ARTICLES

APPOINTMENT AND REMOVAL

DAVID M. DRIESEN*

This Article examines the relationship between appointment and presidential removal of "Officers of the United States," which scholars and the Supreme Court generally treat as separate matters. The analysis of the relationship between appointment and removal reveals hidden issues about how the Court conceptualizes the constitutional culture of the Executive branch, which has implications for separation of powers jurisprudence.

This Article shows that appointment and removal have a very close relationship in theory and in practice. Presidential removal of Senate-confirmed officials can, in principle, defeat the practical operation of the Appointments Clause by preventing Senate-confirmed officials from faithfully executing the law. The President can prolong this effect by authorizing officials not confirmed by the Senate to execute the laws, rather than nominating a successor for a removed official. This Article shows that Presidents Jackson, Andrew Johnson, Nixon, and Trump used this technique to undermine the rule of law and fair elections, or both, and that this technique has played a role in almost all presidential impeachment cases.

The modern Supreme Court has paid little attention to this problem. Instead, it has articulated two competing conceptions of the Executive branch in its removal and Appointments Clause jurisprudence. The two lines of jurisprudence differ in whether the Court acknowledges checks on executive power, addresses the Founders' interest in avoiding autocracy, recognizes the Framers' goal of having competent and somewhat independent government officials, and embraces efficiency as a goal. This Article suggests that the Court needs to more carefully balance the competing founding-era goals reflected in this juxtaposition to improve its separation of powers jurisprudence. Its analysis of the problems in reconciling the two competing cultural visions of the Executive branch helps us better understand the jurisprudence and uncovers opportunities to improve judicial reasoning, temper rhetoric that might help an autocratic president defeat the rule of law, and think harder about the future of the unitary executive theory.

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* University Professor, Syracuse University College of Law. The author would like to thank Aziz Huq, Daniel Farber, and participants in the Syracuse University Faculty workshop for helpful comments and Elizabeth Dannon and Gavin Ratcliffe for research assistance. Any errors belong to me.

INTRODUCTION

This Article examines the relationship between appointment and presidential removal of "Officers of the United States," which scholars and the Supreme Court generally treat as separate matters.[1] This combined approach yields new insights into the Court's separation of powers jurisprudence, which evinces a kind of schizophrenia.[2]

Because the Court usually treats appointment and removal as separate problems, it employs two different constitutional conceptions of the Executive Branch of government in its decisions. In its Appointments Clause cases, it acknowledges that the Framers did not adopt a pure separation of powers system, but instead created checks and balances constraining the Executive Branch of government. In its removal cases, it often treats the Executive Branch as a completely separate institution unconstrained by checks and balances. In its Appointments Clause jurisprudence, it recognizes that the Constitution gives Congress a role in shaping the Executive Branch

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1. *See generally* MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS (2000) (focusing almost exclusively on the Appointments Clause); STEVEN G. CALABRESI & JOHN S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008) (focusing on removal); *cf.* Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN L. REV. 175, 214–17, 219–20, 224, 228 (2021) (focusing on removal, but sometimes in the context of appointment); Jed Handelsman Shugerman, *Presidential Removal: The* Marbury *Problem and the Madison Solutions*, 89 FORDHAM L. REV. 2085, 2090 (2021) (asking why the Framers would give the President less power over appointment than the kings but more removal power); Ben Miller-Gootnick, Note, *Boundaries of the Federal Vacancies Reform Act*, 56 HARV. J. ON LEGIS. 459, 460 (2019) (asking whether the Federal Vacancies Reform Act applies when an officeholder is fired); Justin C. Van Orsdol, Note, *Reforming Federal Vacancies*, 54 GA. L. REV. 297, 303 (2019) (arguing that "self-created vacancies via termination violate the Appointments Clause").

2 I use the term "schizophrenia" to describe the jurisprudence as "characterized by the coexistence of contradictory or incompatible elements," not as a reference to the mental illness. *Schizophrenic*, WORDREFERENCE, https://www.wordreference.com/definition/schizophrenic (last visited Aug. 16, 2022) (offering this as a second definition of schizophrenia); *see Split Personality*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/split%20personality (last visited Aug. 16, 2022) (defining schizophrenia as "split personality"). This usage of the term is "non-medical." *See* Adam J. Joseph, Neeraj Tandon, Lawrence H. Yang, Ken Duckworth, John Torous, Larry J. Seidman et al., *#Schizophrenia: Use and Misuse on Twitter*, 165 SCHIZOPHRENIA RSCH.. 111, 112–13 (2015) (describing use of the term schizophrenia "to describe something besides a person" as a non-medical "non-reference"). It should not be taken as casting aspersion on those suffering from schizophrenia. *See id.* at 113 (recognizing that not all non-medical uses of the term are negative). Nor am I suggesting that members of the Supreme Court suffer from schizophrenia. *See* WORDREFERENCE, *supra* note 2 (definition 1) (not associating the illness of schizophrenia with inconsistency).

to guard against despotism. In its jurisprudence on removal, it ignores or dismisses the role an unrestrained president might play in creating autocracy. Most importantly from a cultural standpoint, the Appointments Clause opinions often embrace an Executive Branch made up of somewhat independent officials loyal to the laws and the Nation as a whole. The removal opinions sometimes look at these same officials as lackeys who must "fear and . . . obey" the President.[3] Finally, the Court disavows "efficient" administration as a primary aim of the Founders in its Appointments Clause decisions, while making it a touchstone of its removal decisions.

But the Constitution envisions only one Executive Branch of government, not two. The Court's dueling conceptions of the Executive Branch of government do not stem from the growth of the "administrative state."[4] The issue of constitutional culture that this Article's analysis highlights comes into view as soon as the President and the Senate approve a cabinet.[5]

The Court has formalist reasons for this schizophrenia. The Constitution expressly requires Senate approval of presidential appointees, but it vests the executive authority in the President.[6] The Constitutional text fails to expressly resolve the issues that modern litigants raise respecting removal and appointment, so the Court frequently employs functional arguments to help resolve cases coming before it. For example, in the recent case of *Seila Law*

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3. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau (CFPB), 140 S. Ct. 2183, 2197 (2020) (officials "must fear, and in the performance of [their] functions, obey" the President because he possesses removal authority) (citing Bowsher v. Synar, 478 U.S. 714, 726 (1986)).

4. *See, e.g.*, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 596 (1984) (discussing "the realities of the administrative state").

5. The term "constitutional culture" refers to the practices, norms, and attitudes that keep a constitutional order intact. *See* Rett R. Ludwikowski, *Constitutional Culture of the New East-Central European Democracies*, 29 GA. J. INT'L & COMP. L. 1, 5 (2000) (defining constitutional culture as human behaviors relevant to constitutional practices); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Ace*, 112 YALE L. J. 1943, 1983 (2003) (defining constitutional culture as including norms, understandings, and practices); Andrew M. Siegel, *Constitutional Theory, Constitutional Culture*, 18 UNIV. PA. J. CONST. L. 1067, 1070–71 (2016) (characterizing constitutional norms as regularities of behavior prevailing among high level officials). *See generally* Paul W. Kahn, *Constitutional Culture: Opening a Space Between Law and Power*, 189 TELOS 15, 27–28 (2019) (a constitution is not about text but about culture); *cf.* Josh Chafetz & David E. Pozen, *How Constitutional Norms Breakdown*, 65 UCLA L. REV. 1430, 1433–34 (2018) (defining constitutional norms); Jason Mazzone, *The Creation of a Constitutional Culture*, 40 TULSA L. REV. 671, 672 (2005) (discussing the citizenry's rather than the Executive Branch's constitutional culture); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2189–90 (2018) (defining norms as "unwritten or informal rules of political behavior" and providing examples of norms limiting presidential power).

6. *See* U.S. CONST. art. II, §§ 1–2.

LLC v. Consumer Financial Protection Bureau (CFPB),[7] the Court ultimately relied on a functional argument (supported by debatable inferences from text, history, and structure) that the Director of the CFPB must "fear and . . . obey" the President so that voters could control the CFPB's policies through presidential elections.[8] But the functionalist conceptions employed in the two lines of cases are at war with each other.

Appointment and removal, moreover, have a very close but underappreciated relationship in theory. The Framers put the Appointments Clause in the Constitution to make sure that top federal officials only obtain power if the President and the Senate agree to their appointment. A president with unfettered removal authority, however, could make sure that Senate-approved officials never exercise power by simply removing them all and failing to nominate successors. In this way, unfettered removal could wholly defeat the Appointments Clause's purpose with respect to officials within the Executive Branch. Doing this could stop faithful execution of the law.

While no president has ever removed all Senate-confirmed officials, several presidents have removed officials in order to defeat the operation of laws they disagreed with or to use government to make elections unfair. Almost all presidential misconduct leading to impeachment and some triggering censure involved coupling abuse of removal authority with a failure to nominate a qualified successor for Senate approval. This Article provides examples from the Jackson, Andrew Johnson, Nixon, and Trump Administrations to show this.

This Article, reflecting on this history, highlights an issue of constitutional culture that the juxtaposition of appointment and removal exposes—the issue of what sort of federal officialdom the Founders aimed to create. Did they envision officers of the United States loyal to the rule of law? Or did they envision officials loyal to the President? While those things often align, this Article shows that they sometimes do not. Analyzing the tension between the two lines of jurisprudence surfaces an issue about how the Court conceptualizes the Executive Branch of government.

The literature on appointment and removal neglects the tension between political removal authority and the Appointments Clause. It also pays little attention to the problem of abuses of presidential power undermining the rule of law and democracy, which the Appointments Clause cases acknowledge, but the removal cases ignore or deny.[9] Avoidance of despotism, however,

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7. 140 S. Ct. 2183 (2020).

8. *Id.* at 2197, 2203–04 (2020) (political accountability considerations require that the President be able to control the CFPB's politics); *cf. id.* at 2243–44 (Kagan, J., dissenting) (rejecting the majority's structural inferences).

9. Much of the scholarship simply addresses technical legal questions without addressing any functional problem, and the rest addresses more everyday problems. *See, e.g.*, Kent Barnett, *Resolving*

constitutes a major goal of the Founders—those who framed and ratified the Constitution.[10] While the Framers feared concentration of power both in the President and in the legislature, almost all experience since then suggests that the head of state plays the leading role in eroding or destroying democracies and does so, in part, by establishing a unitary Executive Branch.[11]

The importance of the rule of law leads me to put abuse of removal power to avoid statutory and constitutional constraints at the center of my analysis of the tension between an unrestricted removal authority and the Appointments Clause, rather than the use of removal to effectuate legitimate policy changes not undermining individual liberty or the law. The Framers, in the words of Chief Justice Marshall, designed the Constitution to address "the *crises* of human affairs;"[12] and avoidance of a potential future crisis threatening our democracy's survival provides a much firmer basis for judicial displacement of legislation passed by Congress and signed into law by a president than the Justices' convictions about who should have the most power when the democratic system faces no peril.[13]

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the ALJ Quandary, 66 VAND. L. REV. 797, 809–14 (2013) (asking whether the term "Officers of the United States" applies to administrative law judges (ALJs)). John F. Duffy, *Are Administrative Patent Judges Unconstitutional?*, 77 GEO. WASH. L. REV. 904, 910–12 (2009); Stacy M. Lindstedt, *Developing the Duffy Defect: Identifying Which Government Workers are Constitutionally Required to be Appointed*, 76 MO. L. REV. 1143, 1148–49 (2011); Jennifer L. Mascott, *Who Are "Officers of the United States?"*, 70 STAN. L. REV. 443, 458 (2018) (describing the Appointments Clause as aiming to "ensure that federal officers were selected for their expertise," but not mentioning despotism); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1227–29 (2014); Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L. J. 233, 234–36 (2008) (examining whether bankruptcy judges are inferior or principal officers); Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 UNVI. PA. J. CONST. L. 745, 746 (2008).

10. The clearest exception to the rule that the appointment and removal scholarship neglects despotism comes from my own previous work. DAVID M. DRIESEN, THE SPECTER OF DICTATORSHIP: JUDICIAL ENABLING OF PRESIDENTIAL POWER 49–50 (2021) [hereinafter DRIESEN, THE SPECTER OF DICTATORSHIP]; David M. Driesen, *The Unitary Executive Theory in Comparative Context*, 72 HASTINGS L. J. 1 (2020) [hereinafter Driesen, *The Unitary Executive Theory*] (explaining why the unitary executive theory—the theory that Constitution gives the President complete control over the Executive Branch of government—can help a despotic President undermine or even destroy American democracy. Many scholars writing in the area of comparative constitutional law, however, have recognized the link between excessive presidential power and the creation of autocracy.). *See, e.g.*, TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 212 (2018) (characterizing a "strong executive" as the principal "risk" to democracy).

11. *See* GINSBURG & HUQ, *supra* note 10, at 101 (characterizing de jure and de facto heads of state as "driving forces" in driving democratic decay).

12. McCulloch v. Maryland, 17 U.S. 316, 415 (1819).

13. A substantial literature suggests that the Court should either refrain from disturbing

One might object to this emphasis on abuse of power on the grounds that since impeachment addresses the worst cases, analysis should focus more heavily on how the government ordinarily functions. But the Appointments Clause itself provides powerful evidence that the Framers did not consider impeachment a sure bet in restraining a despotic President and therefore suffused the Constitution with other checks. Furthermore, experience since then has cast doubt on the efficacy of impeachment as a remedy. The Framers hoped that the Constitution would prevent the creation of "faction."[14] But political parties arose early in the nation's history.[15] With the rise of political parties came an increase in party loyalty and a decrease in loyalty to institutional norms.[16] During times of partisan division, impeachment may fail when it should succeed.[17]

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bargains between Congress and the President or give weight to those bargains in cases adjudicating separation of powers questions. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 263 (1980) (advocating remittance of separation of powers questions involving the President and Congress to the "political process"); David M. Driesen, *The Political Remedies Doctrine*, 71 EMORY L. J. 1, 37–38 (2021) (courts should be more reluctant to disturb bipartisan resolution of separation of powers questions than one branch's unilateral assertion of power); Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1646, 1656–57 (2014) (advocating negotiated solutions of separation of powers claims); Erin Ryan, *Negotiating Federalism and the Structural Constitution: Navigating the Separation of Powers Both Vertically and Horizontally*, 115 COLUM. L. REV. SIDEBAR 4, 20–23 (2015) (reviewing the debate over political bargaining's role in separation of powers cases); *cf.* Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 UNIV. PA. L. REV. 991, 993 (2008) (political resolution of separation of powers questions creates "too much uncertainty").

14. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2320 (2006) (describing factions as "famously anathema to the Framers").

15. *See id.* at 2320–22 (explaining political parties' rise).

16. *See id.* at 2313 (explaining that the competition between political parties has "displaced" competition between the executive and legislative branches of government).

17. *See* David M. Driesen, *Judicial Review of Executive Orders' Rationality*, 98 B.U. L. REV. 1013, 1053 (2018) [hereinafter Driesen, *Judicial Review*] (noting that impeachment provides an inadequate remedy for ensuring fidelity to law, partly because members of the President's party "may overlook blatant legal violations"); Tom Ginsburg, Aziz Huq & David Landau, *The Comparative Constitutional Law of Presidential Impeachment*, 88 U. CHI. L. REV. 81, 116, 119 (2021) (recognizing that impeachment in the United States has "fallen into desuetude" because "copartisans" rarely "defect"); Tom Ginsburg, Aziz Z. Huq & David Landau, *The Law of Democratic Disqualification*, 6–7 (Univ. Chi., Pub. L. Working Paper, Paper No. 791, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3938600 (stating that "[t]he Trump example suggests that [impeachment] may be all but dead as an effective disqualification tool."). S*ee generally* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 220–21 (2018) (citing "extreme partisan division" as the biggest threat to American democracy and

The tension between unrestrained removal authority and the Appointments Clause implicates the unitary executive theory.[18] It shows that liberating the President from all removal restraints can undermine the rule of law and democracy by defeating the checks found in the Appointments Clause. This Article's treatment of appointment and removal together, therefore, exposes an underappreciated problem with the unitary executive theory. [19]

Most of the recent scholarship on appointment and removal seeks to uncover an original intent with respect to either appointment or removal (usually considered separately).[20] This Article's claim that unfettered removal can undermine the Appointments Clause might be considered a functional point. But this Article's analysis also can be viewed as analyzing original intent, as the Framers clearly intended compliance with the Appointments Clause. Furthermore, the inconsistency between the Court's appointments and its removal jurisprudence arises, to a significant degree, from the Court's failure to recognize tensions between various founding-era goals. So, by analyzing these inconsistencies, this Article contributes to the original intent debate.

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noting that such division destroyed Chilean democracy).

18. S*ee* Stephen G. Calabresi & Kevin H. Rhodes, *The Structural Constitution, Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158 (1992) (noting that "[u]nitary executive theorists claim that all federal officials exercising executive power must be subject to the direct control of the President."); Stephen G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Law*, 104 YALE L. J. 541, 544 (1994) (emphasizing that the unitary executive theory claims that "the President must be able to control the execution of all federal laws"); *cf.* Peter L. Strauss, Foreword, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 696–97 (2007) (disputing the unitary executive theory). Unitarians offer different forms of the theory.

19. A complete argument against the unitary executive theory would require a more thorough canvassing of the originalist sources purporting to justify it than I can offer in an article devoted to exploring the relationship between removal and appointment. *Cf.* David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 72–75 (2009) [hereinafter Driesen, *Duty-Based Executive Power*] (making an originalist case against the unitary executive theory).

20. *See, e.g.*, Birk, *supra* note 1, at 197–202 (making an originalist case against a presidential removal prerogative by finding it was not a prerogative of the King of England); Calabresi & Prakash, *supra* note 18 (creating an original intent argument for the unitary executive, which focuses primarily on removal rights); Calabresi & Rhodes, *supra* note 18 (focusing on removal rights to support the unitary executive); Driesen, *Judicial Review*, *supra* note 17, at 1041–42 (asserting an originalist argument against the unitary executive theory, which relies, in part, on the Appointments Clause); Mascott, *supra* note 99, at 465–79 (asserting an originalist argument about the Appointments Clause); Jed Handelsman Shugerman, *Vesting* 14–23 (Fordham L. Legal Stud. Rsch. Paper, Paper No. 3793213, 2021), https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=625422 (analyzing the original meaning of "vesting" as part of an originalist argument against the unitary executive theory focused primarily on removal).

This Article aims to surface issues of constitutional culture germane to the unitary executive theory, which receive erratic treatment in the Court's jurisprudence. Analysis of these cultural issues helps explain some problems in the Removal Clause jurisprudence. It also leads to recommendations for improvements in the Court's reasoning and in its direction in removal cases.

The literature on acting appointments incidentally exposes the tension between authority to fire an official for political reasons and preserving the Senate's role in appointments but does not address the tension between the Court's jurisprudence on these two issues.[21] This Article draws on the acting officials literature primarily to discuss whether statutes regulating the appointment of acting officials can adequately address the tension between a political removal authority and safeguarding the Senate's role in appointments.

This Article's first Part explains how a political removal authority can interfere with the Senate's authority over appointments. It begins with a brief review of the constitutional landscape with respect to appointment and removal. It tells the interference story primarily by explaining the role that political removal followed by unilateral appointment—in tension with the Appointments Clause—has played in wresting legal authority from Senate-approved officials following the law and giving it to officials more likely to defy or evade it. This account focuses on the Administrations of Andrew Jackson, Andrew Johnson, Richard Nixon, and Donald Trump. The story of these administrations' use of appointment and removal does not provide a representative sample of American practice but rather underlines the potential tension between political removal accomplished without Senate approval of a successor and the Constitution's goal of securing a rule of law. On the other hand, this Part also recognizes that the Senate may undermine laws passed by previous congresses by failing to properly fulfill its duty to advise and consent to the nomination of competent and conscientious appointees.[22] This first Part ends with a discussion of federal statutes, most prominently the Federal Vacancies Reform Act (FVRA), and their role in checking evasion of the Senate's advice and consent function.[23] It shows

21. *See* Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN. L. REV. 533, 550 n.81 (2020) (stating that the Federal Vacancies Reform Act (FVRA) does not "address whether the President may designate an acting official to fill a vacancy caused by presidential firing"); Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 672–75 (2020) (discussing use of FVRA to fill vacancies the President creates through removal); Van Orsdol, *supra* note 1, at 308–09 (permitting a president to appoint a temporary officer to fill a vacancy he created through removal may violate the Appointments Clause).

22. *See* O'Connell, *supra* note 21, at 698–99 (stating that presidents of both parties have put officers whom the Senate would not confirm in acting roles).

23. *See id.* (explaining that acting officials are less accountable to Congress); *see also*

that neither authorizing nor prohibiting unilateral presidential appointments can force a recalcitrant President seeking to undermine the law to promptly nominate qualified replacements. Accordingly, FVRA amendments cannot protect the Appointments Clause from evasion.

The second Part addresses issues of constitutional culture exposed by examining removal and appointment together. It discusses the unified cultural conception of the Executive Branch prior to the Constitution's ratification. It shows that the Framers conceived of "Officers of the United States" as faithful servants of the law, rather than as presidential lackeys, at least in domestic affairs. It then examines the Supreme Court's jurisprudence on appointment and removal, analyzing the schizophrenic treatment of the Executive Branch revealed in the disparate conceptions found in the two types of cases.[24]

The third Part analyzes potential judicial responses to the tension between political removal and preserving a meaningful Senate role in appointments. It argues that the Supreme Court should consider this problem in its removal jurisprudence. It also identifies opportunities for the Court to temper its rhetoric, improve its reasoning, and reconsider the direction of its removal jurisprudence.

I. REMOVAL UNDERMINING THE APPOINTMENTS CLAUSE.

This Part begins with a brief sketch of the constitutional law governing removal and appointment. It continues by recounting examples in our history of presidents abusing removal authority to avoid the constraint of reliance on a Senate-approved officer in hopes of evading the law's purposes, covering up crimes, improperly tilting election results, or broadly undermining the rule of law. It shows that FVRA cannot adequately resolve the tension between a political removal authority and the Senate's role in appointments.

Brannon P. Denning, *Article II, The Vacancies Act and the Appointment of "Acting" Executive Branch Officials*, 76 WASH. U. L.Q. 1039, 1062–63 (1998) (reviewing FVRA); Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 932–35 (2009) (discussing the constraints on filling positions for executive officers at agencies following a vacancy); Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1514–17 (2005) (arguing that acting appointments are constitutional); Joshua L. Stayn, Note, *Vacant Reform: Why the Federal Vacancies Reform Act of 1998 is Unconstitutional*, 50 DUKE L. J. 1511, 1525–37 (2001) (arguing that FVRA is unconstitutional); E. Garrett West, Note, *Congressional Power Over Office Creation*, 128 YALE L. J. 166, 173–74 (2018) (discussing FVRA's implications for the Appointments Clause).

[24] As explained previously, I am using the term schizophrenia in a specific, well-established way not intended to cast aspersions on those suffering from the disease. *See supra* note 2. I am using the term "schizophrenic" in the same limited way. *Cf.* Joseph, Tandon, Yang, Duckworth, Torous & Seidman et al., *supra* note 2, at 112–13 (noting that the term "schizophrenic" is more likely to be negative when "medically inappropriate" than when "non-medical").

A. Removal and Appointment: Constitutional Background

The Appointments Clause provides that the President shall nominate "Officers of the United States" subject to the "Advice and Consent" of the Senate.[25] That Clause, however, contains two exceptions to the rule that the Senate must approve official appointments. First, Congress may authorize the President, the head of a department, or the courts to appoint "inferior Officers" unilaterally.[26] Second, the Appointments Clause authorizes the President to "fill up all Vacancies" occurring during a Senate recess but terminates those temporary appointments at the end of the following session.[27] Thus, the President generally has no express constitutional authority to appoint the government's top officials without the Senate's approval if the Senate is in session when a vacancy arises.[28]

As the Supreme Court has recognized, the Constitution denies the President the authority to unilaterally appoint the chief officers of the government in order to avoid "despotism."[29] Alexander Hamilton explained that the Senate's advice and consent role would discourage the President from nominating personal allies or those "possessing the necessary . . . pliancy to render them the obsequious instruments of his pleasure."[30] For personal allies might obey a president's request or order to take actions entrenching him in power rather than faithfully executing the laws. Hamilton also explained that the requirement of Senate consent would encourage nomination of competent officials.[31]

The Constitution contains but one Removal Clause, which authorizes the Senate to remove officials of the government upon impeachment by the House for high crimes and misdemeanors.[32] Prior to the Constitution's adoption, Alexander Hamilton explained to those considering its ratification that the President could only remove officials with the Senate's consent.[33]

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25. U.S. CONST. art. II, § 2, cl. 2.

26. *Id.*

27. *Id.* art. II, § 2, cl. 3.

28. *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 948–49 (2017) (Thomas, J., concurring) (noting that FVRA may violate the Constitution, because it "waive[s]" the express provisions of the Appointments Clause).

29. Freytag v. Comm'r, 501 U.S. 868, 883 (1991) (describing a unilateral appointment power as "'the most insidious and powerful weapon of eighteenth century despotism'") (citing GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 143 (1969)).

30. THE FEDERALIST NO. 76 (Alexander Hamilton).

31. *See id.*

32. *See* U.S. CONST. art. I, § 3, cls. 6–7.

33. THE FEDERALIST NO. 77 (Alexander Hamilton).

This old federalist doctrine can be supported in two ways.[34] The customary constitutional rule that the power of removal follows the power of appointment justifies the doctrine.[35] Some members of the First Congress, however, justified it by arguing that the Constitution's Removal Clause provides the exclusive method of removing an officer.[36]

The First Congress debated the question of whether the Constitution authorized removal outside the impeachment context and most thought that it did.[37] But the congressmen debating the issue, many of whom helped frame the Constitution or participated in the ratification debates, took conflicting positions on who should have this removal authority.[38] Some congressmen stuck to the position Hamilton took before ratification—that the Senate must consent to removals—but interpreted it as authorizing bilateral removal outside the impeachment context.[39] They based this argument on the "traditional rule . . . that the removal power mirror[s] the appointment power."[40] Others thought that the President has a constitutional right to remove executive officers unilaterally, the position of modern unitarians (proponents of the unitary executive theory).[41] Still others thought that Congress could decide whom to entrust with removal authority outside the impeachment context under the Necessary and Proper Clause.[42]

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34. *See* JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND THE STATES BEFORE THE ADOPTION OF THE CONSTITUTION § 1538–39 (5th ed. 1891) (describing the doctrine that removal requires Senate assent as a doctrine urged with great earnestness by the Federalists).

35. *See* Myers v. United States, 272 U.S. 52, 119 (1926) (describing the "constitutional principle" that "appointment carried with it the power of removal").

36. *See* Brief for Jed H. Shugerman as Amici Curiae Supporting Respondents, at 7, Collins v. Yellen, 141 S. Ct. 1761 (2021) (stating that "a small number of representatives" in the First Congress viewed impeachment as the sole means of removing officers).

37. Birk, *supra* note 1, at 187 (recognizing that some representatives in the First Congress thought that removal could occur solely through impeachment, but "most thought this interpretation unlikely.").

38. *See* Bowsher v. Synar, 478 U.S. 714, 723–24, n.3 (1985) (noting how many members of that Congress helped frame the Constitution); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989); Edward S. Corwin, *Tenure of Office and Removal Power Under the Constitution*, 27 COLUM. L. REV. 353 (1927); Saikrishna B. Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006).

39. Shugerman, *supra* note 36, at 7 (a "substantial number of representatives" believed that removal requires Senate consent).

40. *Id.* at 7.

41. *Id.* (identifying a "fourth . . . group" in the First Congress as supporters of mandatory presidential removal authority).

42. *See id.* (identifying a "third group" as believing that Congress could specify the locus of removal authority); THE FEDERALIST NO. 39, at 194 (James Madison) (Shapiro ed., 2009)

The Court held that the Senate could not prevent the President from unilaterally removing an executive officer by requiring the Senate's consent to removal in *Myers v. United States*,[43] relying on a heavily disputed reading of the debates in the First Congress.[44] A few years later, the Court held that Congress could nevertheless limit the *grounds* for presidential removal, at least for officers that exercise quasi-judicial and quasi-executive functions.[45] In *Morrison v. Olson*,[46] the Supreme Court held that Congress may protect an independent counsel charged with prosecuting high-level wrongdoing from arbitrary removal by only permitting removal for cause.[47] In *Seila Law*, however, the Court held that the President must have authority to fire the sole head of a government agency performing executive functions for political reasons or no reason at all.[48] So, the Court has squarely repudiated a ban on presidential removal without Senate consent and has recently gone further by limiting the use of for-cause removal protection.[49] *Seila Law*, however, left in place previous cases holding that Congress can restrict presidential removal of inferior officers and members of multimember commissions.[50]

The Appointments Clause jurisprudence focuses on the exceptions to the Advice and Consent requirement and on congressional efforts to employ appointment procedures other than those set out in the Appointments Clause. *Myers* strongly suggests that Congress may determine which officials constitute inferior officers—who may be appointed by the President unilaterally, department heads, or the courts—rather than approved by the

(stating that the tenure of office would be subject to "legal regulation").

43. 272 U.S. 52 (1926).

44. *See id.* at 109–17 (reading the debates in 1789 as establishing the President's right to remove officials unilaterally); *cf.* Casper, *supra* note 38 (disputing Justice Taft's reading of the 1789 debate); Peter L. Strauss, *On the Difficulties of Generalization* – PCAOB *in the Footsteps of* Myers, Humphrey's Ex'r, Morrison*, and* Freytag, 32 CARDOZO L. REV. 2255, 2259 (2011) (arguing "the decision of 1789" did not did "explicitly" give the President any removal authority).

45. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 626–29 (1935) (*Myers* does not justify giving the President unfettered removal authority over officers exercising quasi-judicial and quasi-legislative authority).

46. 487 U.S. 654 (1988).

47. *See id.* at 692–93 (holding that the for-cause removal provision in the Independent Counsel Act does not impermissibly interfere with the President's duty to "ensure" the law's "faithful execution").

48. *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2197 (2020) (invalidating for-cause removal protection for CFPB's Director).

49. *Cf. id.* at 2198 (generally recognizing that Congress may provide for-cause removal protection for inferior officers and members of multimember commissions).

50. *Id.* at 2198–200.

Senate.[51] Recent cases, however, favor judicial supremacy in configuring the scope of the inferior officers exception to the rule requiring Senate confirmation, but have employed varying definitions of an inferior officer.[52] The *Morrison* Court defined an inferior officer as an official with relatively narrow responsibilities, but more recently the Court has tended to define an inferior officer as an official subject to a superior's control and direction (a definition advancing the unitary executive theory).[53] The Court has cabined the Recess Appointments Clause by holding that recess appointments can only occur during a recess of "substantial length" and that the Senate may block recess appointments by holding periodic pro forma sessions when not engaging in substantive business.[54] Accordingly, a president seeking to unilaterally control appointment of officers often has to rely on removal of Senate-approved officials followed by unilateral appointment of an acting official or delegation of a fired officials' duties, rather than upon his recess appointment authority.

In another line of cases, the Court has stopped Congress from assuming a unilateral appointments authority or requiring that its own members assume various posts that are not purely part of the legislative branch, suggesting that such congressional appointments encroach upon the President's nomination power.[55] The Court, however, has done nothing to check the President from unilaterally peopling the government with

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51. *See* Myers v. United States, 272 U.S. 52, 162, 173–74 (1926) (suggesting that Congress may determine that an officer is inferior and may enlarge the civil service through legislation).

52. *See* Edmond v. United States, 520 U.S. 651, 661 (1997) (the Court's cases "have not set forth an exclusive criterion for distinguishing between principal and inferior officers"); *cf.* United States v. Eaton, 169 U.S. 331, 343 (1898) (allowing Congress to treat a "subordinate" temporarily performing the duties of a superior "under special and temporary conditions" as an inferior officer).

53. *See, e.g.*, United States v. Arthrex, 141 S. Ct. 1970, 1980 (2021) (an "inferior officer" must have a superior); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd. (PCAOB), 561 U.S. 477, 510–11 (2010) (defining an inferior officer as a subordinate); *Edmond*, 520 U.S. at 662 (same); Morrison v. Olson, 487 U.S. 654, 671–72 (1988) (holding that a special counsel with "limited duties" and jurisdiction is an inferior officer even though "she possesses a degree of independent discretion").

54. *See* NLRB v. Noel Canning, 573 U.S. 513, 527, 549–50 (2014) (holding that the President may not make a recess appointment during a pro forma session or a recess of insubstantial length); Mendelson, *supra* note 21, at 554 (explaining that *Noel Canning* makes it easy to "block recess appointments").

55. *See, e.g.*, Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 276 (1991) (forbidding Congress from populating a Board of Review regulating D.C. airports with its own members); Buckley v. Valeo, 424 U.S. 1, 118–43 (1976) (per curium) (invalidating creation of an electoral commission consisting of appointees selected by Congress and some of its officers).

partisan supporters whom the Senate might not approve, although the lower courts have disapproved of appointments violating FVRA.[56]

B. Evading Senate Confirmation

The problem of political presidential removal decisions interfering with the Senate's role in appointments has played a role in important challenges to the rule of law undergirding our democracy. At important moments in our history when a president wished to defy or evade legal restraints, he has removed government officials committed to rule of law values and replaced them with people not approved by the Senate and willing to subvert the laws. This problem of removal leading to evasion of the requirement for Senate confirmation arose in events triggering four of the five presidential impeachment cases in the nation's history, and it became a ground for impeachment in two of them (counting President Nixon's resignation under threat of impeachment). It also figured in one incident triggering a rare censure resolution.

1. Andrew Jackson

Andrew Jackson abused his removal and appointment authority to defy the law respecting the National Bank of the United States. Andrew Jackson opposed the Bank, but it enjoyed significant support in Congress.[57] Congress passed a bill renewing the Bank in 1832, but Jackson vetoed it, arguing that it was unconstitutional.[58] But the 1832 veto did not immediately abolish the Bank because the previous unexpired law establishing it remained in effect until 1836.[59]

Unable to obtain legislation promptly terminating the Bank, President Jackson decided to remove Executive Branch officials faithfully executing the

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56. *See, e.g.*, Behring Reg'l Ctr. LLC v. Chad Wolf, 2021 WL 2554051 (N.D. Cal. June 22, 2021) (invalidating appointment of Kevin McAleenan as Department of Homeland Security (DHS) Secretary); Batalla Vidal v. Wolf, 501 F. Supp. 3d 117, 123 (E.D.N.Y. 2020) (invalidating Chad Wolf's appointments as DHS Secretary); Casa de Md., Inc. v. Wolf, 486 F. Supp. 3d 928, 950–57 (D. Md. 2020) (finding that Trump's appointment of acting DHS heads likely violated order of succession requirements); Immigrant Res. Ctr. v. Wolf, 491 F. Supp. 3d 520 (N.D. Cal. 2020) (same); L.L.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 23 (2020) (holding that UCSIS's Acting Head was not properly appointed).

57. Frank W. Garmon Jr., *Andrew Jackson's Veto of the National Bank*, BILL OF RIGHTS INST., https://billofrightsinstitute.org/essays/andrew-jacksons-veto-of-the-national-bank (last visited Aug. 16, 2022).

58. Aditya Bamzai, *Tenure of Office and the Treasury: The Constitution and Control Over National Financial Policy, 1787 to 1867*, 87 GEO. WASH. L. REV. 1299, 1356 (2019); *cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819) (holding that the Constitution authorizes creation of the National Bank).

59. ROBERT V. REMINI, ANDREW JACKSON AND THE BANK WAR 109 (1967).

law and unilaterally appoint an official willing to destroy the Bank.[60] Jackson asked the Secretary of the Treasury, Louis McClane, about removing the federal deposits that sustained the Bank.[61] McClane suggested that he would not do so, as he considered the request illegal.[62] So, Jackson transferred him to the Department of State and installed a known Bank critic, William Duane, as Secretary of the Treasury.[63] William Duane, however, likewise considered the request illegal and refused to remove the deposits.[64] So, Jackson removed him, too, and installed Attorney General Roger Taney (who later became a Supreme Court Justice and helped precipitate the Civil War with the *Dred Scott*[65] decision) in his stead.[66] Jackson chose Taney because he was the only cabinet member who clearly favored removing the deposits, and Taney promptly withdrew them once put at the head of the Treasury Department.[67] Jackson not only used his removal authority to oust officials dedicated to following a law he disapproved of, he also evaded Senate confirmation proceedings for Secretary of the Treasury by appointing Taney while Congress was in recess.[68]

This incident triggered a censure supported by Daniel Webster, Joseph Story, and Henry Clay's arguments that President Jackson had acted tyrannically by abusing his removal authority to subvert the will of Congress, a claim echoed by numerous constitutional scholars at the time.[69] Part of the tyranny charge relied on the use of removal to evade the Appointments Clause by putting a unilaterally chosen official in place to subvert the

60. *See* ARTHUR M. SCHLESINGER JR., THE AGE OF JACKSON 81–82, 97–98 (1945) (explaining that Jackson wished to terminate the bank and conceived of the plan to withdraw federal deposits).

61. DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT, THE TRANSFORMATION OF AMERICA, 1815–1848 387 (2007).

62. *See* REMINI, *supra* note 59, at 113–15 (discussing McClane's response to Jackson's suggestion).

63. *Id.* at 115; HOWE, *supra* note 61, at 387.

64. REMINI, *supra* note 59, at 122–24.

65. 60 U.S. (19 How.) 393 (1856).

66. REMINI, *supra* note 59, at 124.

67. *See id.* at 118, 125 (discussing the cabinet members' positions and how Taney arranged for the removal of the deposits).

68. *See* HOWE, *supra* note 61, at 388 (observing that making an "interim appointment" of Taney Jackson allowed him to "take over immediately without waiting for Senate confirmation"); *cf.* REMINI, *supra* note 59, at 118 (discussing Duane's opposition to removing the deposits during the congressional recess).

69. *See* WILLIAM R. EVERDELL, THE END OF KINGS: A HISTORY OF REPUBLICS AND REPUBLICANS 209 (2000) (discussing the attitude of constitutional scholars); *see also* HOWE, *supra* note 61, at 387–90 (explaining that the Senate censured President Jackson for improperly firing two subordinates).

legislation establishing the Bank.[70] And the Senate rejected the appointment of Taney as Secretary of the Treasury.[71] But it could not do so rapidly enough to save the Bank from destruction. The objective of the replacement of officials without Senate consent was not to secure faithful execution of the law, but to replace officials who would properly execute the law with an official who would use executive power to undermine the law's core purpose.[72]

2. Andrew Johnson

More thorough abuse of removal and appointment authority took place under Andrew Johnson and led to his impeachment. Andrew Johnson used removal and appointment as tools to defeat the operation of the laws governing reconstruction after the Civil War.

Andrew Johnson, an avowed white supremacist, followed a policy of allowing Confederate leaders to assume positions of prominence in state governments being created in the vanquished South, while doing little or nothing to protect freed slaves, including many union soldiers, from murders and even massacres tolerated or carried out by southern governments.[73] The Republicans obtained veto-proof majorities in the midterm election of 1866, likely because of Johnson's failure to protect Black individuals (and for that matter, loyal White Republican) from terrorism in the South.[74]

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70. SCHLESINGER, *supra* note 60, at 106–07, 110 (discussing Clay's characterization of Jackson's effort to manipulate appointments to remove the Bank deposits as a "revolution" concentrating "all power in the hands of one man," Webster's charging Jackson with "despotism," and Justice Story staying, "[t]hough we live under the form of a republic we are in fact under the absolute rule of a single man.").

71. REMINI, *supra* note 59, at 141–42.

72. *See id.* at 126 (characterizing the removal of government funds from the National Bank as Jackson's "lunge to kill the Bank outright"); HOWE, *supra* note 61, at 388, 390 (explaining that Jackson ordered "an officer to break the law" and violated "the spirit, [and] perhaps the letter, of the law").

73. On white supremacy, see, for example, BRENDA WINEAPPLE, THE IMPEACHERS 83 (2019) (quoting Johnson, who said: "this is a country for white men, and, by God, as long as I am president it shall be a government for white men"). On Johnson's policy, see, for example, *id.* at 71 (explaining the pardoning of confederates) & 80–83 (describing Johnson's failure to protect Black citizens from violence in the South); WILLIAM REHNQUIST, GRAND INQUESTS 206 (1992) (recounting that a mob killed forty and wounded 100 Black and White Republicans holding a state constitutional convention after Johnson signaled that the federal government "would not interfere with the [state's] civil authorities").

74. WINEAPPLE, *supra* note 73, at 171 (explaining that contemporary observers felt that the "massacre at New Orleans" would hurt Johnson in the 1866 election, which indeed produced a Republican landslide). Andrew Johnson failed to prevent the massacre of Black individuals and the attacks on white Republicans in New Orleans.

Congress exercised its constitutional authority to determine the course of reconstruction through legislation by extending and strengthening the Freedmen Bureau Act and passing the first Civil Rights Act months before the 1866 election and by enacting The Reconstruction Acts afterwards.[75] The Reconstruction Acts established a policy of military reconstruction, which granted voting rights to the freed slaves and used the occupying Union armies to protect freed Black Americans and other unionists from attacks.[76] The Reconstruction Acts also required states to guarantee equal protection of the laws as a condition for readmission to the Union.[77] President Johnson vetoed the Reconstruction legislation, but Congress overrode his vetoes.[78]

President Johnson used removal of officials as a tool to suppress dissent and to prevent faithful implementation of the laws governing reconstruction, "replacing Freedmen's Bureau officials with flunkies, sacking over a thousand postmasters, and discharging . . . Treasury offic[ials] who [disagreed] with him."[79] In order to avoid the sort of presidential subversion that had occurred with respect to the Freedman's Bureau, Congress passed the Tenure of Office Act on the same day that it overrode President Johnson's veto of the First Reconstruction Act.[80]

The Tenure of Office Act forbade the removal of cabinet officers appointed during the appointing President's term plus one month without the Senate's consent.[81] Johnson, however, continued to abuse his removal authority repeatedly in an effort to dictate policy now at odds with the law. For example, Johnson replaced generals implementing the Reconstruction legislation with "men willing to prevent [B]lacks from voting, running for office, serving on juries, or riding in the front of a streetcar."[82]

The most famous case of abusive removal and appointment involved War Secretary Edwin Stanton, a holdover from the Lincoln cabinet committed to implementing the law.[83] Johnson wanted to replace Stanton with a War

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75. *See* Howard C. Westwood, *To Set the Law in Motion: The Freedmen's Bureau and the Legal Rights of Blacks, 1865-1868*, 80 COLUM. L. REV. 204–06 (1980) (discussing the congressional override of Johnson's second veto of a bill to extend the Freedmen's Bureau's life and specify its powers); Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982).

76. WINEAPPLE, *supra* note 73, at 194–95, 199, 202–03.

77. *Id.* at 195.

78. *Id.* at 196–99, 202–03.

79. *Id.* at 184–85.

80. Tenure of Office Act, 14 U.S.C. § 430 (1867); An Act to Provide for the More Efficient Government of the Rebel States (First Reconstruction Act), 14 U.S.C. § 428 (1867).

81. *See* Tenure of Office Act § 1.

82. *See* WINEAPPLE, *supra* note 73, at 214–15.

83. *See id.* at 209–10 (noting that Stanton had "formally stated that he would obey the

Secretary willing to substitute Johnson's perferred policy for the law's policy on reconstruction. General William Tecumseh Sherman, after consulting with General Ulysses S. Grant, advised President Johnson to replace Stanton with an appointee likely to win Senate approval, General Jacob Dolson Cox.[84] Johnson, however, replaced Stanton with a more pliant and unqualified official, Adjutant General Lorenzo Thomas.[85]

President Johnson's determined resistance to faithfully implementing the reconstruction laws capped by the effort to replace Stanton with a person whom the Senate would never approve (for good reason) led to his impeachment by a vote of 126 to 47.[86] The first article of impeachment cited his violation of the Tenure of Office Act by removing Stanton.[87] The second article flagged his appointment of Thomas without the Senate's advice and consent.[88] The final impeachment article charged Johnson with firing Stanton for the purpose of preventing "the execution" of the first Reconstruction Act.[89] The majority of Senators agreed with the House's impeachment decision, but the Senate acquitted him, falling one vote shy of the two-thirds majority required for removal.[90]

President Johnson's decision during the impeachment proceeding to compromise his evasion of the Appointments Clause apparently played a role in saving Johnson from removal. Johnson agreed to nominate John Schofield as Secretary of War, a person who, unlike Thomas, Senators regarded as qualified and conscientious.[91] General Grant, a war hero who supported faithful implementation of the Reconstruction legislation, won the next election.[92] Thus, an effort to check abusive removal in order to preserve the Senate's role in appointments helped restore the rule of law in the federal government.

Reconstruction Acts").

84. *See id.* at 235.

85. *See id.* at 249 (describing Thomas as incompetent and "loyal . . . to . . . his alcohol").

86. *See id.* at 258–62, 320–22, 341 (discussing the reasons for impeachment).

87. *Id.* at 431, Appendix B, art. 1.

88. *Id.* at 432, art. 2.

89. *See id.* at 438, art. 11 (accusing Johnson of "unlawfully devising and contriving . . . means . . . to prevent the execution" of the Reconstruction Act) (internal quotation marks omitted).

90. *See* REHNQUIST, *supra* note 73, at 233–35 (the Senate voted 35 to 19 for removal).

91. *See id.* at 247 (observing that the assurances that the President would nominate "a successor to Stanton . . . who was satisfactory to" wavering Republicans was of "some importance"). Scholars advance several other possible causes for the one vote loss. *See, e.g.*, *id.* at 246–47 (claiming that fears of President Pro Tempore of the Senate Ben Wade succeeding to the presidency may have influenced the outcome); WINEAPPLE, *supra* note 73, at 383 (finding "circumstantial evidence" of bribery).

92. RON CHERNOW, GRANT 614, 625–26 (2017) (noting "Grant's boldness" in upholding radical Reconstruction and the role that Black peoples' support played in his victory).

3. Richard Nixon

The Watergate scandal demonstrated the potential utility of at-will presidential removal authority combined with unilateral appointment evading Senate Advice and Consent in subverting not just the rule of law, but also fair elections. Richard Nixon and his associates apparently decided to tilt the electoral playing field in his favor by trying to get dirt on the political opposition, ordering burglaries of his political opponents.[93] In response to evidence of the Watergate break-in, Attorney General Elliott Richardson appointed a special counsel to investigate.[94] President Nixon responded to this threat of uncovering his crimes in the same way that Presidents Jackson and Johnson had responded to threats to their ability to unilaterally create policies at odds with the law then in force, by securing the removal of law-abiding subordinates in order to have more pliant officials serve in their vacated posts. Nixon ordered Attorney General Richardson to fire the special counsel.[95] Richardson refused and resigned in protest.[96] Nixon then ordered his successor, William Ruckelshaus, to fire the special counsel.[97] Ruckelshaus likewise refused and resigned.[98] President Nixon, however, found an "obsequious instrument of his pleasure" (in Hamilton's words) in Ruckelshaus' successor, Robert Bork, who agreed to fire the special counsel.[99] But the Department of Justice (DOJ) regulations governing the special counsel office only authorized for-cause removal, and a federal district court judge held Bork's firing of the special counsel illegal.[100] Thus, judicial

93. *See, e.g.*, GARRETT M. GRAFF, WATERGATE: A NEW HISTORY 37, 64–70, 83–84 (2022) (discussing Nixon's orders to burglarize the Brookings Institution and his associates' decision to break into Daniel Ellsberg's psychiatrist's office). A recent history claims that we still do not know who ordered the Watergate break-in itself. *See id.* at 678. But two of the central players, E. Howard Hunt and James McCord, were Nixon associates. *Id.* (identifying Hunt and McCord as central players in the Watergate break-in). E. Howard Hunt was an ex-CIA officer who Nixon tapped to carry out a burglary of the Brookings Institute. *See id.* at 63–64. James McCord was the head of security for the Republican National Committee to Re-Elect the President. *Id.* at 105. Jed Magruder, who was also involved in planning the burglary, was an aide to White House Chief of Staff, Bob Haldeman. *Id.* at 9, 143–45 (suggesting that Magruder either ordered the break-in or conveyed Attorney General John Mitchell's order to carry out the burglary to G. Gordon Liddy).

94. BOB WOODWARD & CARL BERNSTEIN, THE FINAL DAYS 61 (1976).

95. *Id.* at 24, 70.

96. *Id.* at 70.

97. *Id.*

98. *Id.*

99. *Id.* at 70–71; THE FEDERALIST NO. 76 (Alexander Hamilton).

100. Nader v. Bork, 366 F. Supp. 104, 109–10 (D.D.C. 1973); THE FEDERALIST NO. 76 (Alexander Hamilton) (explaining how the Constitution aimed to prevent appointment of

enforcement of a for-cause removal provision helped vindicate the rule of law.

The reaction to the "Saturday Night Massacre"—the firing of Richardson and Ruckelshaus—led to increased support for impeachment.[101] The House Judiciary Committee drafted articles of impeachment, which made Nixon's interference with the DOJ a basis for impeaching him; and Nixon resigned to avoid almost certain impeachment and removal.[102]

One might argue that the Watergate story does not illustrate the problem of combining removal with unilateral appointment, as Ruckelshaus and Bork assumed office automatically under the DOJ succession statute.[103] But the President did not formally nominate Ruckelshaus or Bork for Attorney General. As a result, the Senate never had an opportunity to inquire whether a new Attorney General would stand up to Nixon to vindicate the law and to refuse to allow an appointment of an official who would not.[104] In other words, Nixon's removal of Attorneys General automatically defeated the Appointments Clause by triggering a statute authorizing succession of officers without Senate approval of a new Attorney General.

4. Donald Trump

Donald Trump evaded the Senate confirmation process by firing officials and then replacing them with "acting" appointees more often than his somewhat recent predecessors.[105] Indeed, Anne Joseph O'Connell tells us that prior to Trump, "[f]irings or forced resignations of top officials" rarely occurred.[106]

"obsequious instruments" of presidential "pleasure").

101. *See* WOODWARD & BERNSTEIN, *supra* note 94, at 113 (House members drew up articles of impeachment after the firing of Richardson and Ruckelshaus).

102. *See* H.R. Rep. No. 93-1305, at 3–4, 177–79 (1974) (showing that the first of the proposed Nixon articles of impeachment accused him of interfering with Department of Justice (DOJ) investigations); Frederick M. Lawrence, *In Memoriam: Archibald Cox and the Genius of Our Institutions*, 85 B.U. L. REV. 356, 356–57 (2005) (noting that Nixon's firing of three DOJ employees led to his resignation).

103. *See* Lois Reznick, *Temporary Appointment Power of the President*, 41 U. CHI. L. REV. 146, 146 n.5 (1973) (noting that 28 U.S.C. § 508 (1970) "authorized" the Bork appointment).

104. *See id.* (explaining that Congress had made a promise that the Attorney General would not "unduly interfere[]" with the Special Prosecutor as a "condition of his confirmation").

105. *See* O'Connell, *supra* note 212121, at 643 (noting that Trump alone had "used more acting secretaries than confirmed secretaries"); Van Orsdol, *supra* note 1, at 299 (observing that "over 200 key [E]xecutive [B]ranch positions requiring . . . Senate confirmation" sat "vacant" late in the Trump Administration's second year). The data on sub-cabinet positions also show that Trump evaded Senate confirmation much more often than his predecessors. O'Connell, *supra* note 20, at 650–54 (providing data for the Environmental Protection Agency and the Federal Aviation Administration).

106. O'Connell, *supra* note 21, at 672.

"[B]etween 1945 and the start of President Trump's Administration," she writes, "twelve Presidents fired a total of nineteen cabinet secretaries."[107] Furthermore, Trump's effort to wrest Appointments power from the Senate by firing officials it had approved and substituting his own people was deliberate.[108] He admitted publicly that he liked the "flexibility" provided by appointing acting officials unilaterally rather than obeying the Appointments Clause.[109] He also often evaded FVRA constraints in order to enhance this flexibility. Nina Mendelson has explained that two-thirds of the way through Trump's Administration, about one-third of the "'key'" posts" in his Administration were not filled by Senate-confirmed officials.[110]

Moreover, Trump's evasion of the Appointments Clause through removal resulted in serious assaults on liberty and the rule of law. For example, President Trump sent irregular paramilitary forces to Portland, Oregon in response to attacks on the city's federal building.[111] Those forces, according to both news accounts and a federal court ruling, went beyond protecting federal property.[112] They attacked peaceful protestors and journalists and arrested citizens for no apparent reason, terrifying them by scooping them up in unmarked vans and holding them for hours without explanation.[113]

Almost all of the people leading this legally questionable liberty-infringing

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107. *Id.*

108. *See id.* at 617 (discussing Trump's "deep affection for his nonconfirmed agency leaders").

109. *See id.*

110. *See* Mendelson, *supra* note 21, at 539.

111. *See* Chris McGreal, *Federal Agents Show Stronger Force at Portland Protests Despite Order to Withdraw*, GUARDIAN (July 30, 2020, 9:23 PM), https://www.theguardian.com/us-news/2020/jul/30/federal-agents-portland-oregon-trump-troops; Index Newspapers v. Portland, 480 F. Supp. 3d 1120, 1124 (D. Or. 2020).

112. *See* John Ismay, *A Navy Veteran Had a Question for Feds in Portland. They Beat Him in Response*, N.Y. TIMES, (July 20, 2020), https://www.nytimes.com/2020/07/20/us/portland-protests-navy-christopher-david.html (explaining how grabbing protesters off the street and throwing them into minivans may have exceeded the officers' arrest authority and violated the rights of protestors); Jonathan Levinson & Conrad Wilson, *Federal Law Enforcement Use Unmarked Vehicles to Grab Protesters Off Portland Streets*, OR. PUB. BROAD. (July 16, 2020, 7:46 PM), https://www.opb.org/news/article/federal-law-enforcement-unmarked-vehicles-portland-protesters/ (describing how federal law enforcement officers would utilize unmarked vehicles to detain protestors without explanation sometimes far away from federal property).

113. *Index Newspapers*, 480 F. Supp. at 1130–36 (discussing evidence that police attacked journalists and legal observers); Katie Shepherd & Mark Berman, *"It Was Like Being Preyed Upon": Portland Protestors Say Federal Officers in Unmarked Vans are Detaining Them*, WASH. POST (July 17, 2020), https://www.washingtonpost.com/nation/2020/07/17/portland-protests-federal-arrests/ (explaining that federal forces arrested and detained peaceful protestors).

paramilitary operation on American soil were improperly appointed.[114] Many of the people making up this newly mustered federal paramilitary force came from components of the Department of Homeland Security (DHS), such as U.S. Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS), and U.S. Customs and Border Protection (CBP).[115] The heads of DHS and these component agencies are "Officers of the United States."[116] Accordingly, the Constitution requires that the President appoint them only with the consent of the Senate.[117] But President Trump never sought Senate approval for any of these agencies' heads before these agencies carried out the Portland deployment.[118]

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114. *See* WILLIAM C. BANKS & STEPHEN DYCUS, SOLDIERS ON THE HOME FRONT: THE DOMESTIC ROLE OF THE AMERICAN MILITARY (2016); U.S. CONST. art. IV, § 4 (authorizing federal protection of state against "domestic violence" only upon application of the state legislature); *see also* Deana El-Mallawany, Christine Kwon & Rachel Homer, *Trump Can't Lawfully Use Armed Forces to Sway the Election: Understanding the Legal Boundaries*, JUST SEC. BLOG (Sept. 23, 2020), https://www.justsecurity.org/72500/trump-cant-lawfully-use-armed-forces-to-sway-the-election-understanding-the-legal-boundaries (explaining that the Portland invasion also violated statutory limits); Don't Shoot Portland v. Wolf, No. 1:20-cv-02040, at *17–20; 63–70; 125–51 (filed July 27, 2020, D.D.C.); *cf.* Martin v. Mott, 25 U.S. (12 Wheat) 19 (1827).

115. *See* Marissa J. Lang, Josh Dawsey, Devlin Barrett & Nick Miroff, *Operation Diligent Valor: Trump Showcased Federal Power in Portland, Making a Culture War Campaign Pitch*, WASH. POST (July 24, 2020), https://www.washingtonpost.com/national/portland-protests-operation-diligent-valor/2020/07/24/95f21ede-cce9-11ea-89ce-ac7d5e4a5a38_story.html; Ben Fox, *Top Homeland Security Official Defends Response to Protests*, OR. PUB. BROAD. (Sept. 9, 2020, 1:37 PM), https://www.opb.org/article/2020/09/09/bc-us-homeland-security-portland-protests-1st-ld-writethru/.

116. *See* U.S. CONST. art. II, § 2, cl. 2; CHRISTOPHER M. DAVIS & MICHAEL GREENE, CONG. RSCH. SERV., RL30959, PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS 35–41 (2017).

117. *See* U.S. CONST. art. II, § 2, cl. 2.

118. *See, e.g.*, Betsy Woodruff Swan & Daniel Lippman, *ICE Chief Tangles with White House over Political Appointees*, POLITICO (May 6, 2020, 4:30 AM), https://www.politico.com/news/2020/05/06/ice-chief-appointees-white-house-239564 (noting Trump never nominated Matthew Albence, the nominal ICE head at the time of the Portland invasion, to be ICE's Director). President Trump did nominate two of Albence's predecessors to become the ICE Director, Thomas Honan and Ronald Vitiello. Trump, however, withdrew both of these nominations, even though the Senate seemed likely to confirm Vitiello. *See* Priscilla Alvarez, Geneva Sands, Kaitlan Collins, Jeremy Diamond & Jim Acosta, *Trump Suddenly Pulls ICE Nominee to go with Someone 'Tougher,'* CNN (Apr. 5, 2019), https://edition.cnn.com/2019/04/05/politics/ice-director-nomination-pulled/index.html (discussing the withdrawal of Vitiello); Press Release, The White House, Fifteen Nominations and One Withdrawal Sent to the Senate Today (May 15, 2018) https://trumpwhitehouse.archives.gov/presidential-actions/fifteen-nominations-one-withdrawal-sent-senate-today/.

The President unilaterally substituted chosen allies for Senate-approved officials by coupling abuse of his removal authority with a failure to nominate a successor to the person removed. He secured the removal of the former head of DHS, Kirstjen Nielsen, reportedly because she opposed some of the President's desired asylum policies,[119] some of which federal courts subsequently found illegal.[120] He then replaced her, unilaterally, with Kevin K. McAleenan, who likewise resisted some of Trump's legally problematic immigration policies.[121] So, Trump secured his resignation and appointed Chad Wolf in his place.[122]

Trump demanded the resignation of the head of USCIS, who enjoyed Senate support and had proclaimed both a dedication to the rule of law and lack of malice to immigrants.[123] The Trump Administration replaced the USCIS director with former Virginia Attorney General Ken Cuccinelli, who almost surely did not enjoy enough support among Republican Senators to obtain Senate confirmation.[124]

President Trump removed McAleenan from his Senate-confirmed post as head of CBP when Trump unilaterally made McAleenan head of DHS.[125]

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119. *See* O'Connell, *supra* note 21, at 621 (noting that President Trump "pushed out" Kirstjen Nielsen); Sophie McBain, *Why Was DHS Secretary Kirstjen Nielsen Pushed Out? She Wasn't Extreme Enough for Trump*, NEW STATESMAN (Oct. 22, 2018), https://www.newstatesman.com/world/americas/north-america/2018/10/why-was-dhs-secretary-kirstjen-nielsen-pushed-out-she-wasn-t-extreme (linking Nielsen's resignation to Trump's frustration with her insistence that law precludes "completely closing the border to asylum seekers").

120. *See* E. Bay Sanctuary Covenant v. Barr, 964 F.3d 832 (9th Cir. 2020) (affirming a preliminary injunction against an anti-asylum policy enacted after Nielsen's resignation); Al Otro Lado v. Wolf, 952 F.3d 999, 1016 (9th Cir. 2020) (finding that the Acting Secretary failed to make a strong showing on the legal merits of another anti-asylum policy).

121. *See* Zolan Kanno-Youngs, Maggie Haberman & Michael D. Shear, *Kevin McAleenan Resigns as Acting Homeland Security Secretary*, N.Y. TIMES (Oct. 11, 2019), https://www.nytimes.com/2019/10/11/us/politics/kevin-mcaleenan-homeland-security.html (discussing McAleenan's opposition to "nationwide deportation raids" and "some of Mr. Trump's most extreme ideas").

122. O'Connell, *supra* note 21, at 622 n. 41.

123. Matthew Choi & Anita Kumar, *Citizenship and Immigration Services Chief Resigns,* POLITICO (May 24, 2019), https://www.politico.com/story/2019/05/24/immigration-cissna-cuccinelli-trump-1344956.

124. *See* L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 7–8 (D.D.C. 2020) (explaining the machinations that put Cuccinelli in the office); Ted Hesson, *Cuccinelli Starts as Acting Immigration Official Despite GOP Opposition*, POLITICO (June 10, 2019), https://www.politico.com/story/2019/06/10/cuccinelli-acting-uscis-director-1520304 (noting that Trump never nominated an ICE director, relying on a series of acting officials to carry out his immigration policies, including family separation); Christina M. Kinane, *Control Without Confirmation: The Politics of Vacancies in Presidential Appointments* (2019) (Ph.D. dissertation, University of Michigan).

125. *See* Stephan Dinan, *Kevin McAleenan Confirmed as U.S. Customs and Border Protection Chief*,

Trump then replaced McAleenan with acting CBP commissioners. The Administration forced out the first of these acting commissioners, John P. Sanders, who had humanitarian concerns about the Administration's policies.[126] His successor, Mark Morgan, became Acting Commissioner of CBP after Sanders left and helped carry out the Portland deployment.[127]

The flexibility Trump obtained by replacing the heads of DHS and its immigration authorities with acting officials lacking Senate confirmation facilitated not only an attack on individual liberty in Portland, but also a host of illegal actions on the immigration front.[128] Federal courts enjoined or

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WASH. TIMES (Mar. 19, 2018), https://www.washingtontimes.com/news/2018/mar/19/kevin-mcaleenan-confirmed-us-customs-and-border-pr (reporting that the Senate-confirmed McAleenan as the CBP chief); Frank Miles, *Kevin McAleenan, New Acting DHS Boss, Has Long Record in Border Security*, FOX NEWS (Apr. 7, 2018), https://www.foxnews.com/politics/new-acting-homeland-security-head-well-respected-longtime-border-officer (discussing Trump's decision to move McAleenan from the Director position at CPB to head DHS).

126. *See* Zolan Kanno-Youngs & Maggie Haberman, '*A Constant Game of Musical Chairs' Amid Another Homeland Security Shake-up*, N.Y. TIMES (June 25, 2019), https://www.nytimes.com/2019/06/25/us/politics/mark-morgan-ice-cbp.html?searchResultPosition=11 (reporting that White House officials directed McAleenan to replace Sanders after White House officials found him insufficiently "aggressive enough at the southwestern border"); Geneva Sands & Priscilla Alvarez, *John Sanders on Why He Left After Two and a Half Months as Acting CBP Commissioner*, CNN (July 11, 2019), https://www.cnn.com/2019/07/11/politics/border-chief-john-sanders/index.html (explaining that Sanders was "hit . . . hard" by the death of a Guatemalan boy in agency custody, considered conditions border control facilities "very bad," and believed that immigrants should be "treated humanely with dignity and respect").

127. *See* Zolan Kanno-Youngs & Michael Tackett, *Trump Names Mark Morgan, Former Head of Border Patrol, to Lead ICE*, N.Y. TIMES (May 5, 2019), https://www.nytimes.com/2019/05/05/us/politics/trump-ice-mark-morgan.html (explaining how Morgan claims he was forced out of the Border Patrol at the beginning of the Trump Administration); Elliot Spagat & Alicia A Caldwell, *Border Patrol Chief Says He's been Forced Out*, CNN (Jan. 26, 2017), https://apnews.com/article/1552a2a8859e49318fbf4f940eab5926 (discussing that Morgan regained Trump's favor through frequent appearances on Fox News promoting the Administration's harsh and often illegal policies); Youngs & Haberman, *supra* note 126 (noting that Morgan appeared on Fox News eighty times before getting his old job back).

128. *See*, *e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901 (2020) (vacating decision to rescind the Deferred Action for Childhood Arrivals program); E. Bay Sanctuary Covenant v. Biden, 993 F.3d 640, 658–60 (9th Cir. 2021) (affirming a nationwide preliminary injunction to prevent a Trump Administration asylum rule from taking effect); Pangea Legal Servs. v. Dep't. of Homeland Sec., 512 F. Supp. 3d 966, 972–77 (N.D. Cal. 2021) (enjoining a rule establishing new categories of crimes triggering an asylum bar); Nat'l Immigrant Just. Ctr. v. Exec. Off. for Immigr. Rev., No. 21-00056 (D.D.C. Jan. 14, 2021) (enjoining rule creating hurdles for asylum seekers); Capitol Area Immigrants' Rts. Coal. v. Trump, 471 F.Supp.3d 25, 31–32 (D.D.C 2020) (finding rule categorically

struck down policies enacted by Trump's officials, reversing the Trump Administration in ninety percent of the immigration policy cases brought in federal court.[129] Furthermore, President Trump's officials often failed to obey court orders seeking to curtail their illegal actions.[130]

President Trump also fired several inspectors general who investigated allegations that his Administration failed to abide by ethical and legal restraints.[131] Firing officials for complying with investigation and disclosure requirements undermines not only the rule of law, but also political accountability through elections by keeping information about an administration's conduct from the voters.[132]

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disqualifying asylum seekers at southern border unlawful); Make the Road N.Y. v. Pompeo, 475 F.Supp.3d 232, 246, 271 (S.D.N.Y. 2020) (rejecting immigration applications based on insurance status is unlawful); Clerveaux v. Searls, 397 F. Supp. 3d 299, 304 (W.D.N.Y. 2019) (holding non-citizen for seventeen months in DHS custody without review of eligibility for release violated due process rights); Jimenez v. Cronen, 317 F. Supp. 3d 626, 633–35, 647–48 (D. Mass. 2018) (holding non-citizens in U.S. Immigration and Customs Enforcement (ICE) detention for four months without opportunity to be heard violated due process rights); Damus v. Nielsen, 313 F. Supp. 3d 317, 339–41 (D.D.C. 2018) (stopping individualized parole determinations for asylum seekers to promote 'deterrence' held unlawful).

129. Bethany A. Davis Noll, *"Tired of Winning": Judicial Review of Regulatory Policy in the Trump Era*, 73 ADMIN. L. REV. 353, 390 (2021) (noting that the Trump Administration lost ninety percent of its immigration policy cases in federal court).

130. Jennifer Lee Koh, *Executive Defiance and the Deportation State*, 130 YALE L.J. 948, 965–77 (2021).

131. *See* Jen Kirby, *Trump's Purge of Inspectors General, Explained*, VOX (May 28, 2020), https://www.vox.com/2020/5/28/21265799/inspectors-general-trump-linick-atkinson; *Interview of Steve A. Linick Before the H. Comm. On Foreign Rel., H. Comm. On Oversight and Reform & S. Foreign Relations Comm.*, 116th Cong. 26, 48–52 (2020) (explaining that Inspector General Linick was fired after an associate of Mike Pompeo "tried to bully [him]" into abandoning an investigation of claims that Pompeo misused State Department resources and participated in an arms deal with Saudi Arabia); Sam Mintz, *Democrats Blast Removal of Acting DOT Inspector General*, POLITICO (May 19, 2020), https://www.politico.com/news/2020/05/19/democrats-blast-removal-of-acting-dot-inspector-general-268611 (Acting Inspector General Behm was investigating a claim that Secretary of Transportation Elaine Chao gave preferential treatment to Kentucky, represented by her husband, Senator Mitch McConnell); Del Quentin Wilber, *He Was Told to be Independent, and Trump Fired Him For It*, L.A. TIMES (Jan. 11, 2021), https://www.latimes.com/world-nation/story/2021-01-11/he-was-told-to-be-independent-and-trump-fired-him-for-it; Pranshu Verma & Edward Wong, *Another Inspector General Resigns Amid Questions about Pompeo*, N.Y. TIMES (Aug. 25, 2020), https://www.nytimes.com/2020/08/05/us/politics/inspector-general-pompeo-state.html.

132. *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2203–04 (2020) (justifying an unlimited presidential authority to fire the CFPB Director by citing the need for political accountability to the voters who elect the President). *See generally* HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION (2015) (highlighting the importance of information about the Executive

Both of Trump's impeachments involved removal of officials to put in place people not approved by the Senate. A whistleblower complaint about Trump's withholding military assistance from Ukraine to induce its President to announce a corruption investigation of Joe Biden's son triggered his first impeachment.[133] Trump apparently fired Inspector General Michael Atkinson because he complied with his legal obligation to disclose whistleblower complaints to Congress and ex-army officer Andrew Vindman as punishment for testifying in impeachment proceedings.[134] President Trump also tried to prevent numerous government officials from testifying against him, and all of them must have feared that testifying would result in their removal in light of Trump's frequent abuse of removal authority.[135]

Removal of officials arguably played a role in President Trump's effort to overturn the results of the 2020 election, which led to his second impeachment. Shortly after he lost the 2020 election, President Trump replaced the Secretary of Defense with an official whom the Senate had not approved.[136] Replacement of a Secretary of Defense late in an administration is very unusual.[137] The Secretary of Defense initially failed to fulfill requests to deploy National Guard troops to defend the Capitol from

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Branch in making political accountability for the President meaningful).

133. *See* H. R. Res. 755, 116th Cong. (2019).

134. *See* Statement of Michael K. Atkinson, Inspector General of the Intelligence Community, on His Removal from Office (Apr. 5, 2020), https://int.nyt.com/data/\documenthelper/6865-atkinson-statement-on-removal/339e56bc31e7c607c4b9/optimized/full.pdf; Charlie Savage, *Inspector General Fired by Trump Urges Whistle-Blowers 'to Bravely Speak Up'*, N.Y. TIMES (Apr. 6, 2020), https://www.nytimes.com/2020/04/06/us/politics/michael-atkinson-inspector-general-fired.html ("The intelligence community inspector general whom President Trump fired . . . has called on whistle-blowers to overcome any fears and come forward with information"); Eric Schmitt & Helene Cooper, *Army Officer Who Clashed With Trump Over Impeachment Is Set to Retire*, N.Y. TIMES (July 8, 2020), https://www.nytimes.com/2020/07/08/us/politics/vindman-trump-ukraine-impeachment.html.

135. *See* Matt Zapotosky, *Why Trump Can't Stop All Witnesses from Testifying in Congress's Impeachment Inquiry*, WASH. POST (Oct. 11, 2019, 3:54 PM), https://www.washingtonpost.com/national-security/why-trump-cant-stop-all-witnesses-from-testifying-in-congresss-impeachment-inquiry/2019/10/11/823c9608-ec2f-11e9-85c0-85a098e47b37_story.html (stating that the Trump Administration "blocked advisers from testifying" and "could fire diplomats who defy its wishes and testify").

136. Rebecca Shabad & Carol E. Lee, *Trump Tweets that Defense Secretary Mark Esper Has Been 'Terminated'*, NBC NEWS (Nov. 9, 2020), https://www.nbcnews.com/politics/politics-news/trump-tweets-defense-secretary-mark-esper-has-been-terminated-n1247138; Helene Cooper, Eric Schmitt & Maggie Haberman, *Trump Fires Mark Esper, Defense Secretary Who Opposed Use of Troops on U.S. Streets*, N.Y. TIMES (Nov. 11, 2020), https://www.nytimes.com/2020/11/09/us/politics/esper-defense-secretary.html.

137. *See* Cooper, Schmitt & Haberman, *supra* note 136 ("Removing . . . senior officials—in effect decapitating the nation's national security bureaucracy—would be without parallel by an outgoing president who has just lost re-election.").

the insurrection.[138] Despite plans to have a "quick reaction force" available, National Guard troops did not arrive until more than five hours after the invasion of the Capitol spurred a request for help.[139] The FBI failed to publicly respond to numerous advance indications of planned violence at the Capitol, partly because its senior leaders feared that doing so would cause the President to remove the FBI Director.[140] And Attorney General Barr's public statement disputing President Trump's election fraud claims led to his ouster.[141]

5. General Lessons and Some Caveats

Thus, we can see that using removal as a tool to replace Senate-confirmed officials can threaten the rule of law, fair elections, and even the Republic's survival. The failure to promptly deploy the National Guard, or worse, to order it to support an insurgency, could have produced the murder of members of Congress and the Vice President and the overthrow of democratic government.[142] While we have no evidence that the Secretary of Defense did anything improper, the situation reminds us that removal followed by appointment of lackeys can provide a powerful weapon in undermining the rule of law.

Furthermore, both the story of the Capitol insurrection and the Jackson case show that even temporary control of a key post by an official not approved for that position by the Senate can have serious consequences. Jackson's Secretary of the Treasurer rapidly destroyed the National Bank. And a non-Senate-confirmed Secretary of Defense may attempt a coup in a single day.

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138. Memorandum from David S. Soldow, Exec. Sec'y of the Office of the Sec'y of Def. to Office of the Sec'y of Def. (Jan. 10, 2021) (explaining that an hour and a half elapsed between the time Mayor Bowser requested deployment of the National Guard to turn back the Capitol invasion and Miller's decision to authorize backup forces).

139. *Id.* (recording that the National Guard did not arrive until 5:40 p.m.); Memorandum from Christopher C. Miller, Acting Sec'y of Def., to Ryan McCarthy, Sec'y of the Army (Jan. 4, 2021) (discussing authorization of the "Quick Reaction Force" in advance of the demonstration).

140. Aaron C. Davis, *RED FLAGS*, WASH. POST (Oct. 31, 2021), https://www.washingtonpost.com/politics/interactive/2021/warnings-jan-6-insurrection/ (explaining how senior leaders worried that any "public statements" by the FBI Director about violence threatened at the Capitol prior to January 6 would cause "a desperate President to come after him").

141. *Id.* (reporting Attorney General Barr's statement that "we have not seen fraud on a scale" that could have changed the election results and how the statement "marked the beginning of the end of Barr's tenure").

142. *Cf. id.* (explaining that Trump's firing of senior defense officials after the election led the Secretary of the Army to have fears that Trump might redirect National Guard troops deployed to the Capitol "as he wished").

The Jackson and Nixon stories teach another lesson. They show that a President seeking to evade the law's restraints can simply fire as many honest officials as necessary to secure illegal conduct, unless some subordinate enjoys for-cause removal protection.

Yet this subsection's focus on undermining the rule of law and elections does not imply that removal followed by a failure to promptly put a Senate-confirmed official in place usually signals a presidential assault on our democracy. A president may remove somebody for good reasons and then find himself unable to gain Senate confirmation of a well-qualified replacement, or he may fail to nominate a replacement promptly because the press of business makes it hard to cope with the much-criticized proliferation of posts requiring Senate approval. [143] But these cases show how a president hostile to the laws or eager to hold on to power can use unrestrained removal authority to shred Appointments Clause constraints and imperil the rule of law.

C. The Federal Vacancies Reform Act and Other Statutory Remedies

Congress, however, since the time of the Adams' Administration, has authorized many temporary appointments by statute in the event of a sudden vacancy, even when the Senate is in session.[144] The primary vehicle for this is now the FVRA. Notwithstanding the tension between temporary unilateral appointments of principal officers and the Appointments Clause, the Supreme Court has approved a limited authority to temporarily fill a sudden vacancy not caused by the President himself. In *United States v. Eaton*,[145] the Court allowed for presidential appointment of a "vice consul" to temporarily perform the work of a consul too ill to perform his duties, even though the Constitution requires Senate approval of a consul.[146] To justify this pragmatic result (the vacancy occurred in Bangkok before the advent of airplanes), the Court created a legal fiction that a person performing the

143. *See* Mendelson, *supra* note 21, at 540 ("Senate recalcitrance in considering a nomination" might create a vacancy that a president wants to fill outside the advice-and-consent process); Stayn, *supra* note23 23, at 1511 (ideologically "charged" Senators sometimes withhold consent "for reasons that have nothing to do with the nominee"); Matthew C. Stephenson, *Can the President Appoint Principle Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940, 942 (2013) ("a desire to impair the Executive's ability to function" motivates refusal to approve nominees in "many cases"). *See generally* Levinson & Pildes, *supra* note 14, at 2368.

144. *See* Mendelson, *supra* note 21, at 581–83 (discussing FVRA's predecessors); *see also* Bullock v. U.S. Bureau of Land Mgmt., 489 F. Supp. 3d 1112, 1130–31 (D. Mont. 2020) (declaring unlawful William Perry Pendley's service as Acting Director of the Bureau of Land Management (BLM) and invalidating his actions).

145. 169 U.S. 331 (1898).

146. *Id.* at 343.

duties of a consul under "special and temporary conditions" is not a consul, but a vice-consul.[147] It rationalized this temporary appointment by stating that otherwise the Constitution would bar any delegation of a superior officer's power to a subordinate "under any circumstances or exigency."[148] This passage does not write a blank check for evasion of Senate consent through delegation of important duties to inferior officers, but it does leave an open question about precisely what exigencies might justify avoiding the Advice and Consent requirement through delegation, and for how long.[149]

FVRA, however, may not authorize a President to appoint an acting official when he creates the vacancy by removing an official for political reasons.[150] Its predecessor statutes did not expressly do so and accordingly do not establish a longstanding congressional acquiescence in a custom of circumventing the Appointments Clause through removal followed by unilateral appointment.[151] Indeed, several commentators and Justice Thomas suggest that the Constitution either does not permit FVRA to operate with respect to principal officers, or does not permit unilateral temporary appointments to vacancies that the President himself created.[152]

FVRA recognizes the general problem of acting appointments defeating the Appointments Clause and limits their duration and extent. This cabining has not worked very well.[153] Presidents have failed to comply with FVRA limits

147. *See id.*

148. *See id.*

149. *Accord* Mendelson, *supra* note 21, at 578 (*Eaton* "fails to provide adequate guidance on *which* circumstances" make appointment of an acting official "permissible"); *cf.* Van Orsdol, *supra* note 1, at 311–13 (discussing problems with delegation after a vacancy arises in lieu of proper appointment of a replacement).

150. *See* Mendelson, *supra* note 21, at 550 n.81 (FVRA does not address the issue); Miller-Gootnick, *supra* note 1, at 461 (arguing that FVRA does not permit the President to temporarily fill vacancies he himself created without Senate approval).

151. *See* Doolin Sec. Sav. Bank v. Off. Thrift Supervision, 139 F.3d 203, 207 (D.C. Cir. 1998) (stating that the original Vacancies Act only contemplated vacancies created through "death, resignation, illness[,] or absence").

152. *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 948–49 (2017) (Thomas, J., concurring) (suggesting that FVRA may violate the Constitution); Van Orsdol, *supra* note 1, at 308–09 (suggesting that allowing unilateral appointment of officials to fill vacancies that the President himself created violates the Appointments Clause); Stayn, *supra* note 23, at 1,513 (finding FVRA unconstitutional).

153. *See* Ronald J. Krotoszynski, Jr. & Atticus DeProspo, *Squaring a Circle: Advice and Consent, Faithful Execution, and the Vacancies Reform Act*, 55 GA. L. REV. 731, 741 (2021) (characterizing FVRA as an "abject failure"); Van Orsdol, *supra* note 1, at 303, 305 (discussing FVRA loopholes that make it a "paper tiger" and arguing for various reforms to make it more effective); *cf.* O'Connell, *supra* note 21, at 667 (describing the Vacancy Act as a measure to ensure that Senate approved officials fill temporary vacancies, but characterizing it as a

on the duration of temporary appointments.[154] President Trump disobeyed laws designating particular holders of particular offices as the proper acting officials by putting other people in vacated posts.[155] But some administrations have disabled offices from functioning by not nominating successors or naming acting officials.[156] In addition, presidents have evaded the Appointments Clause by simply delegating the functions of the departed officials to others.[157]

FVRA does provide an important check on despotism by stating that improperly serving officials' actions have "no force or effect."[158] The federal courts relied on this provision to invalidate several actions taken by improperly appointed officials during the Trump Administration, and a lawsuit challenging President Trump's deployment of paramilitary forces to Portland, Oregon sought remedies based on this provision as well.[159]

While this restraint matters, it does not provide a cure-all. First, justiciability doctrines often prevent courts from enforcing this restraint.[160] Second, the Appointments and Take Care Clauses aim to secure, not stop, proper execution of the laws.[161] Disabling actions do not secure faithful law execution. Furthermore, law execution sometimes plays important roles in keeping a democracy intact by suppressing

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"workaround" with respect to the Appointments Clause).

154. *See* O'Connell, *supra* note 21, at 626 (explaining that most acting appointees by the late 1990s served for longer periods than the Vacancies Act allows); Stayn, *supra* note 23, at 1,518 (discussing the failure of President Nixon and subsequent Presidents to comply with the Vacancies Act).

155. *See, e.g.*, Casa de Md., Inc. v. Wolf, 486 F. Supp. 3d 928, 950–57 (D. Md. 2020) (holding that Trump's appointment of acting DHS heads likely violated requirements for the order of succession).

156. *See* Mendelson, *supra* note 21, at 546 (noting that Presidents tend to leave offices vacant when they want to contract policy); O'Connell, *supra* note 21, at 627–28 (discussing cases where vacancies have stopped an agency from functioning).

157. *See* Mendelson, *supra* note 21, at 558–62 (explaining how subdelegation can evade FVRA restraints); O'Connell, *supra* note 21, at 633–35 (discussing use of this technique and the Vacancies Act's limited efficacy in preventing it).

158. 5 U.S.C. § 3348(d)(1) (2012).

159. *See, e.g.*, L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 29 (D.D.C. 2020) (holding appointment of the "Acting" Director of USCIS violated FVRA); Bullock v. BLM, 489 F. Supp. 3d 1,112, 1,128–30 (D. Mont. 2020) (holding appointment of the "Acting" BLM Director violated FVRA); *see also* Complaint at 16–17, Don't Shoot Portland v. Wolf, No. 1:2020-CV-02040 (D.D.C. filed July 27, 2020); O'Connell, *supra* note 21, at 632 n.98 (collecting cases through 2019).

160. *See* Mendelson, *supra* note 21, at 598 (suggesting that judicial review is generally not available for many important decisions including decisions not to enforce); O'Connell, *supra* note 21, at 658 (suggesting that justiciability doctrines may prevent litigation of various questions about mechanisms undermining the Senate advice and consent function).

161. *Cf.* Mendelson, *supra* note 21, at 575–76 (arguing that the Appointments Clause must permit some use of acting officials in light of the importance of the Take Care Clause's expectation of a functioning government).

insurrection, protecting national security, or prosecuting corrupt supporters of a regime undermining democracy.[162]

FVRA reforms will not solve the problem of removal leading to evasion of the Appointments Clause.[163] The most straightforward reform would clearly bar the appointment of an acting official to fill a vacancy the President had created through removal of a political appointee.[164] But even this strong medicine would not prevent delegation of the officers' functions to presidentially-preferred officials or use of political removal to prevent an agency from carrying out legal duties.[165] A prohibition on delegation would prove extremely difficult to enforce and would not prevent a president from disabling action by firing somebody and not filling a vacant office at all. One commentator likened FVRA reform to "a game of Whac[k]-a-Mole" because every solution creates a new problem.[166] Once political removal is permitted, enforcing the Appointments Clause becomes a challenge.

D. Summary of Removal Undermining the Appointments Clause

Thus, we see that presidents seeking to evade the law usually do so, in part, by coupling removal of officials faithfully executing laws with unilateral appointment of more pliant officials willing to undermine it. Efforts to check this through FVRA have not proven very successful. The overarching point is simply that removal and appointment are closely related. Abusive removal can thwart the goal of the Appointments Clause—having Senate-approved officials in office who are likely to faithfully execute the law.

The primary problem comes from a potential clash between presidents' desires and the rule of law. A president may wish to pursue his own self-interest or his own policies even though his preferences conflict with the laws on the books. That conflict will tempt presidents with unfettered removal rights to use removal, and, when helpful, a failure to nominate a replacement to the Senate to advance his self-interest or policy interests contrary to the law.[167] When that occurs, it raises profound questions about the Executive

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162. *See generally* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 10, at 151–56 (defining national security as defense of democracy).

163. *See, e.g.*, Mendelson, *supra* note 21, at 544 (proposing short time frames for acting appointees, a preference for Senate approved deputy secretaries, and limits on delegation of authority).

164. *See* Van Orsdol, *supra* note 1, at 318 (proposing to amend FVRA to "strictly prohibit the filling of self-created vacancies caused by terminations").

165. *Contra id.* (arguing that a prohibition on appointing an acting official would somehow limit subdelegation).

166. *Id.* at 320.

167. *See* Christina M. Kinane, *Control Without Confirmation: The Politics of Vacancies in Presidential Appointments*, 115 AM. POL. SCI. REV. 599, 599–600 (2021) (noting that presidents

Branch. Should the Executive Branch serve the President, or should it serve the rule of law? The Court's answers have been inconsistent.

II. CONCEPTIONS OF THE EXECUTIVE BRANCH AT THE FOUNDING AND IN THE SUPREME COURT

This Part analyzes conceptions of Executive Branch constitutional culture at the founding and in the Supreme Court. It shows that the Framers endorsed a unified vision of an Executive Branch led by competent and somewhat independent men with a sense of duty to the Constitution. The Court, however, has articulated competing conceptions of the Executive Branch in the two lines of cases. It begins with a discussion of the unified conception. It then contrasts the Court's treatment of the Executive Branch in the two lines of cases respecting the acknowledgment of checks and balances, recognition of the goal of avoid despotism, treatment of the independence of government officials, and approval of efficiency goals in turn.

A. The Unified Conception of the Executive branch's Character at the Founding

The Federalist Papers establish a consistent picture of the qualities sought in an executive officer. The person was to be chosen based on objective considerations of merit, such as the "qualities adapted to particular offices" with a view to avoiding the appointment of "unfit characters."[168] Conversely, Executive Branch officials were to be untainted by presidential "favoritism," meaning that the Constitution would prevent appointment of officials with a "personal attachment" to the President, a "family connection" to him, "State prejudice," or even "popularity."[169] The Constitution aimed to retain in office those evincing "fitness" for their office, rather than simply retaining those "agreeable" to the President.[170] In the words of Alexander Hamilton, the Constitution envisioned executive officers lacking the "necessary insignificance and pliancy to render them obsequious instruments of [presidential] pleasure."[171] Similarly, the occupants of federal offices should

"may strategically" decide whether to fill vacated posts unilaterally or leave a post vacant rather than seek Senate confirmation).

168. THE FEDERALIST NO. 76, at 510–13 (Alexander Hamilton) (J. Cooke ed., 1961). This principle of selection based on qualities needed for a particular office suggests that even replacement of a Senate approved official with a person the Senate approved for another office may not adequately serve the Appointments Clause's objectives.

169. *Id.* at 513.

170. *Id.* at 515.

171. *Id.* at 513.

not be appointed based on partisan considerations.[172] In short, according to the Federalist Papers created to persuade the People to ratify the Constitution, the Constitution aimed to produce an Executive Branch peopled by meritorious and somewhat independent officials, not sycophants or personal favorites of presidents or congressmen.[173]

The foregoing cultural portrait reflects portions of the Federalist Papers discussing both appointment and removal. While one can debate on formalist, structural, or other historical grounds the precise scope of the Appointments Clause and issues regarding the location and scope of removal authority, the constitutional cultural goal of the various opinions conveyed to those ratifying the Constitution is quite consistent. It was to make sure that the officers charged with implementing the law were competent, fit for their offices, and dedicated to carrying out legal duties without favoritism toward the appointing authorities. Thus, the ratification of the Constitution reflects an intention to develop a cadre of competent and somewhat independent officials.

That goal will not surprise students of our constitutional history. The founding generation embraced an ideal of "disinterested leadership."[174] They sought pursuit of an objective public interest that people of sufficient intellect and discernment would agree upon.[175] That may seem strange and unrealistic in this era of intense partisan polarization, but we adopted the Constitution in the middle of the Age of Enlightenment, when belief in the power of rationality and reason was at its height.[176] Consistent with that vision, the Framers sought to avoid the creation of "factions"—what we know today as political parties.[177] They touted the enlarged constituencies for elected officials in the federal government and the bicameral legislature

172. *Id.* at 510–13 (noting that lodging the appointments power in "an assembly" will produce candidates selected based on a party's preferences and therefore presidential nomination checked by Senate advice and consent is best).

173. *See* Jeremy D. Bailey, *The Traditional View of Hamilton's Federalist No. 77 and an Unexpected Challenge: A Response to Seth Barrett Tillman*, 33 HARV. J. L. & PUB. POL'Y 169, 171 (2010) (observing that "throughout his career" Hamilton supported "steady and expert administration of the laws"); *see also* Jeremy D. Bailey, *The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton*, 102 AM. POL. SCI. REV. 453, 464 (2008) (marking that Hamilton favored expertise and stability in administration).

174. *See* GORDON S. WOOD, THE AMERICAN REVOLUTION: A HISTORY 165 (2002).

175. *See* GLENN A. PHELPS, GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM 81 (Wilson Carey McWilliams & Lance Banning eds., 1993) (noting George Washington believed in a single "public interest to which virtuous men could unanimously subscribe").

176. *See* Kahn, *supra* note 5, at 27 (characterizing the Framers as "men of the Enlightenment").

177. *See* DAN SISSON & THOM HARTMANN, THE AMERICAN REVOLUTION OF 1800: HOW JEFFERSON RESCUED DEMOCRACY FROM FACTION AND WHAT THIS MEANS TODAY 15–29 (Kindle ed. 2014) (explaining the Framers' aversion to faction).

as mechanisms that would keep faction at bay.[178] It is hardly surprising that the disinterested leadership model should produce the goal of merit-based officialdom that permeates the Framers' writing about the Executive Branch.

B. Schizophrenia in the Supreme Court's Jurisprudence

The Supreme Court has tended to acknowledge the Founders' goal of disinterested administration in its Appointments Clause jurisprudence, whilst minimizing it in its removal jurisprudence. The inconsistency in the Court's portrayal of the Executive branch manifests itself in choices about when to emphasize separation of powers rather than checks and balances and endorse efficiency. The jurisprudence manifests a kind of schizophrenia in which the Appointments Clause cases state that the Constitution envisions one type of Executive Branch whilst the removal cases suggest another.

1. Separation of Powers versus Checks and Balances

The Appointments Clause jurisprudence acknowledges that the Constitution envisions checks on the Executive Branch of government. The removal authority jurisprudence emphasizes separation of powers instead.

The Supreme Court sometimes conflates separation of powers with checks and balances.[179] A good example of this confusion comes from *Buckley v. Valeo*,[180] which prohibits Congress from unilaterally appointing officials performing administrative and executive functions.[181] The *Buckley* Court emphasized the separation of powers into three branches of government—the Legislative, Judicial, and Executive Branches.[182] The Court mentions "checks and balances" but treats them as something "built into the tripartite Federal Government as a self-executing safeguard."[183] In other words, *Buckley* suggests that separation of powers performs the function of not just balancing, but also checking the government branches' activities.

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178. *See, e.g.*, THE FEDERALIST NO. 10 (James Madison) (describing the Union as diluting the baneful influence of "faction" upon the polity); THE FEDERALIST NO. 62 (James Madison) (portraying the Senate as a check on "the propensity of . . . assemblies . . . to be seduced by factious leaders"); THE FEDERALIST NO. 63 (James Madison) (explaining that the large area a Senator represents acts as a check on the "infection of violent passions").

179. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 721–22 (1985) (mentioning checks and balances while extolling the separation of powers).

180. 424 U.S. 1 (1976).

181. *See id.* at 140–41.

182. *Id.* at 120 (quoting James Madison's claim that the three branches of government are separate and distinct).

183. *Id.* at 122.

That view obscures an important aspect of checks and balances, or at least checks. Checks represent departures from the principle of separation of powers. For example, the Senate power to refuse consent to a presidential Cabinet nomination departs from the principle of a separate Executive Branch of government by providing the Legislative Branch with authority to check the President's power over the Executive Branch. It prohibits the President from controlling the selection of Cabinet members (and other high officials) unless the Senate agrees with his choices. Alexander Hamilton made the point that checks depart from separation of powers principles extremely well. He rejected the notion that the Constitution adopted a pure system of separation of powers.[184] Instead, he explained, the Constitution included "all of the checks which the greatest politicians and the best writers have ever conceived" rendering the structure of government so "complex" and "skillfully contrived" that carrying out a "wicked measure" would prove "next to impossible."[185] Importantly, this reference to "wicked measure[s]" links the checks, not the separation of powers, to the goal of avoiding despotism, which animated the Constitution's drafting and ratification. Other writings of the period did refer to separation of powers as preserving liberty, but the existence of checks represents a judgment that separation of powers alone would not suffice for that purpose.[186]

The Ratifiers understood that checks undercut separation of powers as well. Indeed, many anti-federalists objected because the constitutional provisions creating checks and balances depart from a pure system of separation of powers.[187] This Article adopts this conception of checks as constitutional

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184. *See* 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1953 (Merrill Jensen et al. eds., 1976) [hereinafter DHRC]; *see also* MICHAEL MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING 97 (2020) (characterizing the assumption that all powers neatly divide into three categories as a "great error" and noting that the Constitution vests executive powers in Congress and legislative powers in the President).

185. Hamilton, Remarks at New York Convention Debates (June 27, 1788), *reprinted in* DHRC, *supra* note 184, at 1953.

186. *See* MCCONNELL, *supra* note 184, at 124–25 (quoting James Madison) (discussing the role of constitutional checks in defending one branch of government against the other's encroachment).

187. *See* Myers v. United States, 272 U.S. 52, 120–21 (1926) (quoting 1 ANNALS OF CONG. 380 (James Madison)); Richard Primus, *Herein of "Herein Granted": Why Article I's Vesting Clause Does Not Support the Doctrine of Enumerated Powers*, 35 CONST. COMMENT. 301, 317–18 (2020) (discussing James Madison's affirmation of checks and balances in response to Richard Henry Lee's pre-ratification complaint that the Senate exercised an executive power through the Appointments Clause); *see also* MCCONNELL, *supra* note 184, at 97–98 (discussing many examples of one branch of government exercising powers that might be thought of as naturally belonging to another branch). *Myers*' reliance on Madison's post-ratification views provides a theoretically unsound version of original intent. After the Constitution's adoption, Madison praised the Ratifiers who objected to

provisions that authorize one branch of government to check a second branch of government to limit the second branch's potential to abuse its authority even when the second branch acts with its proper sphere.[188]

The removal jurisprudence warmly embraces separation of powers, while dismissing or simply ignoring the idea of checks and balances. *Myers* dismissed the idea of checks and balances.[189] Former President and Chief Justice Taft, writing for the Court, quoted James Madison's post-ratification view suggesting that the principle of separation of powers is "sacred."[190] Elaborating on this statement without mentioning the historical and textual evidence to the contrary, Taft advocated a principle of construction systematically enhancing separation of powers at the expense of checks and balances.[191] He opined that the Constitution should be construed to keep the branches of government separate "in all cases in which they are not expressly blended."[192]

Bowsher v. Synar,[193] which invalidated a statute authorizing Congress to remove the Comptroller General, took an even more extreme view.[194] Justice Burger's opinion for the *Bowsher* Court claims that the Framers provided for "a separate and wholly independent Executive branch," a statement that ignores, instead of merely discounts, provisions expressly blending powers.[195] On a milder note, Chief Justice Roberts begins his

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giving the Senate an advice and consent role, indicating a preference for a pure system of separation of powers. *See Myers*, 272 U.S. at 120–21. Madison's post-ratification opposition to a Senate role of removal constitutes an effort to overcome, or at least limit, the Ratifiers' decision to give the Senate some measure of executive power. And in principle, the Ratifiers' views should govern, as the Constitution's authority derives from their decision to adopt the Constitution, not from the Framers' subsequent actions in Congress. *See* Calabresi & Prakash, *supra* note 18 at 550–51 (arguing that pre-ratification history deserves primacy over post-ratification history).

188. *See* DHRC, *supra* note 184, at 1953 (recognizing that the Constitution divides the executive power between two branches).

189. *See Myers*, 272 U.S. at 116.

190. *Id.* at 115–16 ("If there is a principle in our Constitution . . . more sacred than another, it is that which separates the Legislative, Executive, and Judicial powers.") (quoting James Madison, 1 ANNALS OF CONG. 581 (1789) (Joseph Gales ed., 1834)).

191. *See id.* at 116 (identifying this "rule of construction").

192. *Id.* This was one of a great number of things that Justice Taft said in justifying his pro-presidential result, so it may justifiably be treated as dicta. It also does not accomplish a lot, as the Necessary and Proper Clause can be read as authorizing congressional restriction of any executive power. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1967, (2011) (explaining that congressional restraint of executive power does not necessarily violate the Constitution because of the Necessary and Proper clause).

193. 478 U.S. 714 (1986).

194. *See id.* at 717–18 (describing the Comptroller General's role in "automatic" deficit reduction).

195. *Id.* at 722. Justice Burger at one point does mention checks, but he does so in such a way as to suggest that he has conflated separation of powers with checks. *See id.* ("this system

opinion for the Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board* (PCAOB)[196] by declaring, "Our Constitution divided the powers of the new Federal Government into three defined categories" and nowhere mentions the idea of checks and balances.[197]

Seila Law dismisses the idea of checks and balances limiting presidential power more explicitly than perhaps any other opinion.[198] Chief Justice Roberts, channeling James Madison, defines the executive power as "the power of appointing, overseeing, and controlling those who execute the laws."[199] The fact that the power to appoint officers is shared with the Senate, however, shows that executive power defined this way is shared.[200] Chief Justice Roberts's opinion for the Court, however, treats the Constitution's vesting clause as moving the entire executive power from the ambit of congressional regulation, endorsing a pure separation of powers view.[201] The *Seila Law* majority fails to squarely address the dissent's argument that the Necessary and Proper Clause gives Congress broad authority to check presidential power by regulating the Executive Branch of government through legislation.[202] The Necessary and Proper Clause authorizes Congress "[t]o make all laws which shall be necessary and proper for carrying into [e]xecution . . . all . . . Powers vested by this Constitution . . . in any Department or Officer . . . ." of the United States.[203]

Humphrey's Executor v. United States,[204] which endorses for-cause removal protection, likewise conforms to the rule that the Court focuses on separation of powers, while ignoring checks and balances, in its removal jurisprudence. In *Humphrey's Executor*, the Court endorsed an extreme version of separation of powers. It described the "fundamental necessity" of freeing the "general

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of division and separation of powers . . . provide[s] for the operation of checks on the exercise of government power.").

196. 561 U.S. 477 (2010).

197. *Id.* at 483 (internal quotation marks omitted).

198. David M. Driesen, *Political Removal and the Plebiscitary President: An Essay on* Seila Law LLC v. Consumer Financial Protection Bureau, 76 N.Y.U. ANN. SURV. AM. L. 707, 729–733 (2021) [hereinafter Driesen, *Political Removal*].

199. Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2197 (2020).

200. *See* Driesen, *Political Removal*, *supra* note 198, at 729–30.

201. *See Seila Law*, 140 S. Ct. at 2197 (claiming that the "entire 'executive [p]ower' belongs to the President alone").

202. *Compare id.* at 2227–28 (Kagan, J., dissenting) (explaining that the "Necessary and Proper Clause" authorizes Congress to restrain executive power), *with id.* at 2207 (disregarding the Necessary and Proper Clause's broadly worded endorsement of congressional regulation of the Executive Branch).

203. U.S. CONST. art. I, § 8, cl. 18. *See generally* McCulloch v. Maryland, 17 U.S. 316, 411–21 (1819) (giving the Necessary and Proper Clause a broad construction).

204. 295 U.S. 602 (1934).

departments of government" from each other's "control or coercive influence" as "hardly open to serious question."[205] It characterized each department as "master in his own house."[206] It just viewed the Federal Trade Commission (FTC) as an agent of Congress and the judiciary, not as a part of the Executive Branch.[207]

But in one removal case—*Morrison v. Olson*—the Court did acknowledge the existence of checks. In upholding for-cause removal protection for the independent counsel, the *Morrison* Court recognized that the Constitution does not provide the Executive Branch with "absolute independence."[208] It bolstered this acknowledgment of checks by subtly rewording the *Buckley* Court's statement about separation of powers to characterize "the system of separated powers *and checks and balances*" together as forming the "self-executing safeguard" that the *Buckley* Court had identified with separation of powers alone.[209]

By contrast, the Appointments Clause jurisprudence generally recognizes that the Constitution does not leave the Executive Branch wholly separated from the legislative branch of government, but instead subjects it to legislative checks. Justice Scalia, writing for the Court in *Edmond v. United States*,[210] recognized that the Appointments Clause functions as a "structural safeguard[]" designed to "curb Executive abuses" of authority.[211] Similarly, in *NLRB v. Noel Canning*,[212] Justice Breyer's opinion for the Court cites a Federalist Papers statement touting the need to obtain Senate approval as "an excellent *check* upon a spirit of favoritism in the President."[213] Both Justice Breyer's *Noel Canning* opinion and, even more vehemently, Justice Scalia's concurring opinion recognize the need to interpret the Recess Appointments Clause narrowly enough to avoid undermining the check of Senate confirmation.[214]

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205. *Id.* at 629.

206. *Id.* at 630.

207. *See id.* (describing the Commission as "wholly disconnected from the executive department" and "an agency of the legislative and judicial departments"); Wiener v. United States, 357 U.S. 349, 352 (1957) (eschewing broad generalizations about the Constitution and following *Humphrey's Executor* in upholding for-cause removal protection for a War Claims Commission preforming "quasi-judicial" functions).

208. Morrison v. Olson, 487 U.S. 654, 693–94 (1988) ("[W]e have never held that the Constitution requires that the three branches of Government operate with absolute independence.") (internal quotation marks omitted).

209. *Compare id.* at 693 (emphasis added), *with* Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curium).

210. 520 U.S. 651 (1997).

211. *Id.* at 659.

212. 573 U.S. 513 (2014).

213. *Id.* at 523 (quoting THE FEDERALIST NO. 76 (Alexander Hamilton)) (emphasis added); *see also* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 935 (2017) (quoting THE FEDERALIST NO. 76 (Alexander Hamilton)).

214. *Compare Noel Canning*, 573 U.S. at 524 (discussing the need not to authorize routine

Even *Buckley*, which conflates separation of powers with checks and balances as a general matter, at least notices the existence of checks on presidential power. The *Buckley* Court recognized that the Necessary and Proper Clause gives Congress broad authority to create a commission.[215] But it held that this power was not so broad as to allow Congress to bypass the Appointments Clause in creating an electoral commission with executive power.[216] The Court in *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise*,[217] like the *Morrison* Court, rewrote *Buckley* to more clearly acknowledge that checks and balances exist, although *Morrison*, like *Buckley*, emphasizes separation of powers.[218] Thus, the Court consistently recognizes checks and balances in Appointments Clause cases, while almost always ignoring their existence in removal cases.

2. Despotism

In its Appointments Clause jurisprudence, the Court frequently emphasizes the Founders' goal of avoiding autocracy—"despotism" in the language of the period. In *Freytag v. Commissioner of Internal Revenue*,[219] the Court characterized "the power of appointment to offices" as "the most insidious and powerful weapon of eighteenth century despotism."[220] Justice Scalia's *Noel Canning* concurrence echoes the theme.[221] Justice Breyer's opinion for the *Noel Canning* majority does not disagree with Justice Scalia's concurrence or the *Freytag* majority, conceding that "the separation of powers can serve to safeguard individual liberty."[222] Similarly, in *Weiss v. United States*,[223] Justice Souter explained that the Senate check on appointments

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avoidance of "the need for Senate confirmation."), *with id.* at 571 (Scalia, J., concurring) (describing checks and balances as "the foundation of a structure of government that would protect liberty.").

215. Buckley v. Valeo, 424 U.S. 1, 134 (1976) (per curium) (characterizing congressional power "to create an office or a commission" as very "broad indeed").

216. *See id.* at 140–41.

217. 501 U.S. 252 (1991).

218. *Id.* at 273 (emphasizing the importance of separation of powers, but rephrasing *Buckley* to recognize "the system of separated powers *and checks and balances*" was set up as a "self-executing safeguard") (emphasis added) (internal quotation marks omitted).

219. 501 U.S. 868 (1991).

220. *Id.* at 883 (quoting *Buckley*, 424 U.S. 1, 143 (1976).

221. NLRB v. Noel Canning, 573 U.S. 513, 570, 578–79 (2014) (Scalia, J., concurring) (describing the Senate's role in appointments as "critical protection against 'despotism . . . .'") (internal quotation marks omitted).

222. *Id.* at 525 (citing Clinton v. City of New York, 524 U.S. 417, 449–50 (1998) (Kennedy, J., concurring)).

223. 510 U.S. 163 (1994).

would check presidential "wrongdoing," which he viewed as analogous to checking "legislative despotism" by creating a presidential nomination authority to limit the legislature's control over appointments.[224] He viewed the sharing of appointment power between the President and the Senate and the public attention created by a Senate advice and consent role as a check on "the exercise of arbitrary power . . . ."[225]

In debating FVRA's scope, Justice Thomas recognized the "serious risk for abuse and corruption posed by permitting one person [the President] to fill every office in the [g]overnment . . . ."[226] And he realized that the Framers had "lived under a form of government that" did not check arbitrary exercises of executive power.[227] Accordingly, he recognized that unitary control of the Executive Branch could endanger liberty, writing that "liberty could be preserved only by ensuring that the powers of [g]overnment would never be consolidated in one body."[228] Thus, Justice Thomas apparently recognized that consolidation of presidential control over the Executive Branch without adequate legal constraint could produce an autocracy.

Yet, the Court's removal decisions either dismiss concerns about despotism or (more often) ignore them entirely. The decision in *Myers*, which abolished the Senate's right to protect officers from removal absent its concurrence, dismissed concerns about autocracy, which animate the dissents.[229] Chief Justice Taft, who wrote the majority opinion in *Myers*, characterized the dissent's autocracy concern as reflecting a "fundamental misconception" that the President exercises his power in opposition to the People.[230] In subsequent removal decisions, the possibility of presidential despotism does not even get a mention.[231]

3. Independence Versus Obedience

Myers forms something of a bridge between the Framers' ideal of somewhat independent and capable officers and the recent removal cases'

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224. *Compare id.* at 184 (Souter, J., concurring) (noting that the majority does not address the Appointments Clause's purpose), *with id.* at 169–76 (analyzing the Appointments Clause issue).

225. *Weiss*, 510 U.S. at 186, 190 (Souter, J., concurring).

226. NLRB v. SW General, Inc., 137 S. Ct. 929, 948 (2017) (Thomas, J., concurring).

227. *See id.* (quoting Immigr. & Naturalization Serv. (INS) v. Chadha, 462 U.S. 919, 2788 (1983)).

228. *Id.*

229. Myers v. United States, 272 U.S. 52, 123 (1926).

230. *Id.*

231. *See* Collins v. Yellen, 141 S. Ct. 1761 (2021) (no mention of despotism in any of the Justices' opinions); Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020) (same); Free Enter. Fund v. PCAOB, 561 U.S. 477 (2010) (same); Wiener v. United States, 357 U.S. 349 (1958) (same); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (same).

view of government officials as presidential lackeys. The *Myers* Court saw the removal authority as allowing the President to remove appointees exhibiting "defects in ability or intelligence, or loyalty in the administration of the laws."[232] Thus, the Court recognized the constitutional ideal of capable officers. But at the same time, the ex-President writing the *Myers* opinion suggested that officers of the government should be "loyal[],"[233] thereby perhaps implying loyalty to the President, the very sort of partiality the unified founding-era conception rejected. Chief Justice Taft in mentioning "loyalty to the service" in a subsequent passage, also suggests that the President should have the sole authority to remove officers with "different views of policy" from his own.[234] He purports to paraphrase Madison in saying this, but in fact, he is moving the Court away from the founding-era conception of disinterested leadership, updating the Constitution to reflect the growing tendency of presidents to exercise vast delegated authority over policy evident at the time of decision.[235]

In its most recent removal cases, the Court has insisted on viewing government officials as presidential lackeys.[236] In *PCAOB*, Chief Justice Roberts described executive officers as mere assistants to the President.[237] In *Seila Law*, the Court took the next step to an autocratic conception of presidential power, indicating that Executive Branch officials "must fear and, in the performance of [their] functions, obey" the President.[238] Both *Seila Law* and *Collins v. Yellen* conceive of government officials as carrying out presidential policy choices, rather than the policies of the Congress enacting the laws.[239]

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232. *See Myers*, 272 U.S. at 122.

233. *Id.*

234. *Id.* at 131.

235. *See id.* Madison claimed that requiring Senate approval for removal conflicts with the "principle of unity and responsibility in the Executive department." *Id.* This statement, and the other statements Chief Justice Taft relies upon, make no references to presidential policymaking and do not mention a problem of officers having different policy views than the President's. *See id.* at 131–32. As Taft seems to acknowledge after quoting Madison and others, these statements refer to the President's responsibility for "effective enforcement of the law." *Id.* at 132.

236. *Cf. Wiener*, 357 U.S. at 353 (holding that some tasks require independence for government officials); *Humphrey's Ex'r*, 295 U.S. at 630–31 (holding that the Comptroller of the Treasury might be properly made independent as he is not "purely" an executive officer).

237. *See* Free Enter. Fund v. PCAOB, 561 U.S. 477, 483 (2010) (stating that the Constitution provides "for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.'") (quoting 30 WRITINGS OF GEORGE WASHINGTON 334 (J. Fitzpatrick ed. 1939)).

238. Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2197 (2020) (quoting Bowsher v. Synar, 478 U.S. 714, 726 (1986)).

239. *See id.* at 2203–04 (describing the removal power as ensuring that the agency is accountable to the policy choices of the elected President); Collins v. Yellen, 141 S. Ct. 1761,

The cases upholding for-cause removal protection for independent agencies do not engage in generalization about the character of the Executive Branch as a whole, but instead insist on the propriety of independence for the particular officers.[240] *Humphrey's Executor*, however, does embrace, at least for the FTC, the idea of a rule of law instead of a rule by presidential plebiscite. The *Humphrey's Executor* Court maintained that the FTC "is charged with the enforcement of no policy except the policy of the law."[241]

On the other hand, cases involving the Appointments Clause tend to emphasize the disinterested leadership ideal. The *Edmond* Court recognized that the Framers sought to avoid "personal favoritism" in selection of officers and secure high quality appointments.[242] The *Noel Canning* Court similarly recognized the Framer's aversion to "favoritism" in the President and the need for qualities suited for a particular office.[243] The *Freytag* concurrence cited the Framers' concern that legislators, if given the sole power of appointment, would appoint their "friends, favorites, and dependents."[244] Quoting James Wilson, the dissenting Justices opined that this ability to appoint friends would lead to "partiality, . . . interestedness, [and] favoritism," the opposite of disinterested, impartial administration of the laws.[245]

4. Efficiency

The Appointments Clause jurisprudence generally downplays efficiency as a constitutional goal for the Executive Branch of government. For example, Justice Thomas recognized that the Appointments Clause imposes "burdens on governmental processes" that may make it "clumsy,

1784 (2021) (describing the removal power as helping the President ensure that his "subordinates" act "in accordance with the policies that the people presumably elected the President to promote."). I do not claim that the Court has consciously disavowed the idea of fidelity to law, but law vanishes from view in the way the Court describes the President's power.

240. *See Humphrey's Ex'r*, 295 U.S. at 628–30 (stating that the Federal Trade Commissioners must enjoy for-cause removal protection in order to "maintain an attitude of independence" against the President's will).

241. *Id.* at 624; *see also Wiene*, 357 U.S. at 355 (1958) (noting the congressional intent to have the War Claims Commission adjudicate claims "according to [the] law . . . supported by evidence and governing legal considerations, by a body . . . free from . . . coercive influence").

242. *See* Edmond v. United States, 520 U.S. 651, 659–60 (1997).

243. *See* NLRB v. Noel Canning, 573 U.S. 513, 523 (2014) (citing THE FEDERALIST NO. 76) (Alexander Hamilton)).

244. Freytag v. Comm'r, 501 U.S. 868, 905 (1991) (Scalia, J., concurring) (quoting 1 Works of James Wilson 359 (J. Andrews ed. 1896)).

245. *Id.* (Scalia, J., concurring).

inefficient, even unworkable."[246] But, he wrote, "[w]e cannot cast aside the separation of powers and the Appointments Clause's important check on executive power for the sake of . . . efficiency."[247]

Similarly, in the cases striking down congressional assertions of control over appointments as inappropriate aggrandizement of Congress, the Court refuses to countenance efficiency arguments based on the idea of fostering "workable government."[248] In *Bowsher*, the Court noted that separation of powers "produces conflicts, confusion, and discordance" but endorsed its inefficiencies as ensuring "full, vigorous, and open debate on the great issues affecting the people."[249] Even in *Noel Canning*, where the majority adopted a broader view of the Recess Appointments Clause exception to the Senate Advice and Consent requirement than the dissent partly to make sure the government could continuously function, the Court did not explicitly rely on efficiency considerations.[250]

On the other hand, the removal jurisprudence sometimes embraces efficiency goals without qualification or hesitance. The *Myers* Court justifies its holding that the Senate may not make its approval necessary to removal in part by repeatedly citing the need to remove "inefficient" executive officers.[251] In *Seila Law*, the Court elevated the efficiency goal by rejecting the entire notion of collaboration as a governance model for the Executive Branch. Chief Justice Roberts's majority opinion emphasizes the energy and "dispatch" that come from the decisions of "one man."[252] He equated a "diversity of views and opinion" with "habitual feebleness and dilatoriness", seeming to disparage the "full, vigorous, and open debate" endorsed by the *Bowsher* Court.[253] Chief Justice Roberts draws support for this emphasis on efficiency from Federalist No. 70, which endorsed efficiency in the context of objecting to a system requiring an executive

246. NLRB v. SW General, Inc., 137 S. Ct. 929, 948 (2017) (Thomas, J., concurring) (quoting INS v. Chadha, 462 U.S. 919, 959 (1983)).

247. *Id.*

248. *See, e.g.*, Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 276–77 (1991).

249. Bowsher v. Synar, 478 U.S. 714, 722 (1986).

250. *See* NLRB v. Noel Canning, 573 U.S. 513, 528, 540 (2014) (holding that the Recess Appointments Clause applies to intra-session recesses and vacancies that arise during the term to "ensure the continued functioning of the Federal Government when the Senate is away."); *cf. id.* at 569 (Scalia, J., concurring) (explaining that the Recess Appointments Clause does not apply to intrasession recesses or to vacancies that first arise when Congress is in session).

251. *See, e.g.*, Myers v. United States, 272 U.S. 52, 135 (1926) (the President should have the power to remove officers he finds "to be negligent and inefficient").

252. *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2203 (2020).

253. *See id.*; *cf. Bowsher*, 478 U.S. at 722.

council to concur before a President may act.[254] When confronting arguments that allowing independence for government officials serves the goal of workable government, however, the Court renounces the efficiency goal, even in the removal context.[255]

5. Overlap Between Appointment and Removal Cases

The claim advanced above—that the two lines of cases advance competing cultural conceptions of the Executive Branch—requires some caveats. While the two lines of cases advance competing cultural conceptions, the cases occasionally overlap, although not in culturally telling ways. In *Morrison*, the Court considered both a removal and Appointments Clause claim in the same case.[256]

A more important line of overlap comes from a new tendency of the Court to use reasoning developed in its removal cases to influence Appointments Clause cases.[257] *United States v. Arthrex, Inc.*[258] provides the best example of this growing tendency.[259] The *Arthrex* Court adjudicated a claim that the Secretary of Commerce's appointment of most of the administrative law judges (ALJs) adjudicating certain patent claims violated the Constitution, because these ALJs were principal officers whom the President must appoint with the consent of the Senate.[260] Chief Justice Roberts wrote a 5–4 opinion in that case holding that the appointment of these ALJs violated the Appointment Clause's "design" because they were not subject to the President's political control, as required by *Seila Law*.[261] While the Court has not yet addressed the cultural clash suggested by having removal jurisprudence influence Appointments Clause decisions, the unitary executive theory has influenced the Appointments Clause jurisprudence.

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254. *See Seila Law*, 140 S. Ct. at 2203; THE FEDERALIST NO. 70 (Alexander Hamilton).

255. *See* Free Enter. Fund v. PCAOB, 561 U.S. 477, 498–99 (2010) (responding to the dissent's argument for "workable government" by stating that "efficiency" is not a "primary objective[] . . . of democratic government.").

256. *See* Morrison v. Olson, 487 U.S. 654, 670–77, 685–93 (1988) (upholding judicial appointment of an independent counsel and restrictions on presidential removal).

257. The overlap in *Morrison* became more significant subsequently because the *Seila Law* Court combined the two holdings to limit *Morrison* to its facts. *See Seila Law*, 140 S. Ct. at 2199–200 (characterizing *Morrison* as holding only that an "inferior officer" may enjoy for-cause removal protection); *cf. id.* at 2235–36 (Kagan, J. dissenting) (the majority misread *Morrison*).

258. 141 S. Ct. 1970 (2021).

259. *See id.* at 1983 (stating that *Free Enterprise Fund* and *Seila Law* support the "principles that guide" the Court to its result in this Appointments Clause case).

260. *Id.* at 1978.

261. *See id.* at 1982 (finding that the President's inability to oversee these ALJs defeats the "political accountability" underlying the Appointments Clause).

III. TOWARD A BALANCED CONCEPTION OF THE EXECUTIVE BRANCH

This Part explains why the inconsistencies in Part II prove problematic. It then puts forth suggestions for how the Supreme Court can improve its reasoning and avoid undermining constitutional culture through its rhetoric. Finally, it argues that the Court must consider the problem of political removal defeating the Appointments Clause in future removal cases, shows that this problem helps illuminate existing cases, and provides a note of caution about the Court's future direction.

A. The General Problem of Two Constitutional Conceptions of the Executive Branch

As the Introduction explained, the Court's description of two different Executive Branches in two lines of jurisprudence proves very problematic, because we have only one Executive Branch of government. Lawyerly selection of evidence to support positions the Court takes in these cases may explain the schizophrenia, but hardly justifies it. Perhaps the correct balance between independence and responsiveness to presidential desires varies across agencies and should do so, but that also cannot explain very much in this jurisprudence, certainly not the pronounced differences between the cultural conception of the Executive Branch in the removal cases from the conception animating the appointments cases.[262]

The Court may view the Appointments Clause as an exception to a rule that the Executive Branch is under the President's control. Even if that is correct, it cannot explain or justify two differing conceptions of the Executive Branch. In the end, either the Framers aimed to prevent despotism (for example), or they did not. Since they did, the Court should consider that desire in its removal cases as well as in Appointments Clause cases. Failing to consider the possibility of

262. *Cf. Seila Law*, 140 S. Ct. at 2236–37 (Kagan, J., dissenting) (stating that "diverse problems of government" call for varied mixtures of "accountability" and "independence"); Birk, *supra* note 1, at 184 (stating that Congress may control the tenure of office, but a particular restriction may "impermissibly burden[]" the President's supervisory power); Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1 (2020) (providing an originalist case for the independence of the Federal Reserve based on the similarity between its functions and those of the Sinking Fund Commission established during George Washington's Administration); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 324 (2016) (noting that several scholars believe that Congress can limit the President's removal power in many instances, but not all); William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 L. & CONTEMP. PROBS., Spring 1976, at 114 (arguing that the President should have the authority to remove those "discharging highly discretionary responsibilities at the President's immediate direction").

presidential despotism in removal cases reduces the Appointments Clause process with respect to Officers of the United States to a meaningless ritual inconsistent with the meaning ascribed to it in the Court's jurisprudence. More mildly, since the Court's Appointments Clause jurisprudence, and the Framers' statements that it relies on, eschews appointment of pliant presidential lackeys, the Court should have some concern about reducing appointed officials to the status of lackeys through its removal jurisprudence.[263]

Arthrex suggests that the Court may in the future resolve the problem by reading the values underling the Appointments Clause out of the Constitution.[264] This is not a solution, because both the cultural conceptions underlying Appointments Clause and removal cases have roots in the original understanding and must have some role to play in making the Constitution function reasonably well.

B. Fine-Grained Problems

This Part discusses some implications of the contradictions discussed previously and develops some recommendations for how considering removal and appointment together could improve the Court's jurisprudence. It starts with the implications of recognizing that the Constitution embraces both separation of powers and checks limiting separation. It addresses the problem of neglecting consideration of despotism in the removal jurisprudence. It then passes on to the related problem of reconciling the ideas of a constitutional culture based on obedience to the President and one based on obedience to the law. Finally, it comments on the contradictory treatment of efficiency.

1. Separation of Powers versus Checks and Balances

A view of the Appointments Clause check on presidential power as an exception to a separation of powers rule may appear to justify the acknowledgment of checks and balances in the Appointments Clause jurisprudence and its virtual denial in the recent removal jurisprudence. But here too, either the Constitution embodies checks as well as separation or it does not. The evidence that the Constitution includes checks that one cannot ascribe to the separation of powers is overwhelming.[265] Congress does not have sole

263. *Cf.* Myers v. United States, 272 U.S. 52, 179 (1926) (McReynolds, J., dissenting) (citing Senator Daniel Webster's concern that an absolute removal power would turn officeholders into "sycophants . . . and man-worshippers").

264. *See generally Arthrex*, 141 S. Ct. at 1976–88 (not discussing the Appointments Clause's goal of ensuring that independent qualified people staff the government).

265. *See* Driesen, *Duty-Based Executive Power*, *supra* note 19, at 84–92, 94–96 (reviewing the

control over legislation as it would in a pure separation of powers system. Instead, the President has a very substantial legislative power—the power to veto bills passed by Congress.[266] Thus, Article I's vesting of "all" legislative authority in Congress[267] does not mean that Congress alone exercises all legislative authority. Nor does the judiciary have sole control over adjudication, even though the Constitution vests the judicial power in the federal courts.[268] Congress has substantial control over the scope of the Supreme Court's appellate jurisdiction, the size of the Court, and life and death power over the lower federal courts.[269] Similarly, Congress has power over the Executive Branch through the Appointments, Removal, Impeachment, and Necessary and Proper Clauses.[270] In this context, the invocation of a simplistic conception of separation of powers cannot justify particular cases.

The juxtaposition of the acknowledgment of checks and balances in the Appointments cases with the removal cases' emphasis on separation of powers reveals a flaw in Chief Justice Roberts's reasoning in *Seila Law*, as suggested above. In particular, Chief Justice Roberts claims that "lesser officers must remain accountable to the President, whose authority they wield."[271] He supports that statement by citing James Madison's post-ratification definition of executive power as "the power of appointing, overseeing, and controlling those who execute the laws."[272] The power of appointing officers under the Constitution, however, is not a power of the President alone, but rather, is shared with Congress.[273] The Court, if it had considered the existence of a Senate check on appointments, might have grappled with the possibility that the Framers intended appointees to owe some responsibility to Congress, not just the President.[274] In fact, the Constitution clearly shows that Congress has at least some power to "oversee[] and control[] those who execute the laws" because the Senate can remove an executive officer upon impeachment by the House.[275]

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constitutional provisions limiting presidential, congressional, and judicial power).

266. U.S. CONST. art. I, § 7, cl. 3.

267. *Id.* art. I, § 1.

268. *Id.* art. III, § 1.

269. *See* Calabresi & Rhodes, *supra* note 18, at 1160–61 (noting that the Constitution "gives Congress total discretionary power to . . . create inferior federal courts" and "broad . . . power to restrict" the Supreme Court's jurisdiction).

270. U.S. CONST. art. I, § 2, cl. 5; § 3, cls. 6–7; § 8, cl. 1; art. II, § 2, cl. 2, § 4.

271. Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2197 (2020).

272. *Id.*

273. The right to appoint principal officers is shared with the Senate. Art. II, § 2, cl. 2. The whole Congress participates in deciding who gets to appoint inferior officers. *Id.*

274. *See* Strauss, *supra* note 44, at 2257 ("the need for confirmation" implies that nominees may have to make promises to Senators in order to obtain confirmation).

275. *Seila Law*, 140 S. Ct. at 2197; U.S. CONST. art. I, § 2, cl. 5, §§ 7–8; art. II, § 4.

This does not negate the Court's claim that the President has an oversight role, but it shows that this role is, at least to some extent, shared with Congress. The Court's failure to consider the implications of its Appointments Clause cases and their acknowledgment of checks and balances in the removal context leads to very puzzling reasoning.

Recognizing that the Constitution, partly through its Appointments and Removal Clauses, provides for at least some congressional oversight of officials casts the issue in *Seila Law*—whether Congress may insist that the President only remove the head of the CFPB for cause—in a very different light. Judged in the context of the Constitution acknowledged to exist in the Appointments Clause jurisprudence, one that relies upon checks, not just separation of powers, the dissent's claim that the Necessary and Proper Clause authorizes for-cause removal protection appears stronger. The majority's response to that argument is inadequate because it simply refuses to acknowledge in the removal context that the Constitution does not create a pure system of separated powers. It simply writes the Necessary and Proper Clause out of the Constitution, failing to respond to the dissent's argument that the Necessary and Proper Clause broadly authorizes congressional legislation affecting the Executive Branch.[276]

2. Despotism

The Court should consider the problem of despotism in its removal jurisprudence, just as it does in its Appointments Clause jurisprudence. As my previous work reveals, democracy loss almost always stems from concentration of power in the chief executive.[277] I am not aware of a single well-functioning democracy that allows a chief executive to fire every important member of the Executive Branch for political reasons.[278] The Appointments Clause jurisprudence acknowledges that the Framers recognized that concentrating too much control over officials in the President could lead to the establishment of an autocracy (which they called despotism).

The Justices have in the past considered the possibility of presidential misconduct undermining or destroying democracy or the rule of law in addressing separation of powers issues, and not only in its Appointments Clause jurisprudence. The most prominent example of this comes from the

276. *See id.* at 2227–28 (Kagan, J., dissenting) (arguing that the Necessary and Proper Clause authorizes legislative restraints on executive power).

277. *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 10, at viii (referencing case studies of Turkey, Hungary, and Poland).

278. *Cf. id.* at 49 ("[Nuremberg Prosecutor] Jackson's report characterizes an act establishing Hitler's at-will removal authority as finally accomplishing the 'total subjugation of the German civil servant' to the head of state.").

leading case on separation of powers, *Youngstown Sheet & Tube Co. v. Sawyer*,[279] in which Justices Frankfurter and Jackson cited the recent experience with Nazi Germany as reasons to reject expansive claims of presidential power.[280]

While *Youngstown* provides the most prominent example of considering the potential for presidential abuse of power, it is neither the first nor the last opinion to do so. In *Ex Parte Milligan*,[281] the Court cited the danger of "wicked rulers" leading to "anarchy or despotism" in ordering the release of civilians sentenced to death.[282] Similarly, when the Supreme Court invalidated the use of military commissions to try civilians in *Hamdan v. Rumsfeld*,[283] the Court recognized that "[c]oncentration of power puts . . . liberty in peril of arbitrary action."[284] In context, this statement refers to concentration of power in the President.

The Court should also recognize that an unfettered removal power can undermine the Appointments Clause and therefore trigger the despotism that the Appointments Clause was designed to prevent. Independent or multi-party electoral commissions, media authorities, and prosecution services are common means of protecting democracies from slides into autocracy.[285] Elected leaders seeking to subjugate democracies, like the current leaders in Hungary, Poland, and Turkey, do so, in part, by securing centralized control of key government agencies, including electoral commissions, media authorities and prosecution services.[286] They use every available means to people the Executive Branch with officials who will use their powers to protect the autocrat's supporters and persecute their political opponents. The Court's jurisprudence should take the despotism problem seriously, both because the goal of avoiding despotism commanded more widespread assent at the founding than any particular arrangement of powers and because subsequent experience

279. 343 U.S. 579 (1952).

280. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593–94 (1952) (Frankfurter, J., concurring); DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 10, at 48–51 (explaining that Hitler's rise to power shaped Justices Frankfurter and Jackson's *Youngstown* opinions).

281. 71 U.S. 2 (1866).

282. *Id.* at 109, 119, 121, 125, 130; *see* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 10, at 58–59 (analyzing the role of concerns about authoritarianism in *Ex Parte Milligan*).

283. 548 U.S. 557 (2006).

284. *Id.* at 638 (Kennedy, J., concurring).

285. *See, e.g.*, Venice Commission, Compilation of Venice Commission Opinion and Reports Concerning Prosecutors (2022), https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2022)023-e (compiling Venice Commission opinions supporting arrangements ensuring some independence for prosecutors).

286. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 10, at 106–13 (discussing Turkey, Hungary, and Poland's efforts to establish centralized control over these institutions); Driesen, *The Unitary Executive Theory*, *supra* note 10, at 32–41 (same).

shows the importance of some degree of independence in Executive Branches officials to preserving democracy.[287]

This Article's analysis reveals that presidents have sometimes used the power to remove officials for political reasons to undermine the law. Thus, unfettered removal authority has some potential to help create despotism by allowing unilateral presidential establishment of policy—which is characteristic of dictatorships not democracies.

3. Resolving the Clash Between a Culture of Independence and a Cultural of Subservience

The Court's vacillation between recognizing a culture of independence and a culture of subservience is understandable. The Appointments Clause and its history suggest that government officials should have some degree of independence. The Appointments Clause shows that the Framers understood that Executive Branch officials would exercise some discretion not controlled by the President.[288] For there is no need for Senate confirmation if the goal is to appoint presidential lackeys. And the congressional authority to have judges appoint "inferior officers" suggests official independence not hierarchical control by the President. On the other hand, granting the President executive power might suggest that others who might exercise executive power should function as his assistants.[289] This problem has divided scholars and judges and I cannot completely solve it here.[290] But the notion that the Framers sought an Executive Branch committed to the rule of law seems to be, and certainly should be, common ground.[291]

In order to protect the common ground, the Court must recognize that a president can abuse unfettered removal authority, using it to undermine the rule of law rather than to secure its faithful implementation. The entire

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287. *See* GINSBURG & HUQ, *supra* note 10, at 102–07 (claiming that an independent bureaucracy helps safeguard democracy).

288. *See, e.g.*, Lawrence Lessig & Cass R. Sunstein, *The President and The Administration*, 94 COLUM. L. REV. 1, 16–22, 27–32 (1994) (discussing degrees of presidential control over various Executive Branch components in the early Republic); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L. J. 1256, 1340 (2006) (discussing independent authority of Treasury officials lower in the hierarchy).

289. *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2197 (2020) (describing executive officers as those who "assist" the President).

290. *See generally* DANIEL FARBER, CONTESTED GROUND: HOW TO UNDERSTAND THE LIMITS OF PRESIDENTIAL POWER 41–43 (2021) (describing competing views about the limits of presidentialism).

291. *See generally* Paul R. Verkuil, *Separation of Powers, the Rule of Law, and the Idea of Independence*, 30 WILLIAM & MARY L. REV. 301 (1989).

Court, not just the conservative Justices in the majority in recent cases, has lost sight of this undeniable fact.[292] This inattention proves especially striking in *Seila Law* and *Collins*, for the Court docketed, heard, and decided these cases while President Trump was busy undermining the rule of law by firing numerous officials apparently seeking to protect it. In *Seila Law*, Chief Justice Roberts supported creation of an unfettered removal authority by citing the example of a president who campaigned on a pro-consumer platform "only to find himself saddled with" an anti-consumer head of the CFPB.[293] Chief Justice Roberts, however, did not consider the converse problem of a president who wishes to undermine consumer protection law by firing officials dedicated to its faithful enforcement. The cases of Richard Nixon, Andrew Jackson, and Andrew Johnson show that this problem of Presidents wishing to undermine faithful law execution is not unique to President Trump.

The failure to consider the possibility of abuse of removal authority—its use to undermine faithful law execution—leads to very incomplete consideration of the question of whether for-cause removal protection adequately protects relevant constitutional interests. As I have explained elsewhere, *Seila Law* fails to confront this issue because it treats the President's power to remove an official for cause as tantamount to having no meaningful removal authority.[294] But the leading article on the meaning of provisions authorizing removal for "inefficiency, neglect or malfeasance"—the type of for-cause removal provision at issue in *Seila Law* and most other cases—[295] authorizes removal of officials not faithfully executing the law.[296] Accordingly, for-cause removal authority proves meaningful.

Seila Law's creation of a political removal authority generates two presidential powers that probably do not exist under statutes only authorizing removal for cause. It empowers the President to fire people who act lawfully but exercise their discretion in ways contrary to a president's lawful policy.[297] "Unfettered" removal authority also authorizes the President to fire people who have faithfully executed the law in hopes of undermining it.[298] This latter possibility receives

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292. *See, e.g.*, *Seila Law*, 140 S. Ct. 2183, 2211, 2224 (majority and dissenting opinions).

293. *Id.* at 2204.

294. *See* Driesen, *Political Removal*, *supra* note 198, at 710–13, 715–17.

295. *Seila Law*, 140 S. Ct. at 2191 (the President cannot remove the CFPB Director "except for inefficiency, neglect, or malfeasance").

296. *See* Jane Manners & Lew Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 6, 8 (2021) (the right to remove officers for "[n]eglect of duty" or "malfeasance" traditionally connotes a right to remove officers not faithfully executing the law).

297. *See* Driesen, *Duty-Based Executive Power*, *supra* note 19, at 78 (referring to this power as the "political dimension" of the unitary executive theory).

298. *See id.* at 78–79 (presidential control over Executive Branch political discretion can lead to distortions of the law); David M. Driesen, *Firing U.S. Attorneys*, 60 ADMIN. L. REV. 707,

no mention in the modern cases. The Court, however, must squarely confront the fact that granting a political removal authority can undermine the law and the Appointments Clause.

The Court should recognize, even in its removal jurisprudence, that obedience to the law, not obedience to the President, was the Framers' primary concern. The Appointments Clause provides strong evidence of a founding-era desire to secure the services of dedicated officials determined to faithfully execute the law. Of course, the Founders must have intended that these officials remain faithful to their constitutional duties as executors of the law after their appointment. Removing them because they are faithfully executing the law can interfere with the Appointment Clause's intended effect on constitutional culture if subject to pressure from a president abusing his removal authority.

We have seen in these case studies and in other instances that Executive Branch officials sometimes resist presidential efforts to undermine the rule of law and free and fair elections. The refusal of various Jackson appointees to undermine the National Bank, of Richardson and Ruckelshaus to fire the special counsel investigating Watergate, of Bush Administration officials to support illegal policy on torture or to prosecute baseless voting fraud claims, of Trump Administration officials to conduct baseless prosecution of Trump's political opponents, and of the DOJ leadership to conduct and announce baseless electoral fraud investigation to aid Trump's campaign to reverse the 2020 election results provide examples of independence's role in checking abuse of power.[299]

The Constitution demands that officials not obey illegal presidential orders. For it requires all officials to swear an oath of allegiance to the Constitution, rather than to the President.[300] The Oath Clause shows that the Constitution aims to create the culture of resistance that these cases illustrate.

720–21 (2008) [hereinafter Driesen, *Firing U.S. Attorneys*] (once presidential political control over prosecution is permitted it can be used to advance a "low political motive" such as to attack political opponents); FARBER, *supra* note 290, at 108 (appointment and removal powers can be used for "less appealing purposes").

299. *See* Driesen, *Firing U.S. Attorneys*, *supra* note 298, at 712–13 (discussing a U.S. Attorney's refusal to prosecute voting fraud without sufficient evidence); STAFF OF S. COMM. ON THE JUDICIARY, 117TH CONG., SUBVERTING JUSTICE: HOW THE FORMER PRESIDENT AND HIS ALLIES PRESSURED DOJ TO OVERTURN THE 2020 ELECTION, 37–38 (2021) (DOJ leaders informed Trump that DOJ's leadership would resign if Trump fired Acting Attorney General Rosen for failing to investigate debunked election fraud claims).

300. *See* Driesen, *Duty-Based Executive Power*, *supra* note 19, at 84–86 (explaining why the General Oath Clause requires Executive Branch officials to disobey illegal presidential orders); *cf.* BOB WOODWARD & ROBERT COSTA, PERIL 93–98 (2021) (reprinting a memorandum from the Chairman of the Joint Chiefs of Staff reminding the heads of the armed forces of their duty to obey the Constitution).

Recognition of the type of constitutional culture envisioned at the founding suggests, at a minimum, that the Court should avoid employing rhetoric that can help legitimate autocratic efforts to undermine the constitutional culture of resistance to illegal presidential orders, which sustains the rule of law. Rather shockingly, Chief Justice Roberts's opinion for the *Seila Law* Court indicates that Executive Branch officials "must fear and, in the performance of [their] functions, obey" the President, as explained above.[301] That "fear and . . . obey" language endorses the idea that Executive Branch officials must obey the President and should do so out of fear.[302] It seems to command government officials to obey illegal presidential orders and to fear the consequences of defiance. Perhaps Chief Justice Roberts meant the "in performance of their functions" language to suggest a rule of law limitation.[303] But that language might be read as endorsing the unbridled use of whatever power the office might possess to carry out the commands, even illegal commands, of a president.[304] That kind of language in a judicial opinion can help a president who wishes to subvert the law persuade underlings that knuckling under to improper demands is reasonable conduct.[305]

The Court should recognize that the founders sought a somewhat disinterested Executive Branch, not one wholly subservient to the President. It does that in the Appointments Clause context, but then ignores it in the removal context. I have elsewhere reviewed the abundant evidence in both the language of the Constitution and its history showing that the Founders aimed to create a duty-based Executive Branch dedicated to carrying out laws enacted by an elected Congress.[306] That evidence shows that they intended to rely on a sense of duty to the Constitution and the laws enacted under it as the primary motivator for faithful execution of the law, and provides no evidence that the Framers intended to rely on fear of a single man.[307]

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301. Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2197 (2020) (quoting Bowsher v. Synar, 478 U.S. 714, 726 (1986)).

302. *Cf.* Daniel A. Crane, *Debunking* Humphrey's Executor, 83 GEO. WASH. L. REV. 1835, 1848–49 (2015) (indicating "widespread" agreement that fear of removal is a relatively unimportant tool for presidential control).

303. *Seila Law*, 140 S.Ct. at 2197.

304. *Cf.* WOODWARD & COSTA, *supra* note 300, at 93 (discussing President Trump's desire to unleash the 82nd Airborne Division against Black Lives Matter protestors and efforts by Senate appointed officials to prevent that).

305. *See generally* Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018) (the "new autocrats" such as Hungary's Victor Orban use plausible sounding legal arguments to advance their aims).

306. *See* Driesen, *Duty-Based Executive Power*, *supra* note 19.

307. The "fear and obey" language in *Seila Law* comes from a 1986 District Court

4. Efficiency

The Court's inconsistencies with respect to efficiency arguments (along with the other contradictions) suggest the need to consider Oliver Wendel Holmes' statement that "general propositions do not decide concrete cases."[308] The Framers favored greater presidential power than many of the state constitutions had created, in part out of a desire for efficient government. On the other hand, clearly the Framers sacrificed efficiency by creating checks like Senate confirmation, so efficiency does not always trump restraints upon a president. Accordingly, general dismissal or endorsement of efficiency hardly provides convincing arguments for anything. The Court could improve its jurisprudence by recognizing consistently that the Framers sought to balance efficiency against the need for processes to ensure a rule of law.

That simple change would force the Court to abandon, or at least not repeat, some additional exaggerated rhetoric that can be read as endorsing arbitrary government in *Seila Law*. As mentioned previously, Chief Justice Roberts strongly endorses efficiency by indicating that the Framers "chose not to bog the Executive down" with a "diversity of views and opinions," favoring instead the "[d]ecision, activity, secrecy, and dispatch that 'characterize the proceedings of one man.'"[309] These quotes seem to advocate a concept of the Executive Branch where a president acts without consulting advisors and hearing a diversity of opinions. Such a conception flies in the face of the Opinions Clause, which empowers the President to get the views of his advisors and a practice of consultation that began with George Washington.[310] Chief Justice Roberts tears Hamilton's statement in favor of a single president rather than a council at the head of government from its context to produce an extreme statement. Hamilton opines that a diversity of views and opinions would harm executive authority most strongly when a council of "magistrates of equal . . . authority" heads the government.[311] Tearing the diversity of opinion statement out of context

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decision, not founding-era sources. *Seila Law*, 140 S. Ct. at 2197 (stating that officials "must fear and . . . obey" the President) (citing Bowsher v. Synar, 478 U.S. 714, 726 (1986)); *Bowsher*, 478 U.S. at 726 (stating that an officer "must fear and . . . obey" the authority who can remove him) (quoting Synar v. U.S., 626 F. Supp. 1374, 1401 (D.D.C. 1986)).

308. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

309. *Seila Law*, 140 S. Ct. at 2203 (quoting THE FEDERALIST NO. 70 (Alexander Hamilton)).

310. U.S. CONST. art. II, § 2. *See* Mashaw, *supra* note 288, at 1304 (discussing President Washington's "consistent style of broad consultation").

311. THE FEDERALIST NO. 70, at 476 (Alexander Hamilton) (J. Cooke ed., 1961). Hamilton explains that dissension can arise in bodies with numerous members and can weaken energy and responsibility. *Id.* He continues, "these observations apply with principal weight . . . to a plurality of magistrates of equal dignity and authority." He then states that these considerations "apply,

suggests that modern presidents, even in making policy judgments, should not confer with other Executive Branch officials. Even the statement that the Framers "gave the Executive the 'decision secrecy and dispatch' that 'characterize the proceedings of one man'"[312] proves too strong. As part of his argument for a single president (rather than a council) Hamilton suggests a general principle that one person can act more efficiently than a greater number as a prelude to his more fine-grained arguments against an executive council.[313] The *Seila Law* Court, however, concedes that the founders did not intend to create an Executive Branch consisting of one person.[314] So, Hamilton's theoretical argument does not describe what the Constitution contemplates with respect to the Executive Branch as a whole.

The exaggeration of the Constitution's embrace of efficiency inherent in Chief Justice Roberts's argument works especially badly in the context of the main thrust of *Seila Law*'s rationale. Chief Justice Roberts ultimately justifies requiring an authority to remove the head of the CFPB for political reasons not by explicit reference to faithful law execution, but by invocation of a presidential policymaking authority.[315] The Constitution, of course, gives policymaking authority to the legislative branch of government, not the President. But modern statutes often delegate substantial policymaking authority to the Executive Branch. The same Federalist paper that praises energy and dispatch of a single person as useful for executing law, claims that pluralism and deliberation should govern legislation, as Chief Justice Roberts points out.[316] That suggests that the Executive Branch should deliberate when it adopts policies.

C. Considering Political Removal's Tension with the Appointments Clause More Broadly

The Court should consider the political removal authority's tension with the Appointments Clause and the culture it aimed to establish in future cases.

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though not with equal, yet with considerable weight to the project of a council, whose concurrence is made constitutionally necessary to the operations of the ostensible Executive." In these contexts only, not in the context of a subordinate official with some responsibility, Hamilton suggested that a "diversity of opinions would alone be sufficient to" make executive authority feeble, because of the problems of dissension mention previously discussed.

312. *Seila Law*, 140 S. Ct. at 2203 (quoting THE FEDERALIST NO. 70 (Alexander Hamilton)).

313. *See id.* at 472.

314. *See Seila Law*, 140 S. Ct. at 2197 (explaining that the Constitution assumes the creation of "lesser executive officers").

315. *Id.* at 2204 (claiming that the structure of the CFPB makes it impossible for the President to "shape its leadership" and to "bring the agency in line with the President's preferred policies").

316. *Id.* at 2203 (citing THE FEDERALIST NO. 70 (Alexander Hamilton)).

Doing so would shift the lines of inquiry in the Court's cases. The Court focuses only on the question of whether limitations on the President's removal authority improperly interfere with the President's power to execute the law. By not looking at the problem of improper removal (at least not explicitly), the Court engages in a one-sided analysis that focuses only on the costs of removal restrictions, without considering possible benefits. This approach is inconsistent with the founding-era consensus shown by putting together appointment and removal that the Constitution sought not only vigorous law execution, but also restraints on abuse of power.

The lessons about the relationship between appointment and removal in this Article might help scholars to understand and the Court to wisely address a key contradiction in the Court's existing removal jurisprudence. In particular, the jurisprudence faces a contradiction between the theory of the plebiscitary president underlying *Seila Law* and the theory of the faithful law executing president underlying *Morrison* and *Humphrey's Executor*.

Morrison relies on a faithful law execution model. The *Morrison* Court upheld for-cause removal protection placed in the Independent Counsel statute enacted in response to the Saturday Night Massacre on the ground that it does not interfere with the President carrying out his duty to faithfully execute the law.[317] That reasoning treats the President not so much as a policymaker, but as a law executor. It implicitly views the President's duty to "take care that the laws be faithfully executed" as not implying that the President himself must dictate how law is executed.[318] But it embraces giving him the power to correct (and therefore remove) officials who are abusing their authority. *Morrison* suggests that for-cause removal authority suffices for that purpose.

A similar model underlies *Humphrey's Executor*. The *Humphrey's Executor* Court upheld for-cause removal protection for FTC Commissioners because it saw them as carrying out policies embodied in law, rather than as serving as presidential agents. That is, it viewed FTC Commissioners as congressional rather than presidential agents. Therefore, *Humphrey's Executor* suggests that the power to remove faithless law executors through for-cause removal suffices.

These cases do not completely explain why an authority to remove faithless law executors suffices. A concern about presidential abuse of power could help justify these decisions. The Watergate background to *Morrison* suggests that the Court must have understood that a president might abuse his power and remove a special prosecutor to thwart faithful law execution. The *Humphrey's Executor* decision might be justified by recognizing that a

317. *See* Morrison v. Olson, 487 U.S. 654, 691–92 (1988).

318. *Id.* at 690–93 (suggesting that "good cause" removal authority allows the President to "ensure the 'faithful execution of the laws" even though it does not allow the President to "control the exercise of" prosecutorial "discretion").

President might prefer his own policy to that of the law, as Presidents Johnson and Jackson did, and that this preference might produce improper firing.

Seila Law, by contrast, endorses a plebiscitary model of the Presidency. It does not emphasize carrying out policies established by Congress, but instead embraces the need for the President to carry out his campaign promises. While cast as an originalist opinion, it reflects the modern presidential practice of presidents campaigning for elections (which they did not do early in our history) on the basis of promises to carry out policies and then "shap[ing]" administration to carry out those promises.[319] It reflects a possible response to concerns about modern delegation of broad authority to administrative agencies.

The advantages of a plebiscitary presidency appear at their height when the President exercises quasi-legislative authority. For the Executive Branch enjoys vast policy discretion under some statutes and a president can provide for some democratic control over the exercise of that discretion. But the risk of abuse does not go away in that context.

On the other hand, the case for a plebiscitary presidency is quite weak when it comes to what Justice Scalia called "quintessential executive functions"—such as prosecution—and for quasi-judicial functions.[320] Presidents with little tendency for despotism do not run for office on promises about whom to prosecute or whose patents to overturn and should not do so. While there may be some reason for presidents to suggest priority areas for law enforcement, functioning democracies like ours have customs or laws prohibiting presidential interference with individual prosecution decisions, lest the President use those decisions to suppress his political opponents and shield his supporters.[321] Nor do presidents usually run for office on promises to improve government administration generally. Unfettered removal authority has little constitutional value for proper supervision of officials carrying out classic executive or quasi-adjudicate tasks, since for-cause removal allows the President to constrain abuses of authority.

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319. *Seila Law*, 140 S. Ct. at 2203–04 (discussing a president "elected on a consumer-protection platform" but unable to "shape" the CFPB's "leadership" to reflect that position); SAIKRISHNA B. PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS 49–51 (2020) (campaigning based on policy pledges began in the mid-19th and fully took hold in the 20th century).

320. *Accord* Wiener v. United States, 357 U.S. 349, 355 (1958) (stating that the "judicial character" of the War Claims Commission justifies holding that the President cannot remove a commissioner without cause); United States v. Arthrex, 141 S. Ct. 1970, 1996 (2021) (Breyer, J., dissenting) (explaining that patent judges must make "technically correct adjudicatory decisions" and therefore should have "independence from those potentially influenced by political factors."); *see* Lessig & Sunstein, *supra* note 288, at 108–10 (supporting prosecutorial independence).

321. *Cf.* Renan, *supra* note 5, at 2189 (citing a norm against presidential control over investigations).

The formalist elements in the removal cases, however, point in the opposite direction. Article II's Vesting Clause gives the President only *executive* power, not quasi-judicial or quasi-legislative power.[322] To put it another way, the functional case for unfettered removal authority appears strongest in cases where officials exercise delegated legislative authority, while the formalist case appears strongest where the Executive Branch performs more classic executive functions.

Thus, it may not appear surprising that the distinction between various forms of power has come under pressure. The *Seila Law* concurrence explicitly supported abolishing the distinction to give the President total control over at least the principal officers in the Executive Branch, and the majority opinion undermined the distinction between executive and legislative power.[323] Furthermore, defining the differences between the various forms of authority proves difficult and some officials lead agencies performing several different functions.

The recognition that appointment and continued employment of Senate-approved officials plays a role in keeping the rule of law leads to a series of questions. While it may be desirable to have presidential control over policy decisions, how serious a risk does the presidential desire to deliver the results he promised regardless of the law pose to the rule of law? Similarly, what are the costs and benefits of extending presidential control over officers performing non-policymaking functions, like prosecuting and adjudicating cases? One might ask similar questions for very specific government entities and come up with varying answers. For example, independent prosecution, media regulation, and electoral commissions may be vital to democracy and therefore present especially strong cases for allowing for-cause removal protection if the teachings of the Appointments Clause cases are considered in the removal context.

The Court seems poised to reimagine the Executive Branch as a unit wholly under the President's control, a vision in tension with the authority of the Senate to confirm top officials and congressional authority to delegate appointment of inferior officers to courts. While this Article cannot fully address the originalist case for the unitary executive theory,

322. *See* U.S. CONST. art. II § 1.

323. *See Seila Law*, 140 S. Ct. at 2217–19 n.4 (Thomas, J., concurring) (advocating overruling *Humphrey's Executor* by suggesting that subsequent cases have undermined the rationale for distinguishing quasi-judicial and quasi-legislative authority). The majority opined that the Court had backed away from distinguishing quasi-judicial and legislative authority in *Morrison*. *Id.* at 2199. It then narrowed *Humphrey's Executor* as about "multimember expert executive agencies that do not wield substantial executive power." *Id.* at 2199–2200. It suggested that agencies exercising rulemaking authority should not be considered legislative. *Id.* at 2200 (treating *Humphrey's Executor* as a case about agencies only recommending policy to Congress).

the Appointments Clause jurisprudence contains lessons for that as well. The cultural vision of the Executive Branch that the Appointments Clause jurisprudence acknowledges, after all, comes from founding-era sources. So, the originalist case for a constitutional regime designed to establishing fearful obedience of presidential orders seems weak.

The experience of political removal undermining the Appointments Clause recounted in this Article shows that political removal can serve the purpose of impairing a vital check supporting the rule of law and democracy itself. This recognition strengthens the case for accepting for-cause removal provisions as "necessary and proper" aids to officials seeking to carry out their duties[324] that should be sustained.

CONCLUSION

The Constitution created only one Executive Branch of government, but the Court's jurisprudence suggests that the Founders agreed to establish two very different Executive branches of government. The Court should address the conflict by considering the lessons of its Appointments Clause jurisprudence in the removal context and the problem of abuse of removal power thwarting the Appointments Clause. The problems revealed by this analysis of these two lines of cases suggest, at a minimum, that the Court should exercise more restraint and wisdom in these cases. It should improve its reasoning, eschew damaging absolutist rhetoric, and take the possibility of abuse of presidential power into account. The lessons gleaned from considering appointment and removal together both illuminate the existing law and strengthen the case for congressional influence on removal jurisprudence.

324. U.S. CONST. art. I § 8.