress. While Congress could continue to prescribe various duties for these officers, the Constitution required that these executive officers serve under the new Chief Executive's control.³⁷ Hence new departments were 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."³⁸ Boudinot said that the previous departments no longer existed in the eyes of the law and even if they were extant, they were inappropriate models under the Constitution.³⁹ Though Boudinot wanted to begin consideration of a Treasury

³² See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

³³ See Saikrishna Prakash and Michael Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 *Minn. L. Rev.* ____ (2005) (forthcoming).

³⁴ See Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 *U. ILL. L. REV.* 701, 764-768; Saikrishna Prakash and Michael Ramsey, *The Executive Power over Foreign Affairs*, 111 *YALE L. J.* 231, 272-78 (2001).

³⁵ See *Essential Meaning of Executive Power*, *supra* note 33, at 766.

³⁶ *Id.* at 766-67.

³⁷ See *id.* at 790-93; *The Executive Power over Foreign Affairs*, *supra* note 33, at 298-302.

³⁸ 10 *DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS*, *supra* note 24, at 718.

³⁹ *Id.*

Department, James Madison thought it best to first decide the number of departments.⁴⁰ Madison moved that there should be three departments, each with a Secretary to be appointed by the president, with the Senate's advice and consent, but to be removable by the president alone.⁴¹

Immediately, William Smith of South Carolina objected that the appointments provision could be read as granting an appointment power. The Constitution already established that the president could appoint Secretaries with the Senate's advice and consent, noted Smith.⁴² After Madison declared that he was not wedded to the appointments language,⁴³ the Committee struck the appointments provision from Madison's motion.⁴⁴

Immediately thereafter, some members objected to the removal provision, some contending that impeachment was the only constitutional means of removal and others arguing that the Senate had a constitutional right to participate in both the appointment and removal of officers.⁴⁵ A member of this latter group, Theoderick Bland of Virginia, moved to add that removals would be "by and with the advice and consent of the senate."⁴⁶ Bland's motion failed.⁴⁷ By a "considerable majority," the Committee of the Whole approved Madison's resolution, including his removal provision.⁴⁸

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 Neas.⁴⁹ The House then created a committee of eleven members to draft bills consistent with the resolution.⁵⁰ This committee reported two departmental bills on June 2 and one more on June 4.⁵¹

But the removal controversy was not to be resolved with just one day's debate. On June 16, the Committee of the Whole took up the bill to establish the Department of Foreign Affairs.⁵² Immediately, Alexander White of Virginia moved to delete the removal

⁴⁰ 10 *id.* at 720 (Charlene Bangs Bickford et al. eds., 1992).

⁴¹ *Id.*

⁴² 10 *id.* at 726.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 10 *id.* at 727-39 (comments of Representatives Smith, Bland, Jackson, White, Silvester, Gerry).

⁴⁶ 10 *id.* at 738.

⁴⁷ *Id.*

⁴⁸ 10 *id.* at 740.

⁴⁹ 3 *id.* at 68-69.

⁵⁰ *Id.* at 68-69.

⁵¹ 3 *id.* at 79, 82.

⁵² 11 *id.* at 847.

provision which provided that the Secretary of Foreign Affairs was “to be removable from office by the president of the United States.”⁵³

For the next four days, members passionately and ably debated the constitutionality of the removal provision, with many members once again claiming that it was unconstitutional either because removal could be accomplished only upon an impeachment conviction in the Senate or that the Senate had a constitutional right to approve removals.⁵⁴ In the face of such arguments, on June 19 the Committee of the Whole, on a vote of 20 to 34, rejected a motion to delete the removal provision.⁵⁵ With such an exhaustive and spirited debate behind them, it seemed that the House had finally settled the removal question. The text providing that the Secretary was “to be removable by the president” would remain in the bill.

Once again, however, representatives could not resist reopening the removal question. On June 22nd, the House took up the Foreign Affairs bill and agreed to various amendments that had been proposed by the Committee of the Whole.⁵⁶ Shortly after taking up the amended bill which included the original removal language “to be removable by the president”, Representative Egbert Benson of New York proposed an amendment, “which he conceived more fully expressed the sense of the committee [of the Whole], as it respected the constitutionality of the decision which had taken place [on June 19th].”⁵⁷ Benson moved to modify language referring to the Chief Clerk having custody of departmental papers whenever there was a “vacancy” in the office of Secretary.⁵⁸ Instead of merely discussing vacancies, the new language would specifically mention presidential removal: the Chief Clerk would have custody of papers “whenever the said principal officer shall be removed by the president, or a vacancy in any other way shall happen.”⁵⁹ Benson also declared that if this first amendment succeeded, he then would move to strike out the bill’s text that provided that the Secretary was “to be removable by the president.” He thought that this latter text could be read to suggest that the Congress was somehow granting or delegating removal authority. According to Benson, this text ought to be deleted because a majority of the House actually endorsed the executive power theory.⁶⁰

⁵³ 11 *id.* at 842.

⁵⁴ See generally 11 *id.* at 842-1026.

⁵⁵ 11 *id.* at 1024.

⁵⁶ 11 *id.* at 1026.

⁵⁷ 11 *id.* at 1027.

⁵⁸ *Id.* Benson’s first amendment was to replace the following language: “in case of vacancy in the said office of secretary to the United States for the department of foreign affairs.” *Id.*

⁵⁹ *Id.*

⁶⁰ 11 *id.* at 1028.

With relatively little discussion, the House passed Benson's first amendment by a vote of 30 to 18.⁶¹ His second amendment generated more discussion, but passed by a vote of 31 to 19.⁶² As Appendix I makes clear, though the vote margins were similar, the majority coalitions were quite different.⁶³ Many members who had voted for Benson's first amendment, voted against his second. Nonetheless, because many members who voted against the first amendment switched their votes as well and voted for the second, Benson's second amendment passed. On June 24, the House approved the entire bill, including Benson's successful amendments, on a vote of 29 to 22.⁶⁴ As Appendix I reveals, this time the majority coalition closely resembled the majority that approved Benson's first amendment.⁶⁵

In mid-July, the Senate took up the bill. According to Pennsylvania Senator William Maclay, the Vice president broke a 10-10 tie to help reject a proposal to strike the entire reference to the president's power of removal.⁶⁶ Four days later on July 18, the Vice president broke another tie, this time 9-9, to reject a motion to strike out the "by the president" from the removal clause.⁶⁷ Had either of these motions passed, the Senate's bill would not have affirmed any constitutional theory of removal. After the House agreed to the Senate's unrelated amendments, the president signed the Foreign Affairs bill.⁶⁸ By not granting removal authority and by discussing what would happen when the president removed the Secretary, the Act assumed that the president had a preexisting constitutionally-based removal power.⁶⁹

Similar divisions emerged over the other departmental bills. Representative Egbert Benson moved an amendment to the House War Department bill similar "to that which had been obtained in the bill establishing the department of foreign affairs."⁷⁰ Benson's amendment passed 24 to 22.⁷¹ Before approving a War Department bill that included Benson's preferred removal text, the Senate voted 10-9 to reject a motion to delete the removal text.⁷² As with the Foreign Affairs Act, the War Department Act

⁶¹ 3 *id.* at 92.

⁶² 3 *id.* at 93.

⁶³ See *infra* Appendix I, columns 1 and 2.

⁶⁴ 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 24, at 95.

⁶⁵ See *infra* Appendix I, columns 1 and 3.

⁶⁶ 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 24, at 697, n.4.

⁶⁷ *Id.*

⁶⁸ 4 *id.* at 693.

⁶⁹ See 1 Stat. 28, 29, § 2 (discussing who would have custody of papers "whenever the said principal Officer shall be removed from Office by the President of the United States").

⁷⁰ 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 24, at 1044.

⁷¹ *Id.*

⁷² 6 *id.* at 2032.

discussed what would happen when the president removed the War Secretary,⁷³ thereby implying 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.⁷⁴ Page's motion passed without debate.⁷⁵ 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.⁷⁶

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.⁷⁷ Following "considerable debate," the House stood its ground and refused to accede to the Senate's amendment.⁷⁸ After the Senate insisted on its removal deletion, a conference committee accomplished little.⁷⁹ Madison reported that in the opinion of the House members of the conference committee, "it would not be right for the House to recede from their disagreement"⁸⁰, *i.e.*, it would be wrong for the House to agree to the deletion of the removal provision. Almost a month after first deleting the removal language, the Senate finally approved the House bill, with the Vice-president once again breaking a 10-10 tie.⁸¹ Paralleling its counterparts, the Treasury Act included language that discussed who would have custody of papers when the president removed the Secretary, thereby implying that the Constitution itself granted the president a removal power.⁸²

B. *Removal Theories*

This timeline omits one of the most fascinating parts of the Decision of 1789—the House debates about the constitutional mechanism for removal. Without simplifying too

⁷³ 6 *id.* at 2028.

⁷⁴ 11 *id.* at 1045. Specifically, Page moved to strike out bill language providing that the Secretary would "be removable at the pleasure of the President." *Id.*

⁷⁵ *Id.*

⁷⁶ 6 *id.* at 1985.

⁷⁷ 6 *id.* at 1985 n.9. But see 11 *id.* at 1174 (suggesting that Senate made two amendments to section 7, deleting the removal language and providing that the Assistant to the Treasury Secretary ought to be appointed by the Secretary).

⁷⁸ 11 *id.* at 1174.

⁷⁹ 6 *id.* at 1279.

⁸⁰ 11 *id.* at 1324.

⁸¹ 6 *id.* at 1979-80.

⁸² 6 *id.* at 1985. Compare section 1 of the original House bill, which noted that the Secretary served 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 6 *id.* at 1980, 1985.

much, representatives voiced four claims: 1) Impeachment was the only means of removal (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 such power to the president (the congressional delegation theory); 4) The Constitution's grant of executive power enabled the president to remove executive officers (the executive power theory).

Though there were four principal theories, there were not four static camps. The situation was more fluid. Some members straddled positions, sometimes expressing one view and other times another. James Madison declared that he had changed his mind about the constitutional method of removal.⁸³

1. *The Impeachment Theory*

This theory had the fewest adherents, no more than two or three Representatives.⁸⁴ Its foremost (and tireless) proponent, William Smith of South Carolina, played the *expressio unius est exclusio alterius* card: since the Constitution expressly provided for removal through impeachment, this was the only means of removing superior (non-inferior) officers.⁸⁵ Relying upon English conceptions, Smith seemed to believe that officers had a property interest in their offices.⁸⁶ This meant that they could not be deprived of their offices/property except when they had committed some malfeasance.

However, Smith asserted that Congress could set terms of office for superior officers, thus periodically culling out the incompetent and infirm.⁸⁷ Moreover, Smith claimed that because Congress could vest the appointment of inferior officers with the president, the Heads of Departments, or Judges, Congress could vest removal power over the inferior offices.⁸⁸ Evidently, Smith thought that Congress could take some measures to reduce the property value of offices.

⁸³ See 11 *id.* at 846 (Madison noting his "original impression" that the advice and consent theory was correct). Earlier, Madison seemingly had endorsed the congressional delegation theory. See 10 *id.* at 730 (saying that Congress could establish whether offices are held during good behavior or pleasure).

⁸⁴ See Corwin, *supra* note 13, at 331-32, n. 22.

⁸⁵ See 11 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 24, at 843, 850.

⁸⁶ See 11 *id.* at 936.

⁸⁷ See 11 *id.* at 934.

⁸⁸ See 11 *id.* at 988.

Smith's position had its 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 had a similar tenure?⁸⁹ Arguably, the Constitution specified judicial tenure during good behavior precisely because it was an exception to a general rule that other officers did not have tenure during good behavior and could be removed.⁹⁰ Moreover, Smith's theory, if accepted, also would have led to the splintering and distribution of the president's executive power, as it would have been difficult for a new president to deal with holdover secretaries who could not be removed save through impeachment. Still, Smith's position had its attractions: it was relatively uncomplicated.

2. *The Advice and Consent Theory*

A half dozen or so Representatives spoke up in favor of the theory that the Senate's concurrence was necessary to remove.⁹¹ Adherents of this theory clearly rejected the notion that executive officers served during good behavior. Instead these members claimed that the power to appoint, jointly vested in the president and Senate, implied a parallel power to remove. Since the Senate had to approve appointments, it had to consent to removals as well.⁹² Others viewed the Senate as an executive council, charged with participating in every question relating to treaties and federal officers.⁹³ Perhaps the president could suspend an officer until the Senate acted on, one way or another, the president's removal request.⁹⁴

Proponents of the executive power theory tried to turn the appointment argument against proponents of the advice and consent theory. Even if it were true that the entity appointing necessarily enjoyed an implied removal power, that logic did not mean that the Senate had to consent to presidential removal. Some executive power proponents claimed that the Senate formally did not participate in the appointment. While the Senate's consent was necessary to appoint, the president actually appointed persons to offices.⁹⁵ Hence if the appointing power necessarily enjoyed an implied removal power, the president had sole possession of removal power because he alone appointed.

⁸⁹ See 11 *id.* at 731. 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. Even with a term of office, however, Smith's theory contemplated removal only by impeachment.

⁹⁰ *Id.*

⁹¹ Corwin claims that seven spoke in favor of the advice and consent theory. See Corwin, *supra* note 13, at 331-32, n. 22.

⁹² See, e.g., 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 24, at 842, 899, 901-02.

⁹³ 11 *id.* at 894.

⁹⁴ 10 *id.* at 872-73, 11 *Id.* at 930.

⁹⁵ 11 *id.* at 887.

Opponents of the advice and consent theory made a number of other claims. Some rejected the “rule” that he who appoints may remove, arguing that removal authority ought to be regarded as vested with the person responsible for the officer, namely the president.⁹⁶ Others claimed that the Senate’s impeachment role implied that it had no other removal role. Indeed, if the Senate refused to remove after the president sought removal, it would be awkward should the House later impeach the same officers, for the Senate would have “prejudged” the case and refuse to impeach the officers.⁹⁷ Executive power proponents also argued that the Senate’s executive functions were limited to advising and consenting on treatymaking and appointments. The Constitution did not make the Senate an all-purpose executive council, with a check on all of the president’s executive functions.⁹⁸ One of the most powerful objections was that a Senate removal role would render the executive a two-headed monster and “reduce the president to a mere vapor.”⁹⁹ Officers would curry favor with Senators and thereby secure their permanence.

As discussed earlier, the Committee of the Whole rejected an amendment to provide that removals of the Secretary of Foreign Affairs could occur only with the Senate’s advice and consent.¹⁰⁰ Moreover, the final bill—because it assumed unilateral presidential removal authority—clearly rejected the idea “that the two clauses allowing senatorial participation in executive matters constituted the Senate a permanent executive council.”¹⁰¹ While this theory had the one time support of Publius,¹⁰² it could not muster majority support in the House.

⁹⁶ 11 *id.* at 870.

⁹⁷ 11 *id.* at 874-75.

⁹⁸ 11 *id.* at 846.

⁹⁹ 11 *id.* at 867.

¹⁰⁰ 11 *id.* at 1024.

¹⁰¹ Charles Thach, *THE CREATION OF THE AMERICAN PRESIDENCY, 1776-1789* (1969).

¹⁰² See *THE FEDERALIST NO. 77* (Alexander Hamilton) (“the consent of that body [“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 of William Smith to Edward Rutledge, (June 21, 1789) in *16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS*, *supra* note 24, at 832 (William Smith of South Carolina noting that Egbert Benson had sent him a note indicating 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 President alone should have the power of removal at pleasure”) (emphasis in original).

3. *The Congressional Delegation Theory*

This theory had its able champions who voiced the theory's two simple propositions: the Constitution did not grant a removal power and Congress could remedy this shortcoming by delegating removal authority. Because the Constitution implied that most offices (other than a handful such as the president and the Vice-president) would be created by law, Congress could specify the terms and conditions of such offices, including authorizing removal.¹⁰³ The Necessary and Proper Clause not only authorized office creation, it also sanctioned the grant of removal authority.¹⁰⁴

Most of this theory's supporters favored delegating removal power to the president.¹⁰⁵ Some representatives argued that the Constitution's overall structure of presidential responsibility for law execution, foreign affairs, and the conduct of wars argued in favor of granting the president a removal power.¹⁰⁶ 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 fulfill. "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."¹⁰⁷

Though Madison began as a partisan of the congressional delegation theory, he eventually came to denounce it.¹⁰⁸ He and others were wary of the theory's implications.¹⁰⁹ If Congress could delegate removal authority wherever and however it saw fit, Congress could delegate removal power to someone else other than the president.¹¹⁰ Congress might even elect not to delegate removal authority at all.¹¹¹ 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, and not the president, would be the real Chief Executive.

Detecting the congressional delegation theory's level of support is tricky. A handful of representatives spoke in its favor at various times.¹¹² But some of these also

¹⁰³ See 11 *id.* at 888, 959.

¹⁰⁴ See 11 *id.* at 1009.

¹⁰⁵ Thach, *supra* note 24.

¹⁰⁶ See, e.g., 11 *id.* at 960.

¹⁰⁷ 11 *id.* at 964.

¹⁰⁸ 11 *id.* at 846.

¹⁰⁹ 11 *id.* at 895.

¹¹⁰ *Id.*

¹¹¹ 11 *id.* at 921.

¹¹² Corwin claims that seven spoke in its favor. See Corwin, *supra* note 13, at 331 n.22.

made statements that sounded like arguments in favor of the executive power view, making them impossible to pigeonhole.¹¹³ Moreover, given the fluidity of positions, others may have trod the same path as Madison and ultimately rejected the congressional delegation theory.

Based on inferences, some scholars have maintained that this group was relatively large, 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 that could be read as a grant or delegation of removal authority, went on to vote for the bill containing the final removal language.¹¹⁴ Corwin and others have claimed that such Representatives wanted to keep language implying delegation precisely because they were congressional delegation partisans.¹¹⁵ Based on a combination of recorded speeches and voting patterns, Corwin claimed that this group was composed of some sixteen members, with seven vocal members and nine silent ones.¹¹⁶

4. *The Executive Power Theory*

The adherents of this theory claimed that because the Constitution granted the president the executive power and because removal was an executive power, the president had a constitutional right to remove. Madison, with the zeal of a convert, claimed that the “constitution affirms that the executive power shall be vested in the president.”¹¹⁷ Because the Constitution created some exceptions to the executive power (such as the Senate’s participation in appointments), Madison concluded that Congress could create no other exceptions. In his words, the “Legislature has no right to diminish or modify his executive authority.”¹¹⁸ Because the Constitution had clearly granted the president the “executive power” and because Congress could not modify this executive power, the question was a simple one:

¹¹³ For instance, Corwin claims that Representative John Laurance and favored the congressional delegation theory. *See id.* But Laurance, it turns out, also said things favoring the executive power theory. *See, e.g., 11 id.* at 908.

¹¹⁴ *See supra* notes and text.

¹¹⁵ Currie, *supra* note 14, at 41 n.240; Corwin, *supra* note 13, at 331 n.22. As discussed later, I think there are far better explanations of their voting patterns.

¹¹⁶ *See* Corwin, *supra* note 13, at 331 n.22 (claiming that congressional delegation faction had seven vocal members and nine silent members). Currie has the same figure. *See* Currie, *supra* note 14, at 41 n.240.

¹¹⁷ 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 24, at 868.

¹¹⁸ 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 24, at 868.

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 controlling those who execute the laws.

Others echoed Madison's claims, such as Fisher Ames of Massachusetts¹¹⁹ and John Vining of Delaware.¹²⁰

Voicing arguments that still reverberate today, opponents of the executive power theory made several claims: 1) the vesting of executive power did not convey any independent power, merely vesting the specific powers mention in the remainder of Article II¹²¹; 2) reading the vesting clause as if it vested power would make the remainder of Article II superfluous¹²²; 3) even if the vesting clause was a general grant, removal was not an executive power, at least if the state constitutions were to be consulted as a guide¹²³; 4) arguments about a substantive grant of executive power were better suited for European, monarchical countries¹²⁴; and 5) that if the president had the removal power he could toss aside incumbents willy-nilly, thereby depriving them of their "constitutional rights" to their offices.

As noted earlier, some executive power partisans were unsatisfied with merely securing language that ensured a presidential removal power over the Secretary.¹²⁵ These representatives wanted to make it clear that there was a House majority not merely favoring a presidential removal power, but a majority behind the more precise proposition that the Constitution itself granted the president a removal authority.¹²⁶ Hence Representative Egbert Benson proposed his two amendments. Just days after the majority coalition had fended off remarkably persistent attempts to delete the original bill's

¹¹⁹ 11 *id.* at 850, 880.

¹²⁰ 10 *id.* at 728. Although there were representatives who thought the constitution granted the president a removal power who 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 merely tried to undermine the arguments of advice and consent partisans who argued that the Senate must have a role in removal. Such representatives argued that if it was true that 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, they did not actually participate in the act of appointing. See *supra* note 95 and accompanying text. Hence rather than discussing a broader "presidential theory" that encompasses members who supposed the president had a constitutionally granted removal power but differed on the constitutional basis of such power, the article discusses the executive power theory because this theory was clearly and repeatedly advanced as the reason why the Constitution granted the president a removal power.

¹²¹ 11 *id.* at 937.

¹²² *Id.*

¹²³ 11 *id.* at 877.

¹²⁴ 11 *id.* at 912.

¹²⁵ See 11 *id.* at 1028.

¹²⁶ *Id.*

provision that the Secretary could be “removed from office by the president,” Benson moved to strike this very language and add new language elsewhere that implied that the president had a constitutional right to remove. It had become clear in the debates that some read the original text as a grant of authority rather than a confirmation of constitutional authority.¹²⁷ According to Benson his amendments would more clearly convey the majority’s conclusion that the president had constitutional removal authority and therefore represent a legislative construction of the Constitution in favor the executive power theory.¹²⁸

Ironically, the votes on Benson’s two amendments and the final bill have not generated a clear consensus on the meaning of the Decision of 1789. In the minds of some scholars and judges, Benson’s amendments accomplished nothing, except perhaps to perpetuate the ambiguity. The next section explains that Benson’s amendments actually were a success because they generated a bill that clearly endorsed the executive power theory. In particular the next section explains why some members seemingly voted against the executive power theory, but then went on to vote for a Foreign Affairs bill that endorsed the executive power theory because the bill assumed the president had constitutional removal authority.

II. DEMYSTIFYING THE DECISION OF 1789

Two mysteries remain unsolved to this day. First, why did representatives who supposedly favored the executive power theory first vote to retain text that appeared to James Madison and Egbert Benson as a *delegation* of removal authority? For lack of a better description, we will call this group of 13 representatives—those who voted against Benson’s second amendment and for the House bill—the “enigmatic faction.”¹²⁹ Taft’s detractors, such as Brandeis and Corwin, contend that if Taft was right—if all members who voted for the final bill favored the executive power theory—members of the enigmatic faction ought to have voted for Benson’s second amendment (the amendment which would have deleted language that could be read as a grant of removal authority). Taft’s critics claim that by voting against this amendment and hence voting to retain the delegation language, members of the enigmatic faction effectively signaled their endorsement of the congressional delegation theory.¹³⁰ More importantly, because the 29

¹²⁷ 11 *id.* at 1029.

¹²⁸ 11 *id.* at 1028, 1029-30.

¹²⁹ As Appendix I makes clear, 13 representatives voted “no” on Benson’s second amendment and yes on the House bill. See *infra* Appendix I.

¹³⁰ See Corwin, *supra* note 13, at 331 n. 22. Brandeis says the same. See Myers, 272 U.S. 52, 285 n. 75 (Brandeis, J., dissenting), even though he also claims that the Decision did decide that the president had a constitutional power of removal. See *id.* at 284.

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.¹³¹ Corwin claimed that the executive power theory enjoyed the support of about sixteen members.¹³²

The second mystery also relates to the enigmatic faction. Why would members of the enigmatic faction—supposed congressional delegation partisans in the eyes of 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 that theory? Because the bill spoke of what would happen when the president removed the Secretary and never conveyed any authority, it seemed to very well imply that the president had some preexisting removal authority. Since the only source of such 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 voting for it. Brandeis and Corwin say nothing about this troubling feature of their claim about the enigmatic faction.¹³³

A. *Possible Solutions Considered and Rejected*

Neither Taft nor any of his supporters have ever responded to the serious challenge posed by Brandeis and Corwin.¹³⁴ This suggests either a failure to understand the challenge or an inability to develop an adequate response to a seemingly powerful critique. By the same token, Taft's critics seem unaware of the parallel difficulties with their account. Brandeis and Corwin focus on the votes on Benson's amendments without saying anything about the vote on the House bill itself.¹³⁵ Their curious silence also suggests a weakness in their reading. This subpart considers some possible solutions, each of which has its flaws.

Trying to solve these mysteries, a defender of 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. They sought to retain the

¹³¹ See *Id.* at 332; Currie, *supra* note 14, at 41. See also Myers, 272 U.S., at 285 n.75 (Brandeis, J., dissenting) (saying same).

¹³² Corwin, *supra* note 13, at 331 n. 22. See also Currie, *supra* note 14, at 41 n.240.

¹³³ See Corwin, *supra* note 13, at 331-332; Currie, *supra* note 14, at 41.

¹³⁴ In his opinion, 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. 52, 114. Presumably he meant the efforts of Brandeis. See *Id.* at 285 n. 75. Yet Taft does not directly respond to any of Brandeis' claims regarding the enigmatic faction.

¹³⁵ Myers, 272 U.S. at 284-86; Corwin, *supra* note 13, at 331-32.

congressional delegation language, but having lost that vote they decided to at least satisfy their policy preference 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 claim 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.¹³⁶ The bill merely said that when the president removed the Secretary, the Assistant Secretary would have custody of departmental papers.¹³⁷ Under this view, the bill's removal language was harmless, for it discussed an eventuality that was constitutionally impossible. Because the final bill really said nothing of consequence relating to removal, congressional delegation partisans could vote for it and not abandon their convictions.

Finally, some might suppose that congressional delegation partisans read the final House bill as somehow endorsing their theory. Once again, the bill did not expressly endorse the executive power theory. Nor did it expressly reject the congressional delegation theory. By discussing what would happen when the president removed the Secretary, perhaps the bill actually contained an implicit grant of removal authority from Congress, thus implicitly endorsing the congressional delegation theory.

None of these explanations are persuasive. First, almost all congressional delegation partisans wanted the president to enjoy a removal power. Yet such partisans logically could not satisfy their policy preference by voting for a bill that did not grant removal authority. If one wishes to ensure that the president enjoys a removal power and also firmly believes that the president lacks a removal power until Congress grants it, one does not ensure the existence of a presidential removal power by voting for a bill that assumes that the president had a preexisting removal power. It was impossible for pure congressional delegation partisans to believe that a vote for the House bill could satisfy their policy preference for presidential removal authority.

Second, it also seems rather unlikely that in the early months of Congress, with the Constitution's ratification so fresh in their memory and having recently taken the first Article VI required oaths in support of the Constitution,¹³⁸ that the congressional delegation partisans casually tossed aside their constitutional scruples merely to satisfy

¹³⁶ See 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 24, at 696-97.

¹³⁷ See 4 *id.* at 697 (discussing who would have custody of departmental papers "whenever the [Secretary] shall be removed from office by the President of the U.S.").

¹³⁸ See U.S. CONST. art. VI, § 3 ("The Senators and Representatives before mentioned . . . shall be bound by Oath or Affirmation, to support this Constitution").

their policy preferences for a president who could remove. 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 level of the debate and the sincerity of the members.¹³⁹

Third, it is extremely unlikely that congressional delegation partisans felt comfortable voting for the final bill because they regarded its removal language as serving no purpose. It is true that the final bill never expressly provided that Congress believed that the president had a preexisting constitutional removal power. Nonetheless, it seems farfetched to suppose that members of Congress knowingly voted for bills containing removal language that they regarded as dross, especially since a supermajority of the House clearly did not regard the language as empty or useless.¹⁴⁰ 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 the final bill 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 (and the eventual Acts) most naturally reads like they each assume that the president already had a removal power, even in the absence of any congressional statute. This is especially true when one considers the legislative debates that preceded the crafting of the final language. Moreover, the amendments which led to the eventual removal language were expressly proposed as an endorsement of the executive power theory and as a rejection of the congressional delegation theory. Third, there is no evidence that anyone 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. Lastly, the members of the enigmatic faction had voted to retain language that could be read as a delegation, suggesting that if they were congressional delegation partisans they understood that the

¹³⁹ Fisher Ames wrote that in the removal debate all held “a most sanguine belief of their creed.” Letter from Fisher Ames to George R. Minot, (July 9, 1789), at 16 *id.* 984. He went on to say that there was “little art” in the House. “If [a group] wish to carry a point, it is directly declared, and justified. Its merits and defets are plainly stated, not without sophistry and prejudice, but without management There is no intrigue, caucusing” *Id.* at 985.

¹⁴⁰ The executive power partisans clearly believed this language served a purpose, for they engineered the final removal language. Likewise, those who opposed the bill because of its removal language obviously did not believe this language was useless, else they would not have bothered opposing it.

bill that would result from Benson's two amendments repudiated the congressional delegation theory and would endorse the executive power theory.

Defenders of Taft's position might make more plausible claims. Taft's 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 final bill clearly contemplated a constitutional power of removal in the president's hands. What members had in their minds is of no significance. Or Taft's defenders might claim that Representatives who voted to retain the congressional delegation language were not firmly entrenched congressional delegation partisans but were open to the executive power theory. Their openness permitted them to become executive power supporters, of whatever intensity, by the time of the final vote. Such defenders might even cite Madison's change of heart.¹⁴¹

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 because we believe that these actors, being closer to the Constitution's creation, actually believed the readings they espoused. Saying that all that matters is the bill's text, 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 thirteen representatives changed their mind 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. Moreover, no one ever claimed that anyone's mind (other than Madison's) had been changed on the relative merits of these theories.

Perhaps a combination of these theories has some explanatory power. Maybe the votes of a few representatives can be explained on these grounds. Yet given the lack of evidence backing any of these explanations, it seems unlikely that any combination of these reasons helps demystify most or all of the votes of the enigmatic faction.

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

¹⁴¹ See 11 *id.* at 846.

B. *A Blindsided Majority Divided by Tactics, not Principles*

The best explanation for the supposedly inconsistent votes of the thirteen members of the enigmatic faction is that most (if not all) of them were not guilty of casting 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 legislative debates, newspaper summations of those 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 likely was not a vote against the executive power theory.

First, some executive power proponents voted against Benson's second amendment because they regarded the original language as a useful congressional "declaration" about the Constitution. Despite the arguments of Benson and Madison, some members clearly 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. Having participated in (or having witnessed) four days of debates on whether to retain the original removal language, some members of the executive power coalition recoiled at the idea of deleting the very language they fought so hard to preserve. This hypothesis also explains why opponents of the executive power grant theory actually joined Madison, Benson, and others to remove the bill's original removal language. Having fought to remove the original removal text once in May and once again in June, they took pleasure in seizing an opportunity to delete it, even if its removal was in the service of a subset of executive power partisans.

Third, some representatives likely thought that voting to delete the removal language seemed like a concession. 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 needed the majority, delighting in the notion that the majority had somehow conceded a substantial point.

Fourth, some representatives might have feared that removing the original removal language might split the majority. Even if they did not regard Benson's second amendment as a capitulation, they had to be aware that others might so regard it. Representatives who viewed Benson's second amendment as a defeat might go onto vote against any final bill that included the amendment and thereby doom the final bill.

Finally, some representatives may have favored both the executive power theory *and* the congressional delegation theory. Brandeis and Corwin assumed that if some member favored the congressional delegation theory, they could not also have favored the executive power theory. But some members might have thought that if the executive power theory was wrong—if a court (or a president for that matter) concluded that the Constitution did not grant removal authority—the original bill language could be read as a delegation of removal authority. Hence some executive power partisans might have wanted to retain text that could be read as 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 real difficulty voting for the House bill. The enigmatic faction consisted of executive power partisans who favored different tactics than did the Benson/Madison faction. While the House bill lacked the original removal language that many of these representatives clearly preferred, it still confirmed, albeit 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 Representative Egbert Benson, reacting to the claim that the majority favoring removal consisted of two clashing factions,¹⁴² had proposed two amendments. Hoping to clarify the Decision of 1789 for posterity, Benson's amendments were meant to make it clear that the executive power theory enjoyed an outright majority. The initial removal language "appeared somewhat a grant. Now, the mode he took would evade that point, and establish a legislative construction of the constitution."¹⁴³ Benson thought that if Congress enacted the original language that might make removal "subject[] to legislative instability,"¹⁴⁴ presumably

¹⁴² See, e.g., 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 24, at 849

¹⁴³ 11 *id.* at 1028. 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 CONGRESS 373 (Gales & Seaton eds.). That resolution provided that the Secretary was "to be removable by the President." 1 *id.* at 371.

¹⁴⁴ 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 24, at 1030.

because subsequent Congresses might conclude that the first Congress had granted the president a removal power. Benson's two amendments, he believed, "more fully express the sense of the committee [of the whole], as it respected the constitutionality of the decision which had taken place."¹⁴⁵

James Madison agreed with Benson's motion and sentiments. The bill's language relating to removal could be viewed as a grant.¹⁴⁶ Madison "wished every thing like ambiguity expunged, and the sense of the house explicitly declared." 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."¹⁴⁷ Madison also claimed that the original bill text was unnecessary because the first amendment "fully contains the sense of this house upon the doctrine of the constitution."¹⁴⁸ Consistent with Benson and Madison's claims, the *Gazette of the United States* reported that the "principal reason assigned for striking out" was that the original language "appears to be a grant of power; whereas it was presumed to be the sense of the committee [of the Whole], that the power was vested in the president by the Constitution."¹⁴⁹

Shortly after Madison spoke, the House, by a vote of 30 to 18, approved Benson's first amendment.¹⁵⁰ Most likely, members of the enigmatic faction regarded this amendment as largely inconsequential because it added another provision discussing removal by the president.¹⁵¹ By itself, it left undisturbed the bill's existing removal language.

¹⁴⁵ 11 *id.* at 1027. On June 17, Benson actually declared that he was going to propose an amendment to the original House bill because "it has the appearance of conferring the power upon" the president. He thought this improper "because it would be admitting the house to be possessed of an authority which would destroy those checks and balances." 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 of power to the president." 11 *id.* at 931-32.

¹⁴⁶ 11 *id.* at 1029.

¹⁴⁷ 11 *id.* at 1029 (emphasis added).

¹⁴⁸ 11 *id.* at 1031.

¹⁴⁹ 11 *id.* at 1027-28. In a letter written before Benson proposed his amendments, Representative Thomas Fitzsimmons agreed with Benson and Madison characterization of the majority position. Fitzsimmons noted that the advocates of the removal clause claimed that the removal power was "Vested in the President in the General Powers of the Executive." See Letter of Thomas Fitzsimmons to Benjamin Rush, (June 20, 1789), in 16 *id.* at 820.

¹⁵⁰ 3 *id.* at 92.

¹⁵¹ 11 *id.* at 1030 (comments of Rep. Theodore Sedgewick that the first amendment could do no harm). In truth, the amendment was quite consequential, because the combination of Benson's two amendments helped establish that the executive power theory enjoyed majority support.

The House immediately took up Benson's second amendment—to delete the language that could be read as a grant of removal authority.¹⁵² Though this amendment ultimately passed by a vote of 31 to 19,¹⁵³ it triggered much discussion and caused much consternation. Brandeis, Corwin, and others have claimed 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.¹⁵⁴

If one focused on the arguments of Madison and Benson only, Brandeis and Corwin might seem correct. After all, Madison and Benson claimed the old language could be read to endorse the congressional delegation grant theory.¹⁵⁵ At least some opponents of the House bill, such as Elbridge Gerry¹⁵⁶ and Thomas Tudor Tucker,¹⁵⁷ seemed to agree. If everyone agreed that the original bill actually endorsed the congressional delegation theory and that the amended bill reflected the executive power theory, then the enigmatic faction's rejection of Benson's second amendment does seem like an 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 obviously endorsed the congressional delegation theory.¹⁵⁸ They merely claimed that it could be so read. 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 (or a vote favoring the congressional delegation theory).

More importantly, when one focuses on what members of the enigmatic faction said, it becomes rather clear that a vote against Benson's second amendment hardly signaled opposition to the executive power theory. Many members of the enigmatic faction probably 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 to be an unwarranted and unnecessary concession to the opposition.

¹⁵² 11 *id.* at 1030.

¹⁵³ 3 *id.* at 93.

¹⁵⁴ See Corwin, *supra* note 13, at 332; Currie, *supra* note 14, at 41. See also Myers, 272 U.S., at 285 n.75 (Brandeis, J., dissenting) (saying same).

¹⁵⁵ 11 *id.* at 1028-29, 1031-32.

¹⁵⁶ 11 *id.* at 1033.

¹⁵⁷ 11 *id.* at 1034-35.

¹⁵⁸ Benson originally thought that the bill's language endorsed the executive power theory. See *supra* note 147. So did Madison. 11 *id.* at 986.

Four members of the enigmatic faction voiced their opposition to Benson's second amendment: Elias Boudinot of New Jersey, Thomas Hartley of Pennsylvania, John Laurance of New York, and Theodore Sedgewick of Massachusetts. Elias Boudinot said he "was against the motion, because the constitution vested all executive power in the president."¹⁵⁹ He had "inferred" that the president "ex officio" could "remove, without limitation; but as the debates arose, and the question being seriously agitated, he was clear for making a congressional declaration, in order to prevent future inconvenience."¹⁶⁰ Boudinot also argued that to switch positions so quickly "argued a fickleness which he hoped to never see affect this honorable body."¹⁶¹ If the majority was right before, it ought to remain steadfast and keep the original bill text.

Far from opposing the executive power theory, Boudinot clearly favored it. He merely supposed that the original bill language was a *superior* expression of the executive power theory and apparently was quite disturbed by the last minute appeal to delete the removal language that they had fought to preserve over the course of a month. Consistent with this classification of Boudinot, neither Brandeis nor Corwin count him as a congressional delegation partisan even though he was a member of the enigmatic faction, *i.e.*, even though he voted against Benson's second amendment.¹⁶²

This classification of Boudinot raises an extremely difficult question for the revisionist account. Apart from Boudinot, Brandeis and Corwin treat each member of the enigmatic faction as if he were a congressional delegation partisan. They classify Boudinot differently because they know that he expressed pro-executive power positions earlier in the debate. But once they admit that at least one executive power partisan voted against Benson's second amendment (Boudinot), they need to be open to the obvious possibility that others who voted against Benson's second amendment were also executive power partisans. In other words, with Boudinot as an unmistakable example, Brandeis and Corwin should have realized that other members of the enigmatic faction might have been "Boudinot executive power partisans"—executive power proponents who opposed Benson's second amendment.

Yet Brandeis and Corwin apparently never considered this prospect. They just assumed that votes against Benson's second amendment must have been votes against the executive power theory. Perhaps their classification of some representatives as pro-congressional delegation partisans can be justified based on what some representatives said at earlier points in the debate. Indeed, Corwin claims that seven delegates said

¹⁵⁹ 11 *id.* at 1034.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See Myers, 272 U.S. at 285 n. 73; Corwin, *supra* note 13, at 332 n.22.

something in favor of the congressional delegation theory.¹⁶³ But Corwin also hastily claims that there were nine “silent” representatives who favored the congressional delegation theory.¹⁶⁴ Because his only evidence for the views of these silent members is a vote on Benson’s second amendment, Corwin actually has no evidence at all that these silent members actually favored the congressional delegation theory over the executive power theory.

Other members of the enigmatic faction who spoke up on June 22, 1789 also suggest that, like Elias Boudinot, they too endorsed the executive power theory. Representative John Laurance said he believed that the legislature “had power to establish offices on what terms they pleased.” He went on to say that Congress could abuse this power and “abridge the constitutional power of the president respecting the removal of such officers.” To avoid the possibility that Congress might constrain presidential power, Laurance wanted to *retain* the original bill language.¹⁶⁵ Earlier, Laurance also said that he viewed the original language as a “legislative declaration.”¹⁶⁶ Laurance’s comments suggest that he favored the original text because he, like Boudinot, viewed it as an express congressional declaration in favor of the executive power theory. Laurance’s comments also suggest that he agreed with Madison that the legislative grant theory was problematic precisely because it permitted Congress to withhold removal authority from the president. Like Boudinot, Laurance likely was someone who voted for the final bill because it endorsed the executive power theory, albeit imperfectly.¹⁶⁷

Thomas Hartley advised that all those “not *fully convinced* that the power of removal [was] vested by the Constitution in the president” should vote against Benson’s second amendment.¹⁶⁸ He admitted that he had “*some doubts himself*.”¹⁶⁹ But he had no doubts about granting authority to the president. Hartley’s comments suggest that while he clearly preferred the original language, he was not opposed to the executive power theory. He merely had doubts, as perhaps did many of the outright executive power partisans.

¹⁶³ Corwin, *supra* note 13, at 331 n.22.

¹⁶⁴ *Id.*

¹⁶⁵ 11 *id.* at 1034.

¹⁶⁶ 11 *id.* at 1028.

¹⁶⁷ Brandeis and Corwin count Laurance as someone who spoke in defense of the congressional delegation theory. In fact, Laurance’s comments are much more equivocal. Laurance clearly thought that if the Constitution did not grant anyone removal authority, Congress could delegate such authority. But he never took a firm position on whether the Constitution was silent on removal. Sometimes he seems to say the power of removal is lodged with the president. See 11 *id.* at 908. Other times he seems to say the Constitution does not assign the removal power. See 11 *id.* at 908-909.

¹⁶⁸ 11 *id.* at 1035 (emphasis added).

¹⁶⁹ 11 *id.* at 1035.

Certainly, Hartley's previous statements do not evince hostility to the executive power theory. On June 17, Hartley said that a "fair construction of the constitution" required that the president control the business of the Department of Foreign Affairs.¹⁷⁰ Moreover, Hartley's subsequent writings suggest that though he might have preferred the original text, he nonetheless supported the executive power theory.¹⁷¹ Evidently, Hartley's misgivings about Benson's second amendment were insubstantial for he voted for the House bill which endorsed the executive power theory.

Of the four members of the enigmatic faction who spoke up on June 22nd, Theodore Sedgwick seems the closest to a true legislative grant partisan. But even he does not fit neatly within that category. During the debate, Sedgwick did assert that a delegation of removal authority was necessary because Congress had "complete power over the duration of the offices they created."¹⁷² 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 principles of the constitution."¹⁷³ This latter comment suggested that Sedgwick believed that Congress was constitutionally obliged to grant the president removal authority, a position that closely borders on the executive power theory.

As a matter of tactics, keeping the original removal text was crucial, claimed Sedgwick. No harm would come if he was wrong about the Constitution, because if the pure executive power partisans were right, the president had removal authority no matter what the bill said.¹⁷⁴ But, said Sedgwick, if the pure executive power partisans' reading of the Constitution was wrong and they succeeded in stripping out the text that could be read as a grant of removal authority, the president clearly would lack removal authority.¹⁷⁵ Hence, Sedgwick claimed that prudence required that the original removal text be retained.

¹⁷⁰ 11 *id.* at 904.

¹⁷¹ See 16 *id.* at 1209, 1241, 1262 (comments of Hartley on the meaning of House vote on removal and on the Senate's reluctance to endorse the executive power principle in Treasury Act).

Brandeis and Corwin count Hartley as a congressional delegation proponent, presumably based on his comments on Benson's second amendment and on his earlier comments. As noted, Hartley's comments on Benson's amendments do not evince hostility to the executive power theory, just doubts. His earlier comments asserted that Congress could delegate removal power if the constitution was silent. Yet Hartley never clearly said that he believed that the Constitution was silent. He merely said if it was, Congress could remedy the defect. See 11 *id.* at 896, 904-907. There appears to be nothing in Hartley's earlier speeches that indicates that Hartley either clearly endorsed the congressional delegation theory or that he clearly opposed the executive power theory.

¹⁷² 11 *id.* at 1033.

¹⁷³ 11 *id.* at 1029.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

Sedgewick's earlier comments only compound the difficulty of properly classifying him. In the early days of the debate, Sedgewick said 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."¹⁷⁶ Later Sedgewick claimed that even though he favored the congressional delegation theory, he also 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."¹⁷⁷ He also said it would be absurd for the president to lack removal authority over the Secretary of Foreign Affairs, because the Secretary was but the president's instrument.¹⁷⁸ When one examines his earlier statements about the executive power theory and the Secretary of Foreign Affairs, it seems likely that Sedgewick voted for the House bill because he felt comfortable (albeit not entirely happy) endorsing the executive power theory.

Review of what members of the enigmatic faction actually said shows little actual hostility to the executive power theory. Some thought the original language better reflected the executive power theory (Boudinot and Laurance); others merely had some doubts about the executive power theory (Hartley); and still others favored the congressional delegation theory but claimed that the constitution required a legislative grant of removal power to the president, at least in the case of the Secretary of Foreign Affairs (Sedgewick). 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 House bill also thought that the original text better expressed the executive power theory. Representative John 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."¹⁷⁹ The majority thereby had "evacuated untenable ground" which they previously insisted upon.¹⁸⁰ Similarly, Representative William Smith of South Carolina claimed that the majority had come to realize that they were wrong. Would they "pretend to carry their point by a side blow, when they are defeated by fair argument on due reflection?" Smith thought it "more candid and manly" to make a declaration in "direct terms than by an implication."¹⁸¹

¹⁷⁶ 11 *id.* at 866.

¹⁷⁷ 11 *id.* at 983.

¹⁷⁸ 11 *id.* at 946.

¹⁷⁹ 11 *id.* at 1030.

¹⁸⁰ *Id.*

¹⁸¹ 11 *id.* at 1029.

James Madison understood that changing tactics midstream might cause problems and tried to assuage his coalition. The opposition “cannot fairly urge against us a change of ground, because the point we contended for is fully obtained by the amendment.”¹⁸² 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.”¹⁸³ 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 the executive power theory. Given the votes of the enigmatic faction and what was said by Boudinot and others, Madison’s hand holding was not entirely persuasive.

Newspaper summations of the debate bear out that votes against Benson’s second amendment were not votes against the executive power theory. The *Gazette of the United States* claimed that people who opposed 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.”¹⁸⁴ In other words, some people voted against Benson’s second amendment because they believed the original language was a better declaration of the executive power theory. The *New York Daily Gazette* added that some voted against the second amendment “with a view of obviating any charge of inconsistency.”¹⁸⁵ In other words, notwithstanding Madison’s pleas, some members of the enigmatic faction likely voted against Benson’s second amendment after hearing the minority chortle that the amendment was actually an overdue and welcome admission of weaknesses in the executive power theory. Representative Smith’s challenge to the majority’s masculinity likely had an effect.

Contemporary newspaper accounts tell the same story. Fisher Ames, writing on June 23, one day after the vote on Benson’s amendments, claimed that those who voted against the second amendment regarded the original language as a superior means of expressing the executive power theory. The original language “operate[d] as a declaration of the Constitution; and at the same (time) expressly dispose of the power.” Some representatives also opposed Benson’s proposal to delete the original language because they were worried that “any change in position” might divide the majority and endanger the final vote.¹⁸⁶ Finally Ames said 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 a full proof, but in my mind they greatly

¹⁸² 11 *id.* at 1032.

¹⁸³ 11 *id.* at 1030.

¹⁸⁴ 11 *id.* at 1028 (emphasis added).

¹⁸⁵ 11 *id.* at 1028 n. 39.

¹⁸⁶ See Letter from Fisher Ames to George R. Minot (June 23, 1789), in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 24, at 840-41.

preponderate.”¹⁸⁷ Ames’ comments suggest that some of those who voted against Benson’s second amendment believed that the original bill language was a better declaration of executive power principles and that the original bill could be read as a delegation if the executive power theory was wrong. Ames’ comments also raise the possibility that people might have favored both the executive power and the legislative delegation theories and ultimately chose to favor the former on the final vote.

Echoing Ames’ claims, Peter Muhlenberg wrote that the majority was divided on the principle of whether to make an express removal declaration. 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,”¹⁸⁸ this majority was divided: one group thought it the “duty of the Legislature to declare by Law where this power is Lodged, in order to prevent Confusion hereafter.”¹⁸⁹ Presumably, these were the executive power partisans who voted to reject Benson’s second amendment. The other part of the majority thought to make an express congressional declaration regarding removal “would imply a doubt, & that nothing more was [illegible] necessary than something of the Declaratory kind expressive in the sense of The House on the subject.”¹⁹⁰ In other words, these members voted for Benson’s second amendment which clearly implied a removal power.

In another letter, Ames suggested that another reason for the division in the executive power camp was a lack of “caucusing and cabal.” The House is not

“sufficiently preconcerted. Mr. Brown’s [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.”¹⁹¹

¹⁸⁷ *Id.*

¹⁸⁸ Letter from Peter Muhlenberg to Benjamin Rush (June 25, 1789), in 16 *id.* at 855-56 (emphasis added). Though Muhlenberg’s letter is dated June 25, 1789, it is unclear whether Muhlenberg wrote his letter 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, he confirms that this majority was composed of executive power partisans. If he wrote after the House vote on the final bill, he 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.

¹⁸⁹ 16 *id.* at 855-56 (emphasis added).

¹⁹⁰ 16 *id.* at 855-56.

¹⁹¹ Letter from Fisher Ames to George R. Minot (July 8, 1789), in 16 *id.* at 978-79 (emphasis added).

Ames' letter suggests two things—that there was a majority for the executive power theory and that this camp became divided because many of its members did not know what to make of Benson's second amendment that seemed to many a surprise.¹⁹² Some members did not know what to make of an amendment that deleted removal language that they had previously insisted upon for over a month.

Finally, members were able to vote for the executive power theory even if they also saw merit in the congressional delegation theory because they thought the executive power theory was the superior theory of the two. In the debates, Fisher Ames had said that when gentlemen who thought the constitution was silent “revert to the principles, spirit, and tendency of the constitution, they will be compelled to acknowledge, that there is the highest degree of probability” that the president had a removal power.¹⁹³ Ames' public comments mirror his comments in the private letter mentioned above, where he claimed that the arguments for the executive power theory “greatly preponderate.” Likewise, 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 Congress all powers necessary and proper.”¹⁹⁴ Vining's comments suggest that he believed that the Constitution itself granted the president a removal power but if that was not the case, Congress could delegate a power. Delegates who made comments that seemed to favor the congressional delegation theory may have concluded that they could support the executive power theory under the same logic. Although the executive power theory was not without its flaws, it had the better arguments.

Taken together, these debates and letters indicate that members of the enigmatic faction did not vote against Benson's second amendment because they opposed the executive power theory, as Brandeis and Corwin have claimed. Instead, those who voted against the second amendment regarded the original language as superior: 1) they believed it more clearly expressed the sense of the House that the president had a constitutional removal power, rather than leaving it to implication¹⁹⁵; 2) they were

¹⁹² Although Benson had declared on June 17 that he would propose an amendment that would clarify that there was a majority in favor of the view that the Constitution granted a removal power to the president, *see supra* note 147, he did not actually propose his clarifying amendment until June 22nd, after the Committee of the Whole's vote on the original bill. So even though Benson had said he would propose an amendment, he did so well after he made his declaration. Moreover, he did not reveal that he was going to propose deleting the removal language that many had fought to retain. Hence it is not surprising that Benson's amendments caught members unawares. His June 17th declaration, which only briefly discussed why he would propose an amendment, was evidently not enough notice.

¹⁹³ 11 *id.* at 978.

¹⁹⁴ 11 *id.* at 939.

¹⁹⁵ Consider, in this regard, Thomas Hartley's letter in which he says that several Representatives “would be better pleased” had the original removal clause been left in the bill. *See* Letter from Thomas Hartley to Tench Coxe (June 24, 1789), *in* 16 *id.* at 848. Although Hartley has been regarded as a

surprised that they were 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 like a concession to the opposition; 4) they were afraid (wrongly, as 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;¹⁹⁶ and 5) they supposed that if the majority's reading of the Constitution was wrong, the original language would delegate a removal power whereas Benson's amendments left a bill that could not be regarded as a delegation. Representatives in the latter group likely saw merit in both the congressional delegation and executive power theories. One could believe that the Constitution granted the president a removal power and that Congress could delegate removal authority if the executive power theory proved wrong.

Which faction of the executive power camp was right? It is hard to say. 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 Constitution, suggesting that he favored the earlier language precisely because he regarded it as an express declaration in favor of the executive power theory.¹⁹⁷ Fisher Ames, who voted for and initially praised Benson's second amendment,¹⁹⁸ 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."¹⁹⁹ 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 and that was wholly impervious to the arguments made by modern revisionists.²⁰⁰

congressional delegation proponent, he hardly sounds like one in this letter. Instead of opposing the executive power theory, he 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, thereby suggesting that his opposition to the second amendment was not based on complete opposition to the executive power theory.

¹⁹⁶ Indeed, there is evidence that opponents of presidential removal regarded the deletion of the original removal language as a "victory" of sorts. See Letter from James Sullivan to Elbridge Gerry (June 28, 1789), *in* 16 *id.* at 878 ("rejoic[ing] with joy unspeakable and full of security" that the president would not have removal power).

¹⁹⁷ Letter from Lambert Cadwalader to James Monroe (July 5, 1789), *in* 16 *id.* at 946.

¹⁹⁸ See Letter from Fisher Ames to George R. Minot (July 8, 1789), *in* 16 *id.* at 979.

¹⁹⁹ Letter from Fisher Ames to George R. Minot (July 9, 1789), *in* 16 *id.* at 985.

²⁰⁰ In hindsight, 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 would have left no doubt as to what Congress was attempting to convey. Nonetheless, in the face of the evidence that Congress endorsed the executive grant theory, Benson's failure to propose such an amendment seems rather insignificant. The

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, representatives reverted back to their original groups. Many representatives who had voted in favor of Benson's second amendment now voted against the bill, for they did not wish to endorse the executive power theory.

More importantly, those who voted against Benson's second amendment now voted for the House bill and thereby endorsed the executive power theory. Many of these members, such as Boudinot and Laurance, favored the executive power theory all along. They favored the original language either because it was a helpful declaration of constitutional principles or because they viewed Benson's amendment as a tacit admission that they were wrong to fight to keep the original removal language. Others, such as Hartley and Sedgewick, were able to vote for the House bill because they were not implacably opposed to the executive power theory—they merely had doubts, doubts which they apparently overcame.

Consistent with reading the House bill as an endorsement of the executive power thesis, there was little drama when members voted on the House bill. The opponents of the bill “knew its fate”—it would pass.²⁰¹ Yet if many people who had voted to retain the original removal language were congressional delegation partisans, as Taft's critics have insisted, the bill's opponents *should not have known its 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 easily could have rejected the bill resulting from Benson's amendments. They then could have reintroduced the original bill. This time, the executive power partisans would have known “its fate” and would not have proposed Benson-type amendments. Because no foreign affairs crisis demanded urgent attention, there was no pressing need for an immediate resolution of the removal

text of the Foreign Affairs bill, the debates, and contemporaneous letters suggest a clear victory for the executive power theory. A stand-alone resolution only would have made the victory unmistakably clear.

²⁰¹ 11 *id.* at 1043. See also *id.* (comments of Representative Sumter that he could not let the bill “pass” without expressing his “detestation of the principle it contains” suggesting that Sumter knew the bill would pass as well).

issue.²⁰² If the congressional delegation proponents enjoyed the strength that Brandeis and Corwin attributed to them, the representatives could have secured a bill more to their liking.²⁰³

In fact, a member apparently made a motion to reconsider the votes on Benson's amendments. According to the *New York Daily Advertiser*, "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]." ²⁰⁴ This motion failed, presumably because a majority was comfortable with a bill that implicitly endorsed the executive power theory.

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 even before the vote on Benson's amendments. The existence of an executive power majority explains why no one could extend the debate prior 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 22.²⁰⁵

3. *The Aftermath*

Another way to gauge the meaning of the House's vote on the Department of Foreign Affairs bill is to examine its aftermath. Was any principle that might have been established promptly repudiated by subsequent decisions of the House or the Senate? Did mature reflection lead to a realization that it had been wrong for members of the enigmatic faction to vote for the final bill because of its obvious implications? Moreover, how did contemporaries describe the vote? Was it deemed a muddled vote for presidential removal, without any constitutional implications because of the supposedly divided forces behind it, as Corwin and Brandeis claimed? Or did people consider it a vote for the executive power theory, as Taft supposed?

²⁰² 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 because it took a while for Thomas Jefferson, Washington's choice for Secretary of Foreign Affairs, to return from Europe. Apparently, nothing changed after the enactment of the Foreign Affairs Act.

²⁰³ It seems likely that many opponents of presidential removal power had the same preferences as Representative Tucker. Tucker's least favorite alternative was a bill that implied a constitutional grant; and his second least favorite alternative was a bill that delegated removal authority. 11 *id.* at 1034-35. If others shared his preferences and if there more than a dozen legislative grant partisans, these legislative grant partisans should have been able to garner a majority for its favored position by garnering the votes of those who disliked the executive power theory the most.

²⁰⁴ 11 *id.* at 1036.

²⁰⁵ 3 *id.* at 95.

Once again, the evidence supports Taft. To begin with, subsequent “Decisions of 1789” support the view that the vote on the House bill was an endorsement of the executive power theory. In particular, both the War and Treasury Department bills contained the same implied endorsement of the executive power theory.

On the same day as the House vote on the Foreign Affairs bill (June 24, 1789), Benson proposed a single amendment to the proposed War Department bill, one that embodied his two earlier Foreign Affairs amendments.²⁰⁶ 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.”²⁰⁷ Another opponent of the earlier bill claimed that Benson’s new amendment “argued a doubt” about the majority’s convictions. The only reason to propose the amendment again was because the majority believed it had to repeat its doubtful principle in the War Department bill.²⁰⁸ By a vote of 24 to 22, Benson’s amendment passed, thus creating a War Department bill that also endorsed the executive power theory.²⁰⁹

Though this vote was far closer than the vote on the Foreign Affairs bill, it also constituted a vote in favor of the executive power theory. The brief discussion preceding the vote suggested that the losing side understood that the majority had already established the executive power principle. Had members believed that the removal language in the Foreign Affairs bill was somehow a grant of removal authority rather than an acknowledgement of its constitutional basis, no one would have told Benson that he already had established a principle and no one would have regarded his War Department amendment unnecessary.²¹⁰

Parallel removal language likewise found its way into the House Treasury Department bill.²¹¹ After the Senate deleted this language, the House refused to agree to the Senate’s revision.²¹² When the Senate insisted upon its amendment,²¹³ the chambers

²⁰⁶ 11 *id.* at 1044.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Benson likely proposed the amendment because he wanted to make it clear that Congress believed that the executive power theory applied to the War and Treasury Departments as well. If those departments contained the original removal provisions, such provisions might have suggested that the Congress had a different view about removal when it came to the War and Treasury Departments. Hence, Benson and his allies sought consistent removal text in all three of the departmental acts.

²¹¹ See section 7 of the Treasury Bill found at 6 *id.* at 1983, 1985.

²¹² 6 *id.* at 1979, 1985 n. 9. Apparently, 19 Representatives voted to accept the Senate’s amendments. 6 *id.* at 1985 n.9.

²¹³ 6 *id.* at 1979.

appointed an unsuccessful conference committee.²¹⁴ Apparently, the members of the House committee made a remarkable demand upon their counterparts: the Senate is “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.”²¹⁵

Speaking for the House members of the conference committee, Madison claimed before the House that “it would not be right for the house to” accede to the Senate’s deletion.²¹⁶ The House thereafter resolved that it “doth adhere to their [previous] disagreement” to the Senate’s attempt to delete the removal language.²¹⁷ Presumably Madison and the House majority realized that deleting the removal language from the bill would suggest that the president lacked a constitutional removal power over the Treasury Secretary, especially when compared to the acknowledgements in the first two bills.

Faced with the two choices offered by the House conferees, either adopt an extra resolution endorsing the executive power theory or recede from their amendment, the Senate chose the latter path by a 10-10 vote, with the Vice President breaking the tie.²¹⁸ Hence, when confronted with a House resolutely in favor of language that implied that the president had a constitutional right of removal, the Senate eventually blinked and conceded the point, albeit on yet another close vote. 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.

Once again, private letters support Taft’s claims because they treated House and Senate votes as vindications of the executive power theory. In numerous letters, Madison repeatedly proclaimed that the House had endorsed the executive power theory. For instance, in a letter to Thomas 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.”²¹⁹ Richard Bland Lee wrote that it “was determined in the affirmative” that the president “had, or ought to have, from

²¹⁴ 6 *id.* at 1979 & n. 7.

²¹⁵ See Letter of Thomas Hartley to William Irvine (Aug. 17, 1789), in 16 *id.* at 1337; see also Letter from Thomas Hartley to Jasper Yeates (Aug. 16, 1789), in 16 *id.* at 1332. The Congressional Register reported that Madison claimed that the House conferees had “submitted certain propositions” to the Senate conferees. 11 *id.* at 1324. Apparently, among those propositions was an executive power ultimatum.

²¹⁶ 11 *id.* at 1324.

²¹⁷ 3 *id.* at 167.

²¹⁸ See 11 *id.* at 1979-80.

²¹⁹ See Letter from James Madison to Thomas Jefferson (June 30, 1789), in 16 *id.* at 893; See also Letter from James Madison to Tench Coxe (June 24, 1789), in 16 *id.* at 853 (saying same); Letter from James Madison to George Nicholas (July 5, 1789), in 16 *id.* at 954-56 (same).

a fair Construction of the constitution,” a removal power.²²⁰ In discussing the troubled Treasury bill, Thomas Fitzsimmons, who voted against Benson’s second amendment but for the House Foreign Affairs bill, claimed that the disagreement turned on the “Constitutional power of the president to remove.”²²¹

The Senate’s vote to retain the House’s removal language was likewise seen as a vindication of the executive power position. Senator Paine Wingate, who voted to strip out the removal language in the Foreign Affairs bill, described the Senate’s vote to retain the House’s removal language as turning on the point “whether the president had a constitutional right to remove; and not on the expediency of it.”²²² Likewise, Representative William Smith of Maryland described the Senate’s vote as favoring the president’s “right of removal from office as chief Majistrate [sic].”²²³ Similarly, the Massachusetts Sentinel printed a post from New York 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.”²²⁴ The Vice-president himself complained that his “Vote for the presidents Power of Removal, according to the Constitution, has raised from Hell an host of political and poetical devils.”²²⁵

Each of these letters reveals that the removal language was generally understood to endorse the “constru[c]tion of the Constitution, which vests the power of removal in the president.”²²⁶ Each of the acts, by discussing what would happen upon the president’s removal of a secretary, clearly implied that the president had a constitutional power of removal.

²²⁰ See Letter from Richard Bland Lee to Leven Powell (June 27, 1789), in 16 *id.* at 866-67.

²²¹ Letter from Thomas Fitzsimmons to Samuel Meredith (Aug. 24, 1789), in 16 *id.* at 1390.

²²² Letter from Paine Wingate to Nathaniel P. Sargeant (July 18, 1789), in 16 *id.* at 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 Presidents a right of removal at pleasure.” Letter from Richard Henry Lee to Samuel Adams (Aug. 15, 1789), in 16 *id.* at 1320, 1321. Although Lee does not explicitly claim to be discussing any of the departmental bills, it seems fair to say 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 17 *id.* at 1625 (claiming 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 16 *id.* at 1418 (complaining that it was unnecessary to say anything about removal if Constitution actually granted president removal authority, thereby suggesting that Adams also regarded the Foreign Affairs bill as endorsing the executive power theory).

²²³ Letter from William Smith (Md.) to Otho H. Williams (July 27, 1789), in 16 *id.* at 1150.

²²⁴ 16 *id.* at 1077.

²²⁵ Letter from John Adams to John Lowell (Sept. 14, 1789), in 17 *id.* at 1538.

²²⁶ See Letter from David Stuart to George Washington (Sept. 12, 1789), in 17 *id.* at 1519.

Finally, one cannot ignore the fact that subsequent presidents clearly believed that they had the power to remove officers by virtue of the Constitution itself. Washington removed twenty-three officers, Adams twenty-seven, and Jefferson one-hundred and twenty four.²²⁷ These presidents apparently did not cite the Decision of 1789 as the basis for these removals, so it is possible that each of them came to the conclusion that they had a constitutional removal power independent of the Decision of 1789. Nonetheless, it is also the case that no one apparently challenged the president's removals even though no statute authorized (or could be read to authorize) such removals. People of the era 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 endorsed, albeit implicitly, the executive power theory. That was what the language was meant to accomplish and, judging by what was said in Congress and what was written in private letters and newspapers, that was what the removal language was understood to accomplish. Although Brandeis and Corwin have contested the claim that the language endorsed the executive power theory, they have never really offered an alternative explanation of the bills' texts, preferring instead to focus on the votes of the enigmatic faction.

Explaining the votes of the enigmatic faction is rather simple. Some thought that the original bill language was an explicit (and therefore superior) congressional declaration of the Constitution's meaning. Others were surprised by Benson's amendments and voted against the second amendment because they did not want to concede ground that they had fiercely fought to retain. Reversing field on a moment's notice requires a nimbleness that most people lack. Still others could hear the glee in the opposition's voices and did not want to vote in a manner that seemed an admission of defeat to the other side.

Can we say with certainty that all members of the enigmatic faction believed wholeheartedly in the executive power theory? Of course not. But it seems likely that all of them felt comfortable with the executive power theory, comfortable enough that each of them had no difficulty voting for three bills that clearly endorsed it. Indeed, when the Senate repeatedly tested the House's executive power majority in the context of the Treasury bill, the House stood its ground and issued an ultimatum: retain the removal

²²⁷ 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 65, 69-70 (1900). Because no statute ever authorized presidential removal, these removals must have been based on the understanding that the Constitution granted the president removal authority.

language or pass a stand alone resolution affirming the executive power theory. When presented with an obvious opportunity to reconsider or repudiate the Decision of 1789, a sufficient number of the enigmatic faction obviously voted to affirm the Decision of 1789. Faced with a resolute House, the Senate blinked and reinstated the removal language that implied a constitutional power of removal.

III. DECIPHERING THE DECISION OF 1789

So there was a Decision of 1789, a decision about the president's executive power under the Constitution. After a great deal of sophisticated debate, Congress decided that the president had a constitutional right to remove the Secretary of Foreign Affairs. Congress made the same decisions with respect to the Secretaries of War and Treasury, though not without further controversy. In sum, Congress held that the Constitution granted the president the power to remove secretaries of the executive departments.

But to describe the Decision in this way is to adopt the narrowest reading of the Decision. Given the length of the debates and the number of votes, it is possible that the Decision resolved other questions. This part considers what else the Decision might have decided. Did the Decision also address other types of officers? In particular, what about other types of executive officers, such as inferior executive officers? What about non-executive officers? Moreover, did Congress believe that the president had an indefeasible executive power of removal or did Congress leave open the possibility that Congress 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 much the way a court case might finally settle a dispute between two parties?

Answering these questions with any certainty is impossible. Notwithstanding the uncertainty, it seems appropriate to discuss these issues precisely because so 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 have suggested that the Decision only related to “high political office,” such as the Secretary of Foreign Affairs.²²⁸ In other words, Congress said little or nothing about whether the Constitution permitted the president to remove other non-inferior executive officers, such as the early Attorney General.²²⁹ Justice Story made the more limited claim that the Decision did not relate to inferior offices. Because Congress could decide who could unilaterally appoint inferior officers, it also could decide who could remove these officers.²³⁰

At one level, the debate was about the Secretaries of Foreign Affairs, War, and Treasury. There was little discussion of officers that might be inferior officers, such as collectors, surveyors, and the postmasters and there was little discussion of non-inferior officers like ambassadors.

Yet the Decision’s *ratio decendi* was that the president had a removal power by virtue of the executive power clause. As Madison put it, “if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws.” And this logic applied equally well to officers meant to carry the president’s foreign policies into execution, such as the Secretary of Foreign Affairs and the nation’s envoys. After all, Madison (and others) made all their removal arguments in the course of the debate over the Foreign Affairs Act. Because removal of executive officers was an executive power and because the Constitution did not constrain or abridge removal authority (as it had appointment authority), the president could remove all executive officers unilaterally.²³¹

Indeed the debates reflected the understanding that the President could remove all executive officers. Madison noted that if the president had removal power “the chain of dependence is this—The officer of the lowest grade, the officer of the middle and higher grades, will be dependent on the president.” The dependence of all executive officers on the president followed precisely the president could remove all of them. Each of them was dependent on the president directly. Similarly, Representative Samuel Livermore of New Hampshire attempted to make hay of the fact that the majority’s arguments made all executive officers, such as ambassadors and military officers, subject to

²²⁸ Corwin, *supra* note 13, at 338 (the decision “related to a high political office, to an office created to be organ of the President”).

²²⁹ The early Attorney General was not a department head. Nor was he an inferior officer. See Saikrishna Prakash, *The Chief Prosecutor*, __ Geo. Wash. L. Rev. __ (2005) (forthcoming).

²³⁰ 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1544.

²³¹ The Decision properly applies to all executive officers, however appointed. Hence, if we assume 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 employ his executive power.

presidential removal.²³² Livermore thought this showed the absurdity of the majority's position. Apparently, no one in the majority bothered to refute Livermore's claim because they agreed with his assessment that the executive power argument applied to all executive officers.

Had the majority believed that the president's authority arose from his power to appoint, perhaps Story's argument would have traction. Because Congress could decide who would appoint inferior officers, perhaps it could also allocate the power to remove as it saw fit. But the majority did not endorse the executive appointment argument. They endorsed the idea that the president had removal authority by virtue of the grant of executive power. Representatives only made arguments about appointment to show that even on the premises of the advice and consent partisans, the president had a constitutional right to remove, at least as to superior officers.²³³ If one believed that whoever appointed an officer could remove her as well, the president was the one who actually appointed, albeit with the Senate's consent. Hence executive power proponents claimed that the appointment argument made by advice and consent proponents actually favored unilateral presidential removal.²³⁴

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. People concluded that the Chief Magistrate—so titled because of his executive power—could remove executive officers. First, the grant of executive power included a power to remove. Second, it seemed inconceivable that the Constitution would make the president the Chief Magistrate and hold him responsible for the conduct of the executive branch and yet convey him no power to remove executive officers. To paraphrase Madison, the removal power was the *sine qua non* of a Chief Executive empowered with the executive power.

²³² 1 ANNALS OF CONGRESS 365 (Gales & Seaton eds., 1789).

²³³ What members of the majority coalition said is if one thought that appointment was crucial in determining who had removal authority, they believed that the president actually appointed. The Senate could prevent an appointment from taking place, but they had no role in the actual act of appointing. See e.g., 11 Documentary History of the First Federal Congress, *supra* note 24, at 871 (comments of John Vining); 11 *id.* at 903 (comments of Egbert Benson).

²³⁴ Corwin claims that those who favored the view that the Constitution granted the president a removal power were split between those who favored the executive power theory, those who favored the appointment power-yields-a-removal-power theory, and those who merely made arguments from "convenience." Corwin, *supra* note 13, at 332. But as we have seen many people described the vote as a vindication of the view that the Constitution's grant of executive power ceded the president a removal power. Others described it as a vote in favor of the view that the president as "chief magistrate" had a removal power, a description that clearly supports the executive power theory. Apparently, no one described the vote as a vindication of the view that the appointing power may remove as well.

B. *The Removal of Non-Executive Officers*

The Decision of 1789 related to removal of executive officers for the simple reason that the three secretaries were understood by most to be executive officers. The Congress concluded that the president could remove executive officers because such officers carried into execution the president's executive powers.

A colloquy conducted within days of the Decision of 1789 suggests that the Decision did not reach the president's power to remove non-executive officers. While discussing the Treasury Act, James Madison argued that the Comptroller ought to have a greater permanency in office,²³⁵ because the Comptroller would partake of both executive and judicial qualities.²³⁶ The Comptroller would have judicial features because he would decide claims brought by citizens against the United States.²³⁷ Despite the Comptroller's judicial features, Madison argued that the Comptroller should be responsible to both Congress and the president and proposed that the Comptroller serve a set number of years, "unless sooner removed by the president."²³⁸

Madison's proposal baffled his colleagues. If Madison hoped to make the Comptroller independent of the president, why had he implied that the president had a constitutional power to remove the Comptroller? Like the Foreign Affairs and War Acts, Madison's language assumed a removal power and did not convey one. Moreover, by giving the Comptroller a set term, the Comptroller would have to be reconfirmed at the end of his term, making him more dependent upon Congress.

Madison's former allies criticized him. Sedgwick claimed that the Comptroller would be an executive officer. He implied that because the Comptroller was an executive officer, the president ought to remove.²³⁹ Benson said that the House had already decided that all non-judicial officers held tenure at the pleasure of the president.²⁴⁰

Madison denied Benson's claim that the president could remove all officers other than judges.²⁴¹ Madison claimed that the earlier decision only related to purely executive officers, whereas the Comptroller was partly executive and partly judicial.²⁴² When it

²³⁵ 11 *id.* at 1080.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ 11 *id.* at 1082.

²⁴⁰ *Id.*

²⁴¹ 11 *id.* at 1083.

²⁴² *Id.*

came to offices with this judicial character, Congress could modify the officer's tenure, Madison claimed.²⁴³

The next day, Madison withdrew his motion.²⁴⁴ Because Madison never explained his withdrawal, we do not know his reasons.²⁴⁵ Perhaps he realized that his proposal was at odds with his comments about the judicial nature of the comptroller. Perhaps he believed that he could not get majority support for his proposal. Or perhaps he came to the conclusion, as his erstwhile allies had, that he was wrong.

Despite the equivocal nature of this episode, it suggests that the Decision of 1789 did not encompass a conclusion that a president had a power to remove *all* officers of the United States that lacked constitutionally-granted tenure during good behavior. The original decision had focused on officers that were obviously executive. There was no discussion of what the constitutional rule was with respect to officers who could not (or should not) be classified as purely executive. Though we cannot say how many members of the majority would have sided with Madison as opposed to Benson, there seems little doubt that there was a split, at least temporarily. Given the division on Madison's withdrawn motion, it is impossible to say that the Decision decided the fate of officers who are neither Article III judges nor executive officers.²⁴⁶

C. *The Possibility of a Defeasible Removal Power*

The majority believed that the Constitution granted the president a power to remove executive officers. Hence the Acts were written to convey the impression that Congress believed that the president already enjoyed a power to remove. 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? Brandeis, McReynolds, and Corwin insisted that the Decision of 1789 left open the possibility that Congress might modify or abridge the president's constitutional power of removal.²⁴⁷

²⁴³ *Id.*

²⁴⁴ 1 ANNALS OF CONGRESS 639 (Gales & Seaton eds., 1789).

²⁴⁵ See Steve Calabresi and Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 YALE L. J. 541, 653 n.516 (1994).

²⁴⁶ Of course, Madison's proposal was premised on the controversial idea that Congress can create non-executive, non-judicial offices. There are reasons to doubt that Congress can create such offices. See Calabresi & Prakash, *supra* note 232, at 567-68.

²⁴⁷ See Myers, 272 U.S. 52, 194-95 (McReynolds, J., dissenting); Myers, 272 U.S. 52, 283-84 (Brandeis, J., dissenting); Corwin, *supra* note 13, at 334.

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 Taft's critics seems right. Because the question of a default removal power was never squarely joined, it is hard to conclude that a majority of the House implicitly opposed the idea of a default removal power. Although Madison claimed that the president's constitutional powers were "unabateable" and that Congress could not extend the constitution's exceptions to the executive power, his claims were never really debated.²⁴⁸ Because Madison's opposition refused to concede that the removal power was an executive power, they had no occasion to address whether the removal power was an executive power that Congress could modify or abridge by statute.

To be sure, there were many representatives who sought a public repudiation of the congressional delegation theory. This was Benson and Madison's stated aim.²⁴⁹ They were afraid that the congressional delegation theory permitted Congress to modify or abridge the president's removal power and that Congress might decide not to grant a removal power at all.²⁵⁰ But repudiating the congressional delegation theory is not the same thing as repudiating a default removal power. One could conclude that the Constitution granted the president a removal power and that Congress lacked authority to delegate a removal power, and yet still believe that, by statute, Congress might limit or retract the Constitution's grant of removal authority.

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 plenty of sound reasons to doubt the idea that Congress has some generic power to treat constitutional grants of power as grants that Congress can modify or abridge, the Decision of 1789 is not one of them.

D. *The Legitimacy and Effect of the Decision of 1789*

Throughout the debates, some opponents of the removal language argued that it was inappropriate for Congress to declare its view of the Constitution's meaning. Some feared that Congress would regularly decide the Constitution's meaning and would

²⁴⁸ 11 *id.* at 868-69 (comments of James Madison) (arguing that executive power is "unabateable"—that Congress cannot modify or retract the powers granted to president).

²⁴⁹ 11 *id.* at 1030 (comments of Egbert Benson); 11 *id.* at 1032 (comments of James Madison).

²⁵⁰ 11 *id.* at 1030 (comments of Egbert Benson); 11 *id.* at 1032 (comments of James Madison).

thereby usurp the judiciary's role as ultimate arbiter of the Constitution's meaning.²⁵¹ Others feared that in "construing" the Constitution, Congress would amend it and thereby expand Congress' powers.²⁵² Congress should adopt the policy of saying nothing about the Constitution. If executive power partisans were right, the president would remove and the courts could decide the question.²⁵³ There was no need for a legislative declaration of the Constitution's meaning.

Obviously, a majority of the House refused to accept the notion that the courts enjoyed a monopoly on constitutional interpretation.²⁵⁴ All branches had the power to say what the Constitution meant. While the judges might decide the Constitution's meaning, once and for all, other institutions could have their say too.²⁵⁵

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 some 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 in 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.²⁵⁶

Madison seemed to suggest that expressing the constitutional readings of Congress was useful precisely because courts had no unique authority to decide the Constitution's

²⁵¹ See, e.g., 11 *id.* at 849 (comments of William Smith of South Carolina) (claiming that judiciary was to "expound the constitution" and that bill's construction of the constitution infringed on judicial rights); 11 *id.* at 991 (comments of John Page) (saying that Congress should say nothing about removal and leave it to the "proper expositors").

²⁵² See, e.g., 11 *id.* at 929-30 (comments of Elbridge Gerry).

²⁵³ See 11 *id.* at 875 (comments of Alexander White).

²⁵⁴ See e.g., 11 *id.* at 884 (comments of Fisher Ames); 11 *id.* at 888 (comments of John Laurence); 11 *id.* at 899 (comments of James Madison).

²⁵⁵ See e.g., 11 *id.* at 884 (comments of Fisher Ames); 11 *id.* at 1007 (comments of Abraham Baldwin).

²⁵⁶ See 11 *id.* at 927.

meaning. Since no branch enjoyed interpretive supremacy,²⁵⁷ each ought to voice its opinion on the Constitution's meaning.

A few members of the majority doubted that the question of removal could even be heard by the courts.²⁵⁸ If the president removed an officer, a court might not be able to hear the case because the president was probably not subject to civil process. That being the case, a congressional decision on the locus of removal power would be the last word for all intents and purposes. Indeed, Madison, somewhat cryptically, suggested that the "decision . . . made will become the permanent exposition of the constitution."²⁵⁹

All representatives must have recognized that being first to express a judgment about the Constitution's meaning relating to removal certainly had its advantages. Some, sensing that they would ultimately triumph, undoubtedly wanted to claim that it might be entrenched somehow. Others, sensing that they would lose, argued that the Congress ought to say nothing 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 would be entitled to some deference it would not decide the question of removal for all time.

Anyone reading the debates of the Decision of 1789 comes away knowing that the departmentalist theory has very deep and solid roots.²⁶⁰ Although many acknowledged that judges would have a chance to register their views about removal, very few thought that the judiciary had a monopoly on constitutional interpretation. Specifically, a majority of the House and Senate clearly had no qualms about expressing their views about the Constitution's meaning.

IV. 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 acts, each of which clearly assumed that the Constitution

²⁵⁷ For an argument against interpretive supremacy, see Saikrishna Prakash and John Yoo, *Against Interpretive Supremacy*, __ MICH. L. REV. __ (2005) (forthcoming).

²⁵⁸ See 11 *id.* at 946 (comments of Theodore Sedgewick) (doubting that president could be compelled to answer in a civil suit and doubting that president could be mandamus-ed). *But see* 11 *id.* at 936 (comments of William Smith of South Carolina) (declaring that where there is a right to an office there is a damage remedy). Smith's comments echo what Chief Justice Marshall would say in *Marbury v. Madison*.

²⁵⁹ 11 *id.* at 921. *See also* 11 *id.* 996 (comments of Abraham Baldwin) (claiming that judiciary will "consider themselves obliged by our decision").

²⁶⁰ *See supra* note 27 and accompanying text.

granted the president a removal authority. Members who voted for the three bills knew full well that they were endorsing the view that the president had a right to remove these officers by virtue of the 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 will 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.”²⁶¹ He can be charged with only a slight exaggeration.

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 between two factions, one of which favored Benson’s language that implied a constitutional removal power and one of which favored a more forceful congressional declaration of the executive power theory. This was a tactical split and not a division grounded in differences in constitutional principle. Once the House adopted Benson’s second amendment, the factions closed ranks and pushed through three bills. When it comes to whether the Constitution grants the president a removal power, the Decision of 1789 was not a “Non-Decision.”

At a time when some scholars search for means of ensuring that members of Congress take their constitutional responsibilities more seriously and as others argue that the political branches ought to take a dominant role in constitutional interpretation, the Decision of 1789 beckons like a beacon, inviting us to gaze in admiration at an episode when Congress approached its constitutional duties with deliberation, sincerity, and sophistication second to none.

²⁶¹ 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 24, at 962 (comments of Richard Bland Lee).

Appendix I

Crucial House Votes During the Decision of 1789

Last Name	First Name	Amendment 1	Amendment 2	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	Edanus	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
Fitzsimmons	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
Heister	Daniel	Y	N	Y
Huntington	Benjamin	N	Y	N
Lawrance	John	Y	N	Y
Lee	Richard Bland	Y		Y
Leonard	George	Y	Y	N
Livermore	Samuel	N		N
Madison, Jr.	James	Y	Y	Y
Mathews	George	N	Y	N
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
Schuerman	James			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

“Amendment 1” refers to the June 22nd vote on Egbert Benson’s first amendment.

“Amendment 2” refers to the June 22nd vote on Egbert Benson’s second amendment.

“House bill” refers to the June 24th vote on the House Foreign Affairs Bill.

Crucial House Votes During the Decision of 1789

Last Name	First Name	Amendment 1	Amendment 2	House Bill
Stone	Michael Jenifer			N
Thatcher	George	Y	N	N
Trumbell	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

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