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Jonathan L. Entin

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SYNECDOCHE AND THE PRESIDENCY: THE REMOVAL POWER AS SYMBOL

Jonathan L. Entin[†]

Contemplating what Dwight Eisenhower could expect upon entering the White House, outgoing President Harry Truman predicted: "He'll sit there . . . and he'll say, 'Do this! Do that!' *And nothing will happen*. Poor Ike—it won't be a bit like the Army. He'll find it very frustrating."¹ I am reminded of that anecdote whenever I encounter strong versions of the unitary executive argument. I thought of it frequently as I read the remarkable work of self-styled unitarians Steven Calabresi and Christopher Yoo—both the book-length manuscript embodying their several years of research and the first installment that appears in this symposium.²

Truman's statement captures an important practical truth about the presidency. The power to remove has limited real-world significance,³ but it has generated an extraordinarily impassioned debate. In this brief comment I want to explore the reasons for this phenomenon. I will illustrate my point by reference to the seminal case of *Myers v. United States*,⁴ which is not discussed in the symposium contribution by Calabresi and Yoo—not surprising, because that case was decided well after the period upon which they focus here. After that, I will suggest some reasons why the

[†] Professor of Law and Political Science, Case Western Reserve University.

1. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER* 9 (1960).

2. See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 *CASE W. RES. L. REV.* 1451 (1997).

3. At least one other unitarian has recognized this point, although he draws different inferences from it than I do. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *HARV. L. REV.* 1231, 1244-45 (1994).

4. 272 U.S. 52 (1926).

removal power, despite its limited substantive importance, retains its grip on the academic and political imagination.

I.

Frank Myers was appointed postmaster of Portland, Oregon, for a four-year term by President Wilson in 1913.⁵ Wilson reappointed him to a second four-year term in 1917. The Senate routinely confirmed Myers both times. Following an investigation into alleged irregularities at the Portland post office, the Postmaster General demanded that Myers resign in January 1920.⁶ When Myers refused, President Wilson summarily dismissed him. In doing so, Wilson ignored the applicable statute, which had been on the books for about half a century. 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."⁷ Myers protested his dismissal and ultimately filed suit to recover the unpaid salary for the balance of his term. After he died, his widow carried on the fight as administrator of his estate.

The Supreme Court, in an opinion by Chief Justice Taft, held that the provision requiring Senate consent to removals was unconstitutional. That provision was inconsistent with the idea of a unitary executive and with the President's duties under the Take Care Clause. To fulfill his constitutional responsibilities the President needed aides whom he could trust implicitly to serve as his surrogates and whom he could dismiss at will. On the way to this sweeping conclusion, Taft also rejected the Tenure of Office Act,⁸

5. Except as otherwise noted, the facts are drawn from the transcript of the record in *Myers*, which was published by the Government Printing Office. See *POWER OF THE PRESIDENT TO REMOVE FEDERAL OFFICERS*, S. DOC. NO. 69-174, at 5-17 (1926).

6. The precise nature of the irregularities or the circumstances that prompted the investigation are unclear. Chief Justice Rehnquist has referred to unspecified "irregularities in the management of the Portland post office." WILLIAM H. REHNQUIST, *GRAND INQUESTS* 262 (1992). He recently observed that Myers was suspected of having "committed fraud in the course of his official duties" but provided no details concerning those suspicions. *Raines v. Byrd*, 65 U.S.L.W. 4705, 4710 (U.S. June 26, 1997).

After finding no reference to this matter in any published works on President Wilson or in his papers, I requested copies of material in the files of the Portland Oregonian. Although the copies were mailed to me some weeks before the symposium, they never arrived. The ghost of Frank Myers lives on.

7. 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.

8. Ch. 154, 14 Stat. 430 (1867); see *Myers*, 272 U.S. at 176.

which had been repealed nearly forty years earlier⁹ after having been amended at the outset of the Grant administration to prevent a repetition of the bitter conflict over removal of cabinet members that had precipitated the impeachment of Andrew Johnson.¹⁰

This dispute over a local postmaster seems like a small-potatoes affair, hardly the stuff of great cases or grand constitutional theory.¹¹ So let's ask an apparently naive question: Why is a statute requiring Senate consent to the removal of postmasters troublesome? Put differently, how did this statute actually work?

The answer is that 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.¹²

What is more interesting about this case is not Wilson's position but Taft's. Taft, you will recall, is the only person ever to sit on the Supreme Court after having served as President, a fact that is often invoked to explain the breadth of his *Myers* opinion. But this fact raises another, largely overlooked, question: What was *President* Taft's position on the statute that *Chief Justice* Taft found so obnoxious?

It turns out that *President* Taft scrupulously complied with the statute—about two hundred times during his four years in office.¹³ 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.¹⁴ Nor did Taft protest when the Senate three times

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

10. See Act of Apr. 5, 1869, ch. 10, 16 Stat. 6. See generally Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L.J. 699, 722-24 (1987).

11. It is clear, however, that *Myers* was regarded as a momentous case even before it was decided. It was argued twice in the Supreme Court; on reargument Senator George Wharton Pepper, appearing by invitation of the Court, presented the views of Congress.

12. Why Wilson chose this strategy is beyond the scope of this essay. For speculation on the question, see Entin, *supra* note 10, at 731-32.

13. 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).

14. See, e.g., 48 CONG. REC. 86 (1911) (resubmitting name of James S. Byrd to be

refused to go along with his proposal to oust John G. Gorth as postmaster of Oconomowoc, Wisconsin, and replace him with W.A. Jones.¹⁵

Now, Taft's failure to object to the statute while he was in the White House does not mean that either the postmaster statute or the Tenure of Office Act was constitutional. But the unitary executive argument goes well beyond situations like these, which are not especially controversial.¹⁶ True unitarians believe, with Chief Justice Taft, that *any* restriction on the President's absolute power to remove nonjudicial officers violates the constitutional design. Even laws that allow the chief executive to remove officials without senatorial consent are unacceptable if those laws limit the grounds for removal. The ease with which the President could accomplish his will under the postmaster statute counsels some hesitancy before we characterize that statute—or more modest restrictions on the removal power such as the for-cause requirements upheld in *Humphrey's Executor v. United States*¹⁷ and *Morrison v. Olson*¹⁸—as heralding the demise of “our former constitutional system.”¹⁹

The institutional arrangements embodied in the postmaster statute bear important resemblances to practices that are widely accepted. Suppose a President unilaterally removes an official—a cabinet secretary, let's say, to keep the discussion focused on a high-level position in the executive branch—and designates a successor who must be confirmed by the Senate. Nothing in the Constitution prevents the Senate from rejecting the new nominee for whatever reason, including opposition to the President's exercise of the removal power. The Senate cannot undo the firing, but it can strongly influence the kind of successor the President could choose.²⁰

postmaster of Jonesboro, Tennessee, after Senate previously adjourned without voting on Byrd's nomination to replace incumbent postmaster Frank E. Britton).

15. 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).

16. Although Justice Brandeis dissented in *Myers* (as did Justices Holmes and McReynolds), his disagreement rested on the view that a local postmaster was really an inferior officer. See *Myers*, 272 U.S. at 240-95 (Brandeis, J., dissenting); see also Nathaniel L. Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 NW. U. L. REV. 1064, 1105 (1981).

17. 295 U.S. 602 (1935).

18. 487 U.S. 654 (1988).

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

20. Consider the reaction to President Nixon's dismissal of Archibald Cox as the

There is nothing wrong with that as a matter of constitutional principle. The Appointments Clause, after all, requires that the Senate give its advice and consent to the selection of such officials. Indeed, we have several recent examples of cabinet nominations foundering on the shoals of the Senate confirmation process: John Tower was rejected as President Bush's secretary of defense, and several of President Clinton's nominees—including his first two choices for attorney general (Zoe Baird and Kimba Wood) and more recently his candidate for director of the CIA (Anthony Lake)—withdrew in the face of concerted senatorial opposition. The Constitution's explicit limitation on the President's appointment power suggests that we should be reluctant to embrace the unitarian view of the removal power. If the chief executive cannot unilaterally select the team that will implement his policies, why infer—in the face of textual silence—that he must have unfettered discretion to fire?²¹

Moreover, Congress has other ways to intrude into executive branch personnel matters over the President's objection. For example, it could abolish an agency or department altogether to force the ouster of someone who had aroused legislative ire. Alternatively, Congress could cut the salary, reduce the staff, or otherwise disimprove the working conditions for such a person. Or Congress could move the person's office to an unattractive location to force a resignation. Finally, Congress could hound someone out of office through extensive investigations or oversight hearings. Most of these options might seem unlikely to occur in the real world,²² but it is generally accepted that nothing in the Constitution prevents the legislative branch from taking any of those actions even though they might significantly restrict the

Watergate special prosecutor. In order to secure Senate confirmation of a replacement for Attorney General Eliot Richardson, who had resigned over the Cox dismissal, the President had to acquiesce in the appointment of a new special prosecutor who had greater guarantees of job security than Cox had. See ELIZABETH DREW, *WASHINGTON JOURNAL* 91 (1975); STANLEY I. KUTLER, *THE WARS OF WATERGATE* 426 (1990).

21. There might be historical evidence suggesting that the framers intended a limited check on presidential personnel policies, embodied in the confirmation requirement. I have not examined the background evidence on the Appointments Clause and do not intend by raising the question in text to add to the historical debate between Professors Calabresi and Flaherty that is renewed in this symposium.

22. The relocation scenario is not, however, entirely hypothetical. The headquarters of the National Institute for Occupational Safety and Health were moved from Washington to Atlanta to accommodate the wishes of the agency's newly appointed director. See *WASH. POST*, Jan. 14, 1983, at A13.

President's ability to implement his policies with personnel of his own choosing.

Finally, unitarians contend that the chief executive must have unfettered removal power as "the 'gun behind the door'" to "bend his 'team' to his will."²³ Whatever might be said for this proposition in theory, it is dubious as an empirical matter. Presidents rarely fire anybody, and not only because everyone in the executive branch is loyal to every aspect of administration policies. There are genuine costs to firing people who might have built a devoted following in the country or who have some kind of political leverage of their own.²⁴ For example, what chief executive could have dismissed J. Edgar Hoover as FBI director?²⁵ And consider the national uproar that followed President Nixon's sacking of Archibald Cox, which fueled suspicions that Nixon had something serious to hide and thereby undermined his ability to remain in office.²⁶ Instead, chief executives use a variety of less formal but more effective mechanisms to maintain their leadership.²⁷

In other words, the unitarian theory of the removal power is unpersuasive if the argument is assessed in terms of the real significance of that power. But the vigor with which the unitarian theory is advanced implies that the argument must be about something else.

II.

At one level, the debate over removal is symbolic. It is about who has power, influence, and strength—and who doesn't. No President wants to look like he can be "rolled." Perhaps this is simply an inelegant modern formulation of Madison's observation that the chief executive possesses "the necessary constitutional means and personal motives" to resist encroachments by the other branches as part of a constitutional scheme under which "[a]mbition [is] made to counteract ambition."²⁸ Thus,

23. CLINTON ROSSITER, *THE AMERICAN PRESIDENCY* 20 (2d ed. 1960).

24. See, e.g., WILLIAM L. CARY, *POLITICS AND THE REGULATORY AGENCIES* 10 (1967).

25. Some considered the idea but decided that the political risks were too great. See RICHARD GID POWERS, *SECRECY AND POWER* 353, 357, 396, 488-89 (1987).

26. See DREW, *supra* note 20, at 112-13, 115-16, 148-49; KUTLER, *supra* note 20, at 406, 410-14, 619.

27. See Entin, *supra* note 10, at 779-80.

28. *THE FEDERALIST* NO. 51, at 321-22 (James Madison) (Clinton Rossiter ed. 1961).

notwithstanding Taft's acquiescence in the postmaster statute, Presidents can be expected to assert their authority over the executive branch. Similarly, the ebbs and flows of relative interbranch power are reflected in other innovations. For example, approximately eighty percent of the more than two hundred bills containing legislative vetoes—the subject of another great legal, political, and academic debate until the Supreme Court purported to settle the question in *INS v. Chadha*²⁹—were enacted between 1970 and 1976, a period when presidents were unusually weak politically.³⁰

The removal argument has largely unfolded as part of the continuing reassessment of the place of so-called independent agencies. All recent chief executives have sought to increase the extent of policy coordination among federal administrative agencies.³¹ The extent to which these initiatives may be applied to independent agencies remains unresolved. Independent agencies are often regarded as somewhat less susceptible to direct presidential control than are executive branch agencies, which tend to be seen as more clearly within the White House's domain.³² The absence of controlling judicial precedent has made it necessary for analysts and advocates to rely upon the Supreme Court's removal jurisprudence—*Myers* involved a postmaster, an executive branch official; *Humphrey's Executor* concerned the head of the Federal Trade Commission, one of the classic examples of an independent agency—for whatever guidance those cases might offer.

That the removal debate has become a symbol of the struggle between Congress and the President for control over policy-making suggests that the debate is really about the role of government in American society. Proponents of the unitarian vision of the presidency tend to favor limited government, or at least a limited

29. 462 U.S. 919 (1983). In fact, Congress has continued to enact analogous provisions in appropriations bills, where for various reasons it is difficult to raise meaningful political or legal challenges. See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, LAW & CONTEMP. PROBS., Autumn 1993, at 273. But see JESSICA KORN, THE POWER OF SEPARATION 39-40 (1996) (arguing that these provisions are not really legislative vetoes).

30. See NELSON W. POLSBY, CONGRESS AND THE PRESIDENCY 237 n.122 (4th ed. 1986).

31. See, e.g., PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW 215-25 (9th ed. 1995); STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 5-25 (3d ed. Supp. 1996).

32. See, e.g., Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 63-64 (1986).

federal government.³³ They believe that a strong defense of presidential prerogative—giving the chief executive unfettered removal authority, for example—would make Congress less willing to empower agencies from which the legislative branch is effectively insulated. This approach is part of a larger program of maintaining clear interbranch boundaries that would make it more difficult for the federal government to take on new responsibilities. Indeed, the blurring of the legislative-executive line in independent agencies such as the Federal Trade Commission and the recently abolished Interstate Commerce Commission suggests that at least some widely heralded innovations are more likely to arise when interbranch boundaries are less distinct than the unitarians prefer.³⁴

Not all advocates of a strong presidency oppose federal initiatives, however. Several of the leading separation of powers cases during the past two decades were brought by proponents of a more vigorous federal government. These activists believe that strict adherence to separation of powers principles will reduce the influence of special interests and enhance the prospects for more effective protections for public health, the environment, workers, and consumers.³⁵

It is not my purpose here to evaluate which of these visions is more accurate. Whether rigorous adherence to the unitary executive theory will limit or reduce the role of the federal government is for more sophisticated analysts. One of those analysts, Professor Lowi, suggests elsewhere in this symposium that neither view is correct and that we have recently seen the emergence of an institutionalized dual-party government that is incapable of making substantive decisions of any kind.³⁶ My point is that the arguments about the removal power are really about what the federal government should be doing. I think we should talk about that very important question directly and not obscure the issue

33. *But cf.* Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 659 (1996) (suggesting that many contemporary opponents of strong federal government also dislike government at all levels); Mark Tushnet, *Living in a Constitutional Moment? Lopez and Constitutional Theory*, 46 CASE W. RES. L. REV. 845, 869 (1996) (noting the possibility that governmental power may be evaporating rather than devolving).

34. *See* Jonathan L. Entin, *Congress, the President, and the Separation of Powers: Rethinking the Value of Litigation*, 43 ADMIN. L. REV. 31, 49-50 (1991).

35. *See id.* at 51-52.

36. *See* Theodore J. Lowi, *President v. Congress: What the Two-Party Duopoly Has Done to the American Separation of Powers*, 47 CASE W. RES. L. REV. 1219 (1997).

behind a facade of rhetoric about a relatively unimportant question that most Americans (and many lawyers) do not understand or care about.

By now it should be clear that I am skeptical about many of the unitarians' underlying premises. But despite my skepticism, I believe that Calabresi and Yoo have performed a valuable service with their prodigious research. They have brought together a massive amount of information about every President's approach to removal and superintendence of executive authority in a format that will facilitate future research and discussion. Their interpretations are bound to provoke disagreement,³⁷ but no one should underestimate the great service they have performed for those of us who care about the presidency and about our country.

37. See, e.g., Martin S. Flaherty, *Relearning Founding Lessons: The Removal Power and Joint Accountability*, 47 CASE W. RES. L. REV. 1563 (1997).

