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## The Curious Case of the Pompous Postmaster: Myers v. United States

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# THE CURIOUS CASE OF THE POMPOUS POSTMASTER: *MYERS V.* *UNITED STATES*

*Jonathan L. Entin*<sup>†</sup>

## CONTENTS

I. FRANK MYERS.....	1061
II. WOODROW WILSON.....	1065
<i>A. Exigent Circumstances</i> .....	1066
<i>B. Democratic Factionalism</i> .....	1067
<i>C. Longstanding Political Philosophy</i> .....	1069
<i>D. Frustration with Congress</i> .....	1070
III. WILLIAM HOWARD TAFT.....	1073
IV. <i>MYERS</i> AS PRECEDENT AND AS SYMBOL.....	1075

*Myers v. United States*<sup>1</sup> is perhaps the leading Supreme Court case on the law of presidential power. The decision invalidated an 1872 law that required senatorial consent to the removal of local postmasters. Despite the seeming triviality of the office at issue, *Myers* clearly was a “great case.” It was argued twice in the Court, the second time with Senator George Wharton Pepper appearing on behalf of Congress.<sup>2</sup> Chief Justice Taft’s expansive opinion was not confined to the postmaster issue but went on to conclude that the Constitution gives the President unfettered power to remove nonjudicial appointees. These officials exercise executive power on behalf of the President, who must have implicit faith in their loyalty and trustworthiness.<sup>3</sup> This reasoning

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1. 272 U.S. 52 (1926).
2. *Id.* at 56.
3. *See id.* at 117 (“As he is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication . . . was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws.”).

led to the conclusion that the Tenure of Office Act,<sup>4</sup> which precipitated the impeachment of Andrew Johnson and served as the model for the postmaster statute, was also unconstitutional.<sup>5</sup> Taft reached that bigger issue even though the Tenure of Office Act had been repealed almost forty years earlier.<sup>6</sup>

*Myers* initially was viewed as a sweeping endorsement of executive power, and in recent times its reasoning has been invoked as a vital precedent by adherents of the so-called unitary executive. But *Myers* has not always been so understood either by the bench or by the academy. The Court soon retreated from Chief Justice Taft's broad language and has not embraced the full implications of the *Myers* approach despite impassioned urging by judicial and academic advocates of the unitary executive theory. Nearly half a century later, nobody involved in the Watergate tapes case, *United States v. Nixon*,<sup>7</sup> noticed that the regulation which created the position of special prosecutor was inconsistent with *Myers*, and even Justice Scalia, the Court's most outspoken proponent of the unitary executive, overlooked the problem in one of his most impassioned dissenting opinions.

So *Myers* remains an important decision, but there are many perplexing aspects to it. For one thing, it has never been very clear why Frank Myers was removed from his position. Chief Justice Rehnquist has suggested that Myers might have "committed fraud in the course of his official duties" but cited no authority for this suspicion.<sup>8</sup> If Myers had been engaged in illegal or unethical activities, however, the administration almost certainly could have obtained the necessary senatorial consent to his ouster. That raises questions about why President Wilson transformed what appears to have been a minor personnel matter into a constitutional confrontation. In addition, Taft's majority opinion in *Myers* went well beyond what was necessary to resolve the case and ignored the position advanced by the solicitor general in support of Wilson's action.<sup>9</sup> The traditional jurisprudential preference for narrow decisions makes the breadth of the *Myers* opinion something of an anomaly that is worthy of explanation. Finally,

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4. Ch. 154, 14 Stat. 430 (1867), amended by Act of Apr. 5, 1869, ch. 10, 16 Stat. 6.

5. See *Myers*, 272 U.S. at 176 (reasoning that "it . . . follows that the Tenure of Office Act . . . was invalid").

6. Act of Mar. 3, 1887, ch. 353, 24 Stat. 500.

7. 418 U.S. 683 (1974).

8. *Raines v. Byrd*, 521 U.S. 811, 827 (1997); see also WILLIAM H. REHNQUIST, GRAND INQUESTS 262 (1992) (noting that Myers was investigated for unspecified "irregularities in the management of the Portland post office").

9. See *Myers*, 272 U.S. at 90 (argument of Solicitor General Beck) (suggesting that "[i]t is not necessary in this case to determine the full question as to this removal power").

perceptions of the *Myers* ruling have fluctuated over the years, suggesting the need to put the case into broader context.

This Article seeks to provide at least tentative answers to some of these questions. Part I outlines the facts leading to the lawsuit. Then Part II considers several possible explanations for why the Wilson administration might have forced the constitutional issue. Next, Part III examines Taft's position both as Chief Justice and as President in order to assess the widespread suggestion that his experience in both offices prompted him to write so expansively. Finally, Part IV explores the changing view of *Myers* both as a precedent and as a symbol of presidential power.

## I. FRANK MYERS

President Wilson appointed Frank Myers as postmaster of Portland, Oregon, for a four-year term in April 1913.<sup>10</sup> Myers, then thirty-seven years old, had been active in Democratic politics in the state, most recently as an aide to U.S. Senator Harry Lane. Lane, the grandson of Oregon's first territorial governor and a Columbia-educated physician, served as superintendent of the state mental hospital, held leadership positions in the medical profession, sat on the state board of health, and in 1905 was elected to the first of his two terms as a reformist mayor of Portland.<sup>11</sup> Myers managed Lane's 1912 campaign for the Senate and went to Washington to serve as his personal secretary before becoming postmaster.<sup>12</sup>

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10. Myers was nominated on April 15, *see* 50 CONG. REC. 199 (1913), and confirmed and commissioned on April 24, *see id.* at 391; POWER OF THE PRESIDENT TO REMOVE FEDERAL OFFICERS, S. DOC. NO. 69-174, at 12 (1926).
  11. *See* ROBERT E. BURTON, DEMOCRATS OF OREGON 33 (1970); GORDON B. DODDS, THE AMERICAN NORTHWEST 191-93 (1986) [hereinafter DODDS, AMERICAN NORTHWEST]; GORDON B. DODDS, OREGON: A BICENTENNIAL HISTORY 173 (1977) [hereinafter DODDS, OREGON] (noting that Lane "reformed the police department and refused to create need-less jobs for patronage plums").
  12. *See Ex-Postmaster F.S. Myers Dies*, OREGON J., Dec. 24, 1924, at 1 ("Through the management of the campaign of former United States Senator Harry Lane and subsequent service as private secretary to the senator, Myers first became prominent in political life of the state."); *F.S. Myers, Ex-Postal Chief, Dies*, PORTLAND TELEGRAM, Dec. 24, 1924, at 1 (noting that Myers "emerged into national politics in 1912 as a member of the campaign committee for the late Senator Lane"); *Frank S. Myers Is Dead*, PORTLAND OREGONIAN, Dec. 25, 1924, at 9 ("In 1912 [Myers] acted as secretary for the late Senator Lane, after having been his campaign manager."). Although Lane's election to the Senate antedated the adoption of the Seventeenth Amendment, which provided for direct election to the upper chamber, Oregon reformers had succeeded in enacting a measure under which members of the state legislature could commit themselves to voting for the candidate receiving the most votes

His appointment was greeted enthusiastically. Local newspapers ran prominent stories marking the new man's arrival and noting his commitment to obtaining larger quarters for the overcrowded local post office.<sup>13</sup> Things seem to have gone uneventfully for Myers during his first term. He remained involved in politics, especially in connection with federal patronage matters.<sup>14</sup> Except for a minor dispute over the delayed seating of Oregon's newly elected member of the Democratic National Committee in 1915, Myers generally managed to avoid controversy.<sup>15</sup> Wilson nominated Myers for a second four-year term in July 1917, and the Senate confirmed two days later.<sup>16</sup>

Myers's second term was much more contentious than his first. In the spring of 1919 he became involved in yet another crisis over the state's national committeeman. This time the split was more serious, with the state party's executive deadlocked between factions loyal to President Wilson and to Senator George Chamberlain, who had been sharply critical of Wilson's military preparedness policies.<sup>17</sup> Myers weighed in strongly on the Wilson loyalist side and was widely rumored to be contemplating a primary run against Chamberlain the following

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in a nonbinding general election contest. See BURTON, *supra* note 11, at 28; DODDS, OREGON, *supra* note 11, at 169–70; Russell G. Hendricks, *Election of Senator Chamberlain, The People's Choice*, 53 OR. HIST. Q. 63, 65 (1952).

13. *New Postmaster Arrives*, OREGON J., May 7, 1913, at 1; *New Postmaster Is In Charge Today*, PORTLAND TELEGRAM, May 7, 1913, at 2.
14. Myers's papers include a substantial correspondence with aspirants for federal appointments and many letters to both his mentor, Lane, and Oregon's senior senator, George Chamberlain, about patronage matters. His focus was not confined to Oregon appointments. See, e.g., Letter from Frank S. Myers to Senator George E. Chamberlain (Aug. 1, 1913) (regarding appointment of James Coffey as Collector of Internal Revenue in South Dakota).
15. See Letter from Frank S. Myers to Hon. A. Mitchell Palmer (Mar. 25, 1915) (noting that "for some unknown and unexplainable reason the National Chairman refuses to recognize [the newly elected committee member]"); Letter from Frank S. Myers to Hon. Joseph Tumulty (Dec. 1, 1915) (noting the unpopularity of the holdover committeeman in Oregon). Ironically, the holdover committeeman whose replacement Myers supported was Will R. King, who would later represent him in his lawsuit challenging his dismissal as postmaster. See *Myers v. United States*, 272 U.S. 52, 56 (1926).
16. See 55 CONG. REC. 5288 (1917); *id.* at 5375.
17. See *Democrats in Row for State Control*, PORTLAND OREGONIAN, Apr. 20, 1919, at 23; *Political Row Near Crux*, PORTLAND OREGONIAN, May 19, 1920, at 20; see generally Sheldon Bernard Avery, *A Private Civil War: The Controversy Between George E. Chamberlain and Woodrow Wilson* (June 1967) (unpublished M.A. thesis, University of Oregon) (on file with author). For further discussion of Chamberlain's position, see *infra* notes 44–49 and accompanying text.

year.<sup>18</sup> The Chamberlain faction hit back by excluding Myers from a private dinner held for Secretary of War Newton D. Baker.<sup>19</sup>

Meanwhile, Myers got into a nasty public spat with Congressman Clifton McArthur, a Portland Republican who took to the House floor to denounce Myers as a “liar” for telling an interviewer that the congressman had gone to Postmaster General Albert S. Burleson with a “crooked scheme.” Myers denied making the statements and claimed that the candidates he had supported against McArthur had never “been guilty of selling the remnant of a tubercular herd of cattle to Multnomah county.”<sup>20</sup>

Later in the year, Myers asked the Post Office Department to investigate his assistant, Harry Durand. The reason for the investigation was not clear, although press reports suggested that Myers suspected Durand of harboring Republican sympathies and of personal disloyalty. The postal inspectors ultimately gave Durand a clean bill of health but then turned their attention to Myers.<sup>21</sup> He was said to run the Portland post office in a high-handed, dictatorial, and manipulative fashion that alienated workers, customers, and all but a handful of local Democratic activists.<sup>22</sup>

Within days of the first newspaper accounts of the investigation, Myers found himself the target of additional criticism. Portland Mayor George L. Baker, a Republican and staunch war hawk,<sup>23</sup> presented

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18. See, e.g., Letter from Frank S. Myers to Hon. J.P. Tumulty (May 20, 1919) (urging DNC to refuse to recognize the Chamberlain faction’s representative); *Rumor Says Myers Seeks Senatorship*, PORTLAND OREGONIAN, Apr. 9, 1919, at 9; *Rumored Candidacy of F.S. Myers Stirs*, PORTLAND OREGONIAN, Apr. 10, 1919, at 16; *Myers Won’t Deny He May Seek Toga*, PORTLAND OREGONIAN, Apr. 23, 1919, at 13. Myers ultimately chose not to make the race but actively supported Chamberlain’s primary opponent. See Avery, *supra* note 17, at 92 n.19.
  19. See *Chamberlain Crowd Hit Hard at Myers*, PORTLAND OREGONIAN, Mar. 19, 1919, at 12 (quoting one of the dinner organizers as saying, “[t]here were some people we didn’t want at the dinner and so we didn’t invite them. . . . I might even go so far as to mention Myers”).
  20. *McArthur Flays Frank S. Myers*, OREGON J., Mar. 4, 1919, at 5; *Myers’ Attack Resented*, PORTLAND OREGONIAN, Mar. 4, 1919, at 8; *Myers Replies to Attack*, PORTLAND OREGONIAN, Mar. 5, 1919, at 3.
  21. See *Myers Loses Fight Against Durand*, PORTLAND OREGONIAN, June 5, 1919, at 4 (“It appears that there is not fault to be found with . . . Mr. Durand.”).
  22. See *Democrats Pleased at Postal Inquiry*, PORTLAND OREGONIAN, July 31, 1919, at 4 (“Hardly one person . . . has seen fit to commend the official administration of Mr. Myers.”); *Postoffice Inquiry of Interest to All*, PORTLAND OREGONIAN, Aug. 1, 1919, at 9 (“The record of Mr. Myers is remarkable, according to [employees]. They say that he has caused more inefficiency in the local office than has ever before existed.”).
  23. See E. KIMBARK MACCOLL, *THE GROWTH OF A CITY* 140–43 (1979). Mayor Baker was instrumental in forcing the resignation of a librarian

public charges implying that Myers was not fully supportive of U.S. involvement in the recently ended First World War. A number of returning servicemen claimed that the postmaster had refused to give them their old jobs, and the mayor took up their cause.<sup>24</sup> Myers responded in his typically diplomatic fashion, describing Baker as “four flushing” and “weak minded” while strenuously denying the charges.<sup>25</sup> Soon the local American Legion began investigating the postmaster’s alleged mistreatment of World War I veterans; within a month, Myers backed down and restored the returnees to their prewar positions.<sup>26</sup> Although this flap was technically separate from the Post Office Department’s investigation, it certainly contributed to public perception that Myers would have to go.<sup>27</sup>

Ultimately the Post Office Department demanded that Myers resign effective January 31, 1920. The letter demanding his resignation explained that the previous year’s investigation had sought to “eliminate the antagonism which existed in the Portland office and bring about needed cooperation” but that this had not happened, leaving Washington no alternative but to remove both Myers and Durand.<sup>28</sup> Myers did not go quietly, denying that he could be removed without the Senate’s consent and demanding a hearing on the charges

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who refused to buy war bonds although she claimed to support American participation in World War I. *See id.* at 149–52.

24. *See War Veterans Turn Guns on Postmaster*, PORTLAND OREGONIAN, Aug. 2, 1919, at 12 (“Failure to give ex-service men former positions in the Portland post-office . . . form the principal charges against Postmaster Frank S. Myers.”); *Mayor Dares Myers to Deny Accusations*, PORTLAND OREGONIAN, Aug. 3, 1919, at 21.
25. *Mayor Baker Four Flusher, Says Myers*, OREGON J., Aug. 2, 1919, at 1, 2.
26. *See Postmaster Yields to Legion’s Demand*, PORTLAND OREGONIAN, Aug. 28, 1919, at 9 (noting that “Postmaster Myers will restore ex-service men to their former positions in the Portland postoffice” as part of his “promise to the employment committee of the American Legion”). Lost in the commotion was one important aspect of the dispute: the returning veterans had been assigned to night duty because, according to Myers, it would be inappropriate to switch the women who had been hired to replace them during the war off the day shift. *See No Promise Given, Declares Myers*, OREGON J., Aug. 4, 1919, at 1 (noting that Myers’s explanation for declining to switch the women off the day shift was due to “thugs and thieves” that infested Portland under the Mayor’s “rotten” administration).
27. *See Democrats Hoping Myers Loses Scalp*, PORTLAND OREGONIAN, Aug. 17, 1919, at 19 (noting that many of those prominent in the Democratic Party held the opinion that “Myers is a liability rather than an asset to the party”).
28. Letter from First Assistant Postmaster General J.C. Koons to Hon. F.S. Myers (Jan. 27, 1920) [hereinafter Myers Resignation Demand Letter], reprinted in S. DOC. NO. 69-174, *supra* note 10, at 6–7.

against him.<sup>29</sup> Nothing happened during the remainder of the Wilson administration, although he had a brief but unsuccessful meeting with President Harding's Postmaster General, Will Hays, in April 1921.<sup>30</sup> Several days later, Myers filed suit in the U.S. Court of Claims for the salary he would have earned had he remained in office for the balance of his term.<sup>31</sup> He lost there in 1923.<sup>32</sup> Myers died in December 1924, but his widow continued the litigation in the name of his estate.<sup>33</sup> And, as noted at the outset, the Supreme Court upheld the removal in 1926.

## II. WOODROW WILSON

In removing Myers as Portland's postmaster, the Wilson administration ignored the applicable statute, which had been on the books for about half a century.<sup>34</sup> That statute provided that local postmasters like Myers "shall be appointed and may be removed by the President by and with the advice and consent of the Senate."<sup>35</sup> A chief executive who wanted to remove a postmaster simply sent the name of a new nominee to the Senate; confirmation of the successor amounted to consent to the removal of the incumbent. President Wilson surely could have chosen that course to get rid of Myers, but, for whatever reason, he decided to defy the statute and risk a constitutional confrontation. In this Part, I will consider several possible explanations for bypassing the statute.

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29. See, e.g., Telegram from Frank S. Myers to Hon. A.S. Burleson (Feb. 2, 1920), *reprinted in* S. DOC. NO. 69-174, *supra* note 10, at 7; *Mr. Myers to Take Appeal to Senate*, PORTLAND OREGONIAN, Feb. 5, 1920, at 11; *Postmaster Myers Says Chamberlain Is Doing Him Injustice*, OREGON J., Feb. 5, 1920, at 3; *Myers Eager to Reply to All Charges*, PORTLAND TELEGRAM, Feb. 14, 1920, at 13.
  30. See *F.S. Myers, Ousted Postmaster, Given Hearing by Hays*, OREGON J., Apr. 22, 1921, at 1; *Ousted Postmaster Interviews Hays*, PORTLAND OREGONIAN, Apr. 23, 1921, at 1.
  31. See *Myers Sues for Salary*, PORTLAND OREGONIAN, Apr. 26, 1921, at 6.
  32. *Myers v. United States*, 58 Ct. Cl. 199 (1923), *aff'd*, 272 U.S. 52 (1926).
  33. After her husband's death, Lois Myers became an editorial writer and columnist for Portland newspapers. See *Journal's Original Mr. Ficit Dies at 80; Retired in 1949*, OREGON J., Sept. 30, 1956, at A11; *Mrs. Lois Myers*, PORTLAND OREGONIAN, Sept. 30, 1956, at 40.
  34. I refer to the Wilson administration rather than to President Wilson because the chief executive was recovering from a stroke at this time. Therefore, it is not entirely clear to what extent he was engaged in day-to-day decisionmaking during this period.
  35. Act of July 12, 1876, ch. 179, § 6, 19 Stat. 78, 80–81. This provision was carried over from the Act of June 8, 1872, ch. 335, § 63, 17 Stat. 283, 292–93.

*A. Exigent Circumstances*

If Frank Myers was engaged in criminal or unethical conduct, the Post Office Department would have had good reason to remove him from office as quickly as possible. As noted earlier, Chief Justice Rehnquist has said Myers was suspected of committing fraud.<sup>36</sup> That seems unlikely, however. Myers was never charged with any crime. The letter from Washington demanding his resignation cited only personal conflicts within the Portland post office.<sup>37</sup> Perhaps the postal authorities were more concerned with removing Myers than imprisoning him, but local newspapers that often reported political gossip contained no intimation that he was suspected of criminal wrongdoing.

Whatever the grounds for ousting Myers, it is difficult to believe that the administration could not have persuaded the Senate to acquiesce. All the Senate had to do was confirm Wilson's nominee to succeed Myers, which was the standard practice in postmaster removals under the statute.

To be sure, the process might have become a bit more cumbersome as a result of Wilson's 1917 extension of civil service procedures to local postmasterships, which previously had been handled as patronage appointments.<sup>38</sup> Perhaps the new rules would have required an initial Senate vote agreeing with the chief executive's desire to remove Myers before the necessary examination could be prepared and administered to potential successors. Even so, it is difficult to believe that the Senate would have objected to declaring a vacancy if there was good reason to believe that Myers had disrupted his operation as completely as the

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36. See *supra* note 8 and accompanying text.

37. See Myers Resignation Demand Letter, *supra* note 28.

38. See Exec. Order No. 2569A (Mar. 31, 1917). This order extended civil service procedures to first-, second-, and third-class postmasters, but it did not apply to incumbents. The Portland office was a first-class postmastership. Wilson's order has been described as "almost his sole contribution to the extension of merit principles," PAUL P. VAN RIPER, *HISTORY OF THE UNITED STATES CIVIL SERVICE* 239 (1958), a surprising statement about a man who had been a vice-president of the National Civil Service Reform League before entering the White House. *Id.* at 230. President Taft had tried to extend civil service protection to incumbent fourth-class postmasters, see Exec. Order No. 1624 (Oct. 15, 1912), but Wilson quickly withdrew the protections from incumbents while providing that all new fourth-class postmasters would be chosen through civil service, see Exec. Order No. 1776 (May 7, 1913). Ironically, Myers opposed Wilson's 1917 order (which did not apply to him because he was an incumbent) because it would adversely affect local Democratic political organizations; so did numerous congressional Democrats. See Letter from Frank S. Myers to Hon. Daniel C. Roper (Mar. 10, 1917); *Civil Service Order Angers Congressmen*, N.Y. TIMES, Mar. 8, 1917, at 7; *Fight Civil Service Order*, N.Y. TIMES, Mar. 9, 1917, at 5. There is no reason to believe that his opposition had anything to do with his later difficulties.

Post Office Department claimed. The likelihood of Senate approval had to have been even greater if, as Chief Justice Rehnquist hypothesized, Myers was suspected of corruption.

Whatever the urgency of getting Myers out of the way, then, it cannot explain why the statutory removal procedure had to be avoided. At most, the exigency provided a rationale for rejecting that procedure.

### *B. Democratic Factionalism*

Another possible explanation for Wilson's decision to ignore the statutory removal provision was that he wanted to punish Myers for being aligned with his Democratic critics. Because those critics were in the Senate, they might have blocked an attempt to remove a postmaster whom one of their number had sponsored. On this reasoning, trying to cut the upper house out of the removal process seems like a sound strategy. That is an understandable hypothesis, but the available evidence makes it highly implausible.

Recall that Myers's political mentor was Harry Lane, for whom he served as 1912 campaign manager and later as personal secretary.<sup>39</sup> Although elected as a strong supporter of Wilson, Lane opposed the President's 1917 proposal to arm U.S. merchant ships. That proposal was blocked by a Senate filibuster at the end of the Sixty-fourth Congress, which led Wilson to denounce the "little group of willful men, representing no opinion but their own."<sup>40</sup> Lane also opposed the declaration of World War I.<sup>41</sup> So Wilson had good reason to seek retribution against someone who owed his position to Lane, but striking back at Myers in 1920 seems a dubious way to make the point.

One problem with this explanation is that Harry Lane had been dead for almost three years when Myers was unilaterally removed from his position.<sup>42</sup> It would take a remarkable political memory to wait that long to go after a critic's protégé. Long memories are legion in politics, but in this instance the administration could have gotten rid of Myers much sooner. Myers's first term as postmaster expired in 1917, just about the time that Lane died. Wilson could have selected someone else at that point. The replacement would have had to go through the new civil service procedures, which were announced less than a month before

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39. See *supra* note 12 and accompanying text.

40. See FRANKLIN L. BURDETTE, *FILIBUSTERING IN THE SENATE* 122–23 (Russel & Russel, Inc. 1965) (1940) (noting that Senator Lane was one of the eleven senators who faced severe public criticism for opposing Wilson's proposal); DODDS, *AMERICAN NORTHWEST*, *supra* note 11, at 199; ARTHUR S. LINK, *WILSON: CAMPAIGNS FOR PROGRESSIVISM AND PEACE* 360, 362 (1965); THOMAS W. RYLEY, *A LITTLE GROUP OF WILLFUL MEN* 32–33, 78, 119, 143–44 (1975).

41. See DODDS, *AMERICAN NORTHWEST*, *supra* note 11, at 199; MACCOLL, *supra* note 23, at 137; RYLEY, *supra* note 40, at 165.

42. See MACCOLL, *supra* note 23, at 137; RYLEY, *supra* note 40, at 170–71.

Myers's term ended, but this complication should not have discouraged the replacement of an incumbent postmaster who had drawn administration ire. Besides, Myers was a strong Wilson supporter who had assisted in his 1916 reelection effort.<sup>43</sup>

Another possibility is that Myers was forced out at the behest of Oregon's other Democratic Senator, George Chamberlain. There is ample reason to believe that Chamberlain had no use for Myers. The Portland postmaster had been severely critical of the senator, so much so that he was rumored to be seriously considering a primary challenge in 1920.<sup>44</sup> The main problem with this hypothesis is that Chamberlain was on terrible terms with the Wilson administration. Although (unlike Lane) he supported the war, Chamberlain had strongly condemned military inefficiency and had publicly aligned himself with Theodore Roosevelt and other Wilson critics on the issue.<sup>45</sup> Worse yet, Chamberlain favored the Lodge reservations to the Versailles treaty, which by itself was likely to put him beyond the pale.<sup>46</sup> Myers went out of his way to bring the Chamberlain faction's disloyalty to the White House's attention.<sup>47</sup> Although Wilson made some overtures to mend the breach,<sup>48</sup> in the end he refused to support Chamberlain for reelection in 1920.<sup>49</sup> Even if getting rid of Myers seemed like a small gesture of reconciliation before the final break came, that would not explain Wilson's defiance of the statutory removal procedure. Indeed, challenging the Senate's role in postmaster removals would have been counterproductive if the goal had been to conciliate Chamberlain by dismissing his nemesis. Presumably the senator would have been delighted to lead the fight against Myers on Capitol Hill.

Here again, then, we can see why party considerations might have prompted the administration to rid itself of Myers. This cannot explain why the strategy included a unilateral removal in the face of the provision for senatorial approval.

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43. See, e.g., Letter from Frank S. Myers to Hon. Thos. R. Marshall (Jan. 3, 1916) (indicating that Myers would be "very glad" to circulate political petitions for Wilson and his Vice President, Thomas Marshall).

44. See *supra* notes 17–19 and accompanying text.

45. See BURTON, *supra* note 11, at 42; SEWARD W. LIVERMORE, POLITICS IS ADJOURNED 81–90 (1966); Avery, *supra* note 17, at 41–45, 53–54, 59–62, 64–65, 70–84, 86–88.

46. See BURTON, *supra* note 11, at 42; Avery, *supra* note 17, at 92.

47. See, e.g., Letter from Frank S. Myers to Hon. W. G. McAdoo (Jan. 30, 1916); Letter from Frank S. Myers to Hon. J.P. Tumulty (Feb. 16, 1918).

48. See *President Seeks Chamberlain's Aid*, PORTLAND OREGONIAN, July 17, 1919, at 1 (describing an amicable meeting between Chamberlain and Wilson).

49. See BURTON, *supra* note 11, at 43–44; Avery, *supra* note 17, at 92–93.

*C. Longstanding Political Philosophy*

Yet another conceivable explanation for Wilson's decision to provoke a constitutional fight over the removal procedure is a deep-seated intellectual aversion to mechanisms that weaken presidential power. Wilson made his mark as one of the first scholars of American government, so perhaps we can find evidence for this hypothesis in his writings. Wilson's most comprehensive work was *Congressional Government*, which was published in 1885.<sup>50</sup> He primarily emphasized the dominance of standing committees in the House and Senate but noted the institutional weakness of the presidency.<sup>51</sup> In that regard, he had a few critical words to say about the Tenure of Office Act, which was still on the books at the time. He characterized the law as a "usurpation" of executive power that is "repugnant . . . to the original theory of the Constitution" but went on immediately to discount its significance in light of the emergence of the civil service as the primary means for filling federal jobs.<sup>52</sup> Later he lamented that the statute also meant that the chief executive "[could not] dismiss his advisers without legislative consent" but quickly added that, in reality, these aides served Congress rather than the President and that the entire arrangement was "a hopeless undertaking."<sup>53</sup> In a 1900 preface to the fifteenth printing, Wilson approvingly noted the repeal of the Tenure of Office Act and confessed that he failed to consider that the law had "[fallen] into the background" after the Johnson impeachment.<sup>54</sup>

Although Wilson plainly disliked the Tenure of Office Act, he regarded the law more as a nuisance than as a serious factor in the weakness of the presidency. In later years, when he took a more optimistic view of the executive and wrote about the prospects for effective presidential leadership, Wilson said nothing about the Tenure

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50. See Robert L. Peabody, *Afterword* to CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 217 (Johns Hopkins paperback ed. 1981) ("none of [Wilson's] books was to rival *Congressional Government* in importance or impact.").
51. See generally NIELS AAGE THORSEN, THE POLITICAL THOUGHT OF WOODROW WILSON 41–67 (1988) (describing Wilson's view of the president as "an almost pitiful figure, selected at a nominating convention by procedures and for reasons that almost guarantee the nominee's inability to exercise leadership in case of election"); Peabody, *supra* note 50, at 216 (noting Wilson's writings regarding the power struggle between Congress and the President); Roland Young, *Wilson's Congressional Government Reconsidered*, in THE PHILOSOPHY AND POLICIES OF WOODROW WILSON 201 (Earl Latham ed., 1958) (noting Wilson's early work criticizing the structure of Congress).
52. WOODROW WILSON, CONGRESSIONAL GOVERNMENT 49 (The Riverside Press Cambridge 1925) (1885).
53. *Id.* at 277.
54. WOODROW WILSON, CONGRESSIONAL GOVERNMENT, at vii (15th ed. 1900).

of Office Act.<sup>55</sup> We should not exaggerate the significance of that omission, however, because the offending statute had been repealed two decades earlier<sup>56</sup> and had no prospects for resuscitation. At most, this suggests only that Wilson was not preoccupied by the subject. That in turn implies that he did not precipitate a constitutional clash over the Myers removal out of a longstanding desire to make a philosophical or jurisprudential point.

One other fact strongly supports this conclusion. Myers was fired just short of seven years into Wilson's presidency.<sup>57</sup> That is hardly the time to expect him to stamp out a blatantly unconstitutional statute that he regarded as substantially undermining his authority. To be sure, postmasters were not the highest priority in the grand scheme of presidential activity, but the postmaster law covered more than 10,000 offices, hardly a trivial number.<sup>58</sup> Perhaps even more telling, if he really objected in principle to the law, Wilson could easily have raised the issue at the outset of his first term, when he removed scores of postmasters who had been appointed by his Republican predecessors. Yet he never did so. Instead, he followed the procedure set out in the postmaster statute and sought Senate consent to removals. Indeed, on the very day he nominated Frank Myers in 1913, Wilson sought to remove another postmaster by submitting the name of a proposed successor to the Senate for confirmation.<sup>59</sup>

Despite Wilson's aversion to sharing his removal power with the Senate, then, there is no reason to believe that he deliberately provoked this fight to vindicate some long-held view of presidential authority.

#### *D. Frustration with Congress*

An alternative explanation, one that relies less on Wilson's longstanding intellectual commitments and more on his experience in office, suggests that he picked a constitutional fight over the Myers

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55. See WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 54–81 (1908) (discussing the presidency).

56. See *supra* note 6 and accompanying text.

57. See Myers Resignation Demand Letter, *supra* note 28.

58. See WILLIAM DUDLEY FOULKE, FIGHTING THE SPOILSMEN 257 (1919); DANIEL D. STID, THE PRESIDENT AS STATESMAN 137 (1998). By way of comparison, there were more than 50,000 fourth-class postmasters. See FOULKE, *supra*, at 233. Indeed, the enormous patronage opportunities presented by postmasterships was one factor in the Wilson administration's reluctance to put these positions under strict civil service procedures. See 4 RAY STANNARD BAKER, WOODROW WILSON: LIFE AND LETTERS 43–50 (1931); ARTHUR S. LINK, WILSON: THE NEW FREEDOM 158–60 (1956); VAN RIPER, *supra* note 38, at 238; *From the Diary of Josephus Daniels (Mar. 7, 1913)*, 27 THE PAPERS OF WOODROW WILSON 160 (Arthur S. Link ed., 1978).

59. See 50 CONG. REC. 199 (1913).

removal because he saw many legislative encroachments on his prerogatives during his White House years. There is no direct evidence for this hypothesis, and Wilson's physical incapacities during his final seventeen months in office suggest a cautious approach to inferring too much about his direct involvement in decisionmaking, but the available record makes this explanation plausible.

Wilson's difficulties with the Senate over the League of Nations and the Versailles treaty are well known and need not be rehearsed in detail. These difficulties capped a long series of conflicts between the administration and Congress, however. Many of the earlier problems also related to diplomatic and military matters. For example, soon after the First World War began, Wilson proposed that the United States purchase merchant vessels of belligerent nations that were marooned in American ports due to the war at sea; Congress rejected this measure early in 1915 despite vigorous administration lobbying.<sup>60</sup> Early the following year, Congress seriously considered a resolution to withdraw American protection of U.S. citizens traveling on vessels of combatant nations; Wilson strenuously opposed this measure, which ultimately was rejected, because he thought it undercut his own diplomatic efforts.<sup>61</sup>

The most significant prewar conflict between Wilson and Congress related to his proposal to arm U.S. merchant ships as a last-ditch way of defending American neutrality. Following the 1916 election, Wilson made this proposal to the lame-duck congressional session.<sup>62</sup> The House voted in favor, but the measure died in the Senate as the result of a filibuster that lasted until noon on March 4, when the Sixty-fourth Congress expired.<sup>63</sup> Wilson was outraged by this senatorial obstreperousness, denouncing the "little group of willful men" who had prevented the legislature from functioning.<sup>64</sup> He announced that he

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60. See BURDETTE, *supra* note 40, at 103–15; ARTHUR S. LINK, *WILSON: THE STRUGGLE FOR NEUTRALITY* 81–91 (1960); RYLEY, *supra* note 40, at 42–44.

61. See ARTHUR S. LINK, *WILSON: CONFUSIONS AND CRISES* 167–94 (1964); LIVERMORE, *supra* note 45, at 7; RYLEY, *supra* note 40, at 47–52.

62. See BURDETTE, *supra* note 40, at 115 ("The short session of the 64th Congress came to an end on March 4, 1917 . . . With the end of the session died the President's prewar measure to arm merchant vessels, the Armed Ship Bill.").

63. RYLEY, *supra* note 40, at 92 ("The House passed the Armed Ship Bill on the afternoon of March 1."); LINK, *supra* note 40, at 346–70 ("Republican senators met in caucus on that same day and agreed unanimously to filibuster against the vital appropriations bill in order to force the President to call a special session of Congress soon after the expiration of the Sixty-fourth Congress on March 4.").

64. See BURDETTE, *supra* note 40, at 115–23; LINK, *supra* note 40, at 346–70; RYLEY, *supra* note 40, at 94–131.

would call the new Sixty-fifth Congress into special session to act on the armed-ship bill but insisted that the Senate first take steps to limit debate; this resulted in the adoption of a rule providing for cloture.<sup>65</sup> In the end, Wilson was able to arm the merchant ships without congressional action.<sup>66</sup> Within weeks, the dispute was superseded by events as the nation found itself officially at war. Still, it is clear that the armed-ship filibuster left a lasting impression on the chief executive.

Two other developments support the view that Wilson was becoming increasingly sensitive to presidential prerogative. First, in early February 1920, he demanded and received the resignation of Secretary of State Robert Lansing for disloyalty.<sup>67</sup> It is true that Lansing was forced out after Myers was dismissed, but Wilson first learned of Lansing's breach while in Portland to deliver a speech on September 15, 1919, during his barnstorming tour to rally support for the League of Nations.<sup>68</sup> Under the circumstances, it is reasonable to infer that the ability to remove executive officials had become a matter of some salience at that point and that protecting that ability from congressional encroachment might well have taken on high priority.

This possibility receives greater support from Wilson's veto of the Budget and Accounting Act in June 1920 over the procedure for removing the Comptroller General. The bill as passed provided that the Comptroller could be dismissed, other than by impeachment, only through a concurrent resolution of Congress,<sup>69</sup> a device that completely excludes the President because it is not presented to the chief executive for approval or veto. Wilson specifically cited the removal provision as the sole basis for rejecting the bill, which dealt with a reform he professed to support and which he had endorsed early in his administration.<sup>70</sup>

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65. See SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE?* 78–79 (1997); BURDETTE, *supra* note 40, at 127–28; LINK, *supra* note 40, at 370; RYLEY, *supra* note 40, at 147–49. Needless to say, the new Senate rule did not eliminate filibusters. See BINDER & SMITH, *supra*, at 6–19, 85–92, 129–53.

66. See LINK, *supra* note 40, at 372–77; RYLEY, *supra* note 40, at 149–50.

67. See Letter from Woodrow Wilson to Robert Lansing (Feb. 11, 1920), in 64 THE PAPERS OF WOODROW WILSON 404 (Arthur S. Link ed., 1991); Letter from Robert Lansing to Woodrow Wilson (Feb. 12, 1920), in 64 THE PAPERS OF WOODROW WILSON 408 (Arthur S. Link ed., 1991).

68. See Clifford W. Trow, “*Something Desperate in His Face*”: Woodrow Wilson in Portland at the “*Very Crisis of His Career*,” 82 OR. HIST. Q. 41, 48 (1981).

69. 59 CONG. REC. 8609 (1920).

70. For the veto message, see 59 CONG. REC. 8609–10 (1920). On the background to the bill, see HARVEY C. MANSFIELD, *THE COMPTROLLER GENERAL* 65–69 (1939); FREDERICK C. MOSHER, *THE GAO: THE QUEST FOR ACCOUNTABILITY IN AMERICAN GOVERNMENT* 43–55 (1979)

Although we cannot know for certain, this series of conflicts with Congress seems the most likely explanation for the Wilson administration's decision to stand on principle in connection with the Myers dismissal. No other explanation can adequately account for the White House's refusal to go to the Senate for the removal of an obscure postmaster whose ouster almost certainly would have been approved on Capitol Hill.

### III. WILLIAM HOWARD TAFT

When the *Myers* case reached the Supreme Court, the government argued for a kind of middle ground: Congress could not reserve a formal place for itself in the removal process but might set standards governing removals by the President.<sup>71</sup> Chief Justice Taft rejected this course and concluded that the chief executive must have unfettered authority in this field.<sup>72</sup> It is often suggested that the breadth of the opinion can be explained by the uniqueness of Taft's experience: he was, after all, the only person ever to serve both in the White House and on the Supreme Court.<sup>73</sup> Justice Frankfurter recognized this view in *Wiener v. United States*,<sup>74</sup> which read *Myers* narrowly to find an implicit limitation on presidential removal authority for members of the War Claims Commission.<sup>75</sup>

This superficially attractive explanation is inadequate for several reasons. For one thing, Taft had no reason to vindicate Woodrow

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[hereinafter MOSHER, GAO]; FREDERICK C. MOSHER, A TALE OF TWO AGENCIES 27–31 (1984) [hereinafter MOSHER, TALE]; DARRELL HEVENOR SMITH, THE GENERAL ACCOUNTING OFFICE 58–61 (1927); ROGER R. TRASK, DEFENDER OF THE PUBLIC INTEREST 24–38 (1996). After Wilson's veto was sustained, Congress the following year modified the removal procedure to require a joint resolution, which was presented to the President, and President Harding signed what became known as the Budget and Accounting Act of 1921. See MANSFIELD, *supra*, at 69–70; MOSHER, GAO, *supra*, at 55–56; MOSHER, TALE, *supra*, at 31–32; SMITH, *supra*, at 62; TRASK, *supra*, at 38–42. The revised removal provision was rejected in *Bowsher v. Synar*, 478 U.S. 714 (1986).

71. See *Myers v. United States*, 272 U.S. 52, 96 (argument of Solicitor General Beck); Brief for the United States on Reargument, *reprinted in* S. DOC. NO. 69-174, *supra* note 10, at 69–71.
72. *Myers v. United States*, 272 U.S. at 106, 176.
73. See, e.g., EDWARD S. CORWIN, THE PRESIDENT'S REMOVAL POWER UNDER THE CONSTITUTION 50 (1927); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 65 (1995); Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 476 (1979); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 610 (1984).
74. 357 U.S. 349 (1958).
75. *Id.* at 351–52.

Wilson, the President who fired Myers. After all, Taft had been humiliatingly defeated by Wilson when he sought reelection in 1912, carrying only two states and finishing third in the popular vote.<sup>76</sup>

Moreover, the argument that Taft objected to the postmaster statute because he previously served as chief executive ignores his behavior as President: Taft sought to remove at least 175 postmasters during his White House tenure and never once objected to the statutory requirement of senatorial consent.<sup>77</sup> It turns out that *President* Taft scrupulously complied with the statute throughout his four years in office.<sup>78</sup> As far as I have been able to determine, he never objected to the requirement of senatorial consent to the removal of postmasters. When the Senate failed to act the first time he proposed to dismiss a postmaster, Taft routinely resubmitted the name of his preferred alternative.<sup>79</sup> Nor did Taft protest when the Senate three times refused to go along with his proposal to oust John G. Gorth as postmaster of Oconomowoc, Wisconsin, and replace him with W.A. Jones.<sup>80</sup>

Skepticism about the vulgar realist explanation for Taft's opinion is further warranted by his distaste for deciding postal personnel matters. In 1912 he tried to place all fourth-class postmasters under civil service.<sup>81</sup> Then, in a book he wrote between his presidency and his chief justiceship, Taft grumped:

I cannot exaggerate the waste of the President's time and the consumption of his nervous vitality involved in listening to Congressmen's intercession as to local appointments. Why should the President have his time taken up in a discussion over the

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76. ARTHUR S. LINK, *WILSON: THE ROAD TO THE WHITE HOUSE* 525 (1965).
77. Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L.J. 699, 736 n.166 (1987).
78. See, e.g., 48 CONG. REC. 9239 (1912) (seeking consent to remove and replace postmasters in Illinois, Kentucky, and Minnesota); 45 CONG. REC. 62 (1909) (seeking consent to remove and replace postmasters in Oklahoma, Pennsylvania, South Carolina, and West Virginia).
79. See, e.g., 48 CONG. REC. 86 (1911) (resubmitting the name of James S. Byrd to be postmaster of Jonesboro, Tennessee, after Senate previously adjourned without voting on Byrd's nomination to replace incumbent postmaster Frank E. Britton).
80. The Senate never voted on the removal of Gorth and his replacement by Jones. See 46 CONG. REC. 73 (1910); 47 CONG. REC. 54 (1911); 48 CONG. REC. 87 (1911).
81. See *supra* note 38.

question of who shall be postmistress at the town of Devil's Lake in North Dakota?<sup>82</sup>

He added that all executive branch personnel below the rank of cabinet secretaries and a single undersecretary in each department should be put under civil service.<sup>83</sup> This hardly sounds like a defense of sweeping presidential prerogative.

In fact, Taft had a more complex view of the office. Although he did not believe in an activist chief executive, he wanted to protect presidential prerogatives in those areas. Moreover, this was not a view that he came to only after serving in the White House. Thirty-five years before *Myers* and nearly two decades before his election as President, Taft argued for an expansive view of the removal power. As Solicitor General in 1891, Taft defended President Cleveland's removal of an Alaska territorial official.<sup>84</sup> In the same year, he advised the Treasury Department that it had broad power to dismiss a politically disloyal customs officer.<sup>85</sup>

Ironically, it appears that it was Taft rather than Wilson who had a longstanding aversion to limitations on presidential removal authority. When the opportunity finally arose, Taft seems to have seized it to write his broad view into constitutional doctrine.

#### IV. MYERS AS PRECEDENT AND AS SYMBOL

Initially *Myers* was thought to have made clear that the President has unfettered power to remove all nonjudicial civilian appointed officials. This view was reflected in two different ways during the years immediately following that ruling. First, the statutes creating the Federal Power Commission in 1930<sup>86</sup> and both the Federal Communications Commission<sup>87</sup> and the Securities and Exchange

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82. WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 67 (1916).

83. *See id.* at 70–71.

84. *See* *McAllister v. United States*, 141 U.S. 174 (1891). Ironically, a major part of Taft's argument was that the removal fell within an exception to the Tenure of Office Act, which was still in force when the official was ousted. *See id.* at 177–78.

85. *See* ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 254 (1965) (quoting Letter from William Howard Taft to A.L. Spaulding (July 23, 1891)).

86. Act of June 23, 1930, ch. 572, 46 Stat. 797 (amended by Department of Energy Organization Act, Pub. L. No. 95-91, § 401, 91 Stat. 565, 582–83 (reorganizing and renaming the agency as the Federal Energy Regulatory Commission)).

87. Communications Act of 1934, ch. 652, § 4, 48 Stat. 1064, 1066–68 (codified as amended at 47 U.S.C. § 154 (2012)).

Commission in 1934<sup>88</sup> were silent with respect to removal, thereby reflecting the view that Myers had resolved the removal issue in favor of the President.<sup>89</sup>

Second, Solicitor General Stanley Reed, having been advised to select a sure winner as the first case he would present in the Supreme Court, chose the seemingly safe argument that the statutory requirement that the President could remove a member of the Federal Trade Commission only for cause was unconstitutional on the basis of *Myers*.<sup>90</sup> Reed's approach seemed reasonable, as *Myers* had been decided only nine years earlier, but it proved to be a colossal miscalculation: the Court unanimously upheld the for-cause provision in *Humphrey's Executor v. United States*.<sup>91</sup> The Court reasoned that the FTC was an independent agency and that *Myers* applied only to "purely executive" offices.<sup>92</sup>

The retreat from the broadest implications of *Myers* continued two decades later in *Wiener v. United States*,<sup>93</sup> which relied on *Humphrey's Executor* to read a for-cause requirement into the statute that created the War Claims Commission.<sup>94</sup> A unanimous Court explained that officials who were charged with deciding claims "according to law"<sup>95</sup> could not function with "the Damocles' sword of removal by the President" hanging over them.<sup>96</sup>

Although *Humphrey's Executor* and *Wiener* limited the broadest language in *Myers*, that ruling has retained its vitality at least to the extent that the Supreme Court continues to reaffirm that Congress itself may not formally participate in the removal of officials exercising executive power. Notably, in *Bowsher v. Synar*,<sup>97</sup> the Court invalidated a provision of a statute that authorized the Comptroller General to

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88. Securities Exchange Act of 1934, ch. 404, § 4, 48 Stat. 881, 885 (codified as amended at 15 U.S.C. § 78d (2012)).

89. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 546–47 (2010) (Breyer, J., dissenting) (noting that the result of the *Myers* decision was to "cast serious doubt on the constitutionality of all 'for cause' removal provisions"). The Court decided *Free Enterprise Fund* on the "understanding," based on the parties' agreement, that members of the SEC were removable only for cause. *Id.* at 487 (opinion of the Court).

90. LEUCHTENBURG, *supra* note 73, at 64.

91. 295 U.S. 602 (1935).

92. *Id.* at 627–28.

93. 357 U.S. 349 (1958).

94. *Id.* at 353–54.

95. *Id.* at 355 (quoting War Claims Act of 1948, ch. 826, § 3, 62 Stat 1240, 1241 (codified at 50 U.S.C. App. § 2002 (2012))).

96. *Id.* at 356.

97. 478 U.S. 714 (1986).

issue sequestration orders to reduce federal spending if the budget deficit exceeded specified limits. The Court reasoned that Congress could unilaterally dismiss the Comptroller General because that official could be removed by a joint resolution—which meant both that only Congress could initiate removal and that the legislative branch could oust the Comptroller over the President’s objection by overriding the chief executive’s veto of a joint resolution.<sup>98</sup> This arrangement rendered the Comptroller “subservient to Congress”<sup>99</sup> and precluded him from exercising any aspect of executive power.<sup>100</sup> Even as it reaffirmed that Congress could not formally participate in the process of removal, however, the *Bowsher* Court explicitly declined to endorse the most sweeping view of presidential power. The opinion contained a footnote that disclaimed any suggestion that the ruling called into doubt the constitutionality of independent agencies such as the Federal Trade Commission, which had been at the heart of the dispute in *Humphrey’s Executor*.<sup>101</sup>

Moreover, *Myers* was the focal point of the argument in *Morrison v. Olson*,<sup>102</sup> which upheld the independent counsel provisions of the Ethics in Government Act<sup>103</sup> against a challenge based in large part on the statutory procedure for removing special prosecutors. Under the Ethics in Government Act, the Attorney General was required to conduct a preliminary investigation of information suggesting that high-level executive officials had violated federal criminal laws. That investigation could last no more than ninety days. If, at the end of this period, the Attorney General found no reasonable grounds to believe that a crime had been committed, the matter ended. Otherwise, the Attorney General was required to refer the matter to a special court that would appoint an independent counsel who could be removed only by the Attorney General and only for good cause.<sup>104</sup>

The Court rejected the challenge to the removal procedure. Reaffirming the *Bowsher* interpretation of *Myers*, Chief Justice Rehnquist explained that the independent counsel law did not entail a

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98. *Id.* at 728 & n.7.

99. *Id.* at 730.

100. *Id.* at 732. The Court had no difficulty in concluding that the functions assigned to the Comptroller General under the statute were executive in nature. *Id.* at 733.

101. *Id.* at 725 n.4 (observing that no statute gives Congress a formal role in the removal of members of independent agencies).

102. 487 U.S. 654 (1988).

103. Pub. L. No. 95-521, tit. VI, 92 Stat. 1824, 1867–75 (1978) (amended 1983, 1987, and 1994; expired 1999).

104. *See Morrison*, 487 U.S. at 660–65 (discussing the procedural steps required by the Act).

legislative effort to participate in the removal process: the Ethics Act “puts the removal power squarely in the hands of the Executive Branch”;<sup>105</sup> only the Attorney General, an executive officer who is directly accountable to the President, could remove an independent counsel. Accordingly, the arrangement was analogous to that in *Humphrey’s Executor* and therefore quite different from those in *Myers* or in *Bowsher*, where Congress itself had a formal role in the removal of an official who exercised executive power.<sup>106</sup> Moreover, the Court declined to focus on whether the independent counsel was a “purely executive” officer, expressing its “present considered view”<sup>107</sup> that the removal arrangements did not “unduly trammel[] on executive authority.”<sup>108</sup>

This analysis provoked an apoplectic dissent from Justice Scalia, who lamented the demise of what he called “our former constitutional system.”<sup>109</sup> Explicitly reaffirming *Myers*<sup>110</sup> while criticizing *Humphrey’s Executor*,<sup>111</sup> Scalia specifically invoked the Watergate special prosecutor to illustrate what he viewed as an acceptable political response to allegations of executive wrongdoing.<sup>112</sup> A closer look at the institutional arrangements relating to the Watergate special prosecutor in the Nixon tapes case suggests that Justice Scalia’s invocation of those arrangements as preferable to those in the independent counsel law might have overlooked an important feature that was never mentioned by either the parties or the Court in *United States v. Nixon*.<sup>113</sup>

By way of background, Leon Jaworski, who litigated the tapes case, was the second Watergate special prosecutor. The first special prosecutor, Archibald Cox, was dismissed on orders of President Nixon. The gravity of the situation was reflected in the resignations on principle of Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus, both of whom refused direct orders to fire Cox. Faced with what his own aides described as a “firestorm” of criticism that badly undermined his credibility following what became

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105. *Id.* at 686.

106. *Id.* (drawing an analogy to *Humphrey’s Ex’r*, 295 U.S. 602 (1935), and distinguishing *Bowsher*, 478 U.S. 714, and *Myers v. United States*, 277 U.S. 52 (1926)).

107. *Id.* at 689.

108. *Id.* at 691.

109. *Id.* at 715 (Scalia, J., dissenting).

110. *Id.* at 723.

111. *Id.* at 725–26.

112. *Id.* at 711.

113. 418 U.S. 683 (1974).

known as the Saturday Night Massacre,<sup>114</sup> Nixon had to acquiesce in the appointment of Jaworski as the new special prosecutor. Whatever we might think about the arrangements for removing an independent counsel under the Ethics Act, the procedure for removing the Watergate special prosecutor should have raised constitutional alarms to anyone who took *Myers*—even as it had been qualified in *Humphrey’s Executor* and *Wiener*—seriously as a precedent.

As noted above, an independent counsel could be removed only by the Attorney General—not by the President—and only for cause. The Watergate special prosecutor, on the other hand, could be removed by the President—but only for “extraordinary improprieties” and even then only after the chief executive’s “first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with [the President’s] proposed action.”<sup>115</sup> The Supreme Court quoted this regulation in a footnote in *Nixon* but attached no substantive significance to the removal mechanism.<sup>116</sup>

In other words, the President had to obtain the effective approval of congressional leaders before removing Jaworski as Watergate special prosecutor. This was precisely the vice that led the Court to invalidate the procedure for removing postmasters in *Myers*. If anything, the problem in the Watergate case was more egregious, because only a handful of legislators rather than one or both houses of Congress had to consent to the dismissal of the special prosecutor.

Perhaps this provision was overlooked because President Nixon’s lawyers did not attack the requirement of congressional approval of the removal of the special prosecutor. It is not as though Nixon’s lawyers ignored *Myers*. Their brief on the merits invoked that precedent as exemplifying the centrality of separation of powers and supporting the notion that the President is immune from compulsory process.<sup>117</sup> The brief went on to mention, almost in passing, that “the specific holding of the *Myers* case was narrowed to some extent” in a subsequent case, although “*that narrowing was on a point that does not bear on the present issue.*”<sup>118</sup>

From a contemporary perspective, this seems like a legal gaffe. After all, *Myers* held that requiring Senate consent for the removal of

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114. ELIZABETH DREW, WASHINGTON JOURNAL: THE EVENTS OF 1973–1974, at 66 (1975); see also STANLEY I. KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON 411 (1990).

115. 38 Fed. Reg. 30738, 30739 (1973).

116. *Nixon*, 418 U.S. at 694–95 n.8.

117. Brief for the Respondent and Cross-Petitioner Richard M. Nixon, President of the United States, at 73, *Nixon*, 418 U.S. 683 (1974).

118. *Id.* at 74 (citing *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935)) (emphasis added).

a postmaster unconstitutionally impinged on presidential power. The subsequent case to which Nixon's brief referred was *Humphrey's Executor v. United States*. But the regulation requiring the President to consult with and obtain consensus approval from the leadership of both houses of Congress before discharging the Watergate special prosecutor goes well beyond the cause requirement upheld in *Humphrey's Executor* and might pose even greater constitutional problems than the postmaster provision that *Myers* rejected. In *Myers* the full Senate had to act, whereas the Watergate regulation empowered a handful of influential Senators and Representatives to prevent the President from discharging the special prosecutor.

I do not raise this example to fault anyone: the Supreme Court, President Nixon and his able lawyers, or Justice Scalia. Maybe the details about removing the special prosecutor got lost in the way that *Myers* was perceived. The strong theory of the unitary executive did not emerge with full force until the presidency of Ronald Reagan, almost a decade after Nixon's resignation.<sup>119</sup> The notion of an unfettered removal power in the President is a central facet of the unitary executive theory.<sup>120</sup> At the same time, some proponents of a strong presidency have not relied on the removal power to support their position and count themselves as skeptical of the unitary executive theory.<sup>121</sup> Whatever the explanation, the Watergate tapes case should remind us about the variability and ultimate contingency of many legal concepts.

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*Myers* was a most curious case. A minor personnel flap became the vehicle for a constitutional collision whose ramifications are still being fought over. That the case was unnecessary does not detract from its significance. Frank Myers could have been fired according to the

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119. See generally J. DAVID ALVIS, JEREMY D. BAILEY & F. FLAGG TAYLOR IV, *THE CONTESTED REMOVAL POWER, 1789–2010*, 186–89 (2013) (explaining how the Reagan administration utilized the theory of the unitary executive).

120. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 692–704 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *rev'd*, 561 U.S. 477 (2010); *In re Sealed Case*, 838 F.2d 476, 496–504 (D.C. Cir.), *rev'd sub nom.* *Morrison v. Olson*, 487 U.S. 654 (1988); STEPHEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008); Stephen G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); David P. Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 31–36; Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41.

121. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

statutory procedures, and the legal question could have been avoided for another day. Woodrow Wilson had more important problems on his agenda in 1920, and William Howard Taft need not have tried to resolve the removal debate so definitively in 1926. But to say that the principals could have behaved differently simply suggests that Bismarck's observation about legislation and sausage applies to litigation as well.

Two last points might be worth noting. The first is ironic and concerns one of the case's participants. Frank Myers was represented throughout the litigation by Will R. King, a longtime leader of the progressive faction of the Oregon Democratic Party who, like Myers, opposed the Chamberlain wing of the party.<sup>122</sup> King went on to serve on the Oregon Supreme Court. When he died in 1934, the newspaper obituaries contained not a word about his role in the great *Myers* case.<sup>123</sup>

Finally, it is apparent that the Supreme Court has not taken Chief Justice Taft's sweeping opinion in *Myers* at face value. The stakes of the removal debate are far from clear, because Presidents rarely exercise whatever removal authority they might have. The arguments here really are proxies for larger disagreements concerning presidential authority to oversee and direct the administration and implementation of policy. In the end, *Myers* is important despite its oddities because of the care and attention that the parties and the Court devoted to the larger questions that the case raised.

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122. See BURTON, *supra* note 11, at 41.

123. See *Will R. King, Ex-Justice of Oregon, Dead*, OREGON J., June 3, 1934, § 1, at 2; *William R. King Dead*, PORTLAND OREGONIAN, June 3, 1934, § 1, at 4.