History and Executive Removal Power: Morrison v. Olson and Separation of Powers

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I. INTRODUCTION

Almost since the founding of the Republic, the United States Supreme Court has faced controversies which have involved interpretation of Constitutional provisions relating to separation of powers of the executive. Many of the earliest Supreme Court cases...
in this area were contradictory. Indeed, there is considerable evidence that the framers of the Constitution themselves could not agree on the meaning or significance of constitutional language defining the appointment and removal powers of the executive branch. For example, in the early part of this century, the well-known cases of *Myers v. United States* and *Humphrey's Executor v. United States*, addressed the issue of the executive power to remove governmental officers, with seemingly contradictory results. More recently, the debate has been renewed in several major Supreme Court cases involving removal power. It could easily be argued that these cases establish that Article II, section 2, Clause 2 of the United States Constitution is so vague that the Supreme

2. Compare *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230 (1839), (power of Congress to provide for appointment of inferior officers under Article II limited to permit appointment only be department of government to which the officer to be appointed most appropriately belonged) *with Ex parte Siebold*, 100 U.S. 371 (1879) (Congress can authorize appointment of executive officer by a court of law).

3. In 1789, in the House of Representatives, James Madison introduced a bill to establish, among others, an executive department for foreign affairs, which was to be staffed by an officer who was to be removable from office by the President. Some representatives understood the language giving the President the power to remove this officer to pose the issue of whether the Constitution mandated that the executive must seek the acquiescence of the Senate in removing such an officer, or whether the President had inherent removal power. *1 Annals of Congress* 473-600 (1789). A vigorous protracted debate followed. *Myers v. United States*, 272 U.S. 52 (1926). The action of Congress in enacting this statute has come to be known as the Decision of 1789, and will be hereinafter referred to as the Decision of 1789.

4. 272 U.S. 52 (1926) (Constitution in Article II places "no express limit . . . on the power of removal by the executive").

5. 295 U.S. 602, 625 (1935) (distinguished *Myers* case, but stated that, "[W]e think it plain under the Constitution that illimitable power of removal is not possessed by the President . . . .")

6. Compare *Buckley v. Valeo*, 424 U.S. 1 (1976) (Supreme Court held that Congress could not constitutionally appoint the members of the Federal Election Commission, for to do so was to invade the power of the executive) *and Bowsher v. Synar*, 478 U.S. 714 (1986) (Congressional retention of power to remove Comptroller General, who performs executive function, is invasion of executive branch power) *with Morrison v. Olson*, 108 S. Ct. 2597 (1988) (no violation of executive power for special prosecutor to be appointed by branch other than executive branch and for prosecutor not to be removable by the Executive).

7. U.S. Const. art. II, § 2, cl. 2, which provides that the President: shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose ap-
Court is unable to interpret or to apply it consistently.

Why have there been such wide divergences in the cases involving executive power to remove? This Article attempts a partial answer to that puzzle. One thesis of this Article is that the relevant constitutional language of Article II, section 2, Clause 2 is unclear or ambiguous. A second thesis is that the Appointments Clause can only be interpreted in light of the concept of separation of powers and further, that the concept of separation of powers is itself not without ambiguity once one moves away from the core concept of separation and its purposes. In such a situation, it is normal for the Supreme Court, or any court for that matter, to use certain aids in interpreting the statutory language involved. One major device which the Supreme Court has used to resolve Appointments Clause removal controversies has been to resort to legislative intent.8 Supreme Court efforts in this area have involved attempts to discern the meaning and objectives of the Founding Fathers, as revealed in The Federalist8 and other tracts,9 that urged adoption of the then-proposed Constitution, as well as examination of the debates at the Constitutional Convention, and not long thereafter, in the First Congress.10

A third thesis of this Article is that most of the differences in the Supreme Court cases involving the Appointments Clause have been caused by different perceptions of the justices deciding those cases about the history and meaning of the Appointments Clause; the doctrine of separation of powers; and the intent of the founding fathers. A principal idea that will be developed in this Article is that judicial perceptions of the history of the Appointments Clause, the removal power, and separation of powers are outcome-determinative. This thesis can and will be examined and developed by examining the cases, the apparent perceptions of the opinion writers about the legislative intent of the founding fathers, and the history of the Appointments Clause and removal powers.

pointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

(This clause of the United States Constitution will hereafter be referred to as the Appointments Clause.)

10. Id.
A final endeavor—and it is a matter of fact, not a thesis—will be to show that the history of the framers' intent in connection with the Appointments Clause and separation of powers has been explained in great detail by historians and other academics. Examination of that research can help to ascertain which of the contradictory versions of the executive's removal and separation of powers is more likely to be correct.

II. SEPARATION OF POWERS

A. Introduction

The American concept of separation of powers is a constitutional doctrine which divides the federal government into three branches; the executive, legislative and judicial. Under the purest form of separation, the executive branch carries out the laws and performs no other function, and the judiciary hears cases and appeals and performs no other function. In this system of divided powers, only the functions which are "appropriate" for a particular branch may be exercised by it and none of the branches may encroach on the powers or functions of the others. For example, the legislature may not execute a statute, and the judiciary may not enact a statute. The effect of the separation of powers doctrine in the Constitution is generally to block out the powers of each of the three branches. A further consequence is that powers assigned or given to one branch theoretically cannot be exercised by another branch that is not constitutionally empowered to do so. This general description is intended as merely a brief restatement of the

12. "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, whether state or national, are divided into the three grand departments, the executive, the legislative, and the judicial." Kilbourn v. Thompson, 103 U.S. 168, 190 (1880).

13. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.

Id. at 190.

14. Id. at 190-191.
doctrine to refresh the reader’s recollection. In order to more fully understand separation of powers doctrine, it is necessary to examine its history. Such an examination not only helps to make sense of the constitutional language and structure, but is quite helpful in identifying the meaning and understanding of the framers of the Constitution.

Some authorities trace the beginning of the separation of powers doctrine to Aristotle. Aristotle in his Politics, divided government into three parts; the deliberators, the magistrates and the judiciary. These functionaries were equivalent to a general legislative assembly, to the public officials who carried out the law, and to a judiciary. However, Aristotle’s division between the branches was not drawn along functional lines. In fact, the division between the three branches was blurred so that there was considerable overlap of functions. It should be noted, however, that not all analysts agree that Aristotle was an early progenitor of the separation of powers doctrine.

The true rise of the separation of powers concept occurred after the middle ages, when the development and rise of Parliament led to constitutional conflict in the seventeenth century. In that conflict, known as The Glorious Revolution, Parliament prevailed; separation of powers can only be understood in the context of that struggle. After the Glorious Revolution, the king did not interfere with acts of Parliament, nor did he interfere with the courts. Thus, the sovereign, the legislature, and the courts became separate, and began to exercise different functions.

John Locke, the great English philosopher, observed and participated in the struggle of Parliament against the king. He pub-

17. Id. at 387.
23. Parker, supra note 20, at 1013.
24. Id.
lished his *Two Treatises of Government*\textsuperscript{26} in 1690 to show that monarchy could co-exist with Parliament, or to put it another way, that a "monarchy of limited powers" was "desirable."\textsuperscript{27} In his writing, Locke divided government into three powers: the legislative power that would enact statutes for the good of the commonwealth; the executive power that would attend to the execution of the laws; and the federative power that would deal with foreign affairs.\textsuperscript{28} In this scheme, the monarch would exercise the executive and federative powers and the parliament would exercise the legislative power.\textsuperscript{29} Locke thus identified a distinction between the governmental organ which exercised a power and the various types of power which a particular governmental organ or department exercised. Furthermore, Locke's work justified taking some power away from one branch — a previously all powerful monarch — and giving it to another governmental organ, the parliament. That division was accomplished along functional lines.

The next writer who contributed to the separation of powers doctrine was the French philosopher, Montesquieu. He studied English government and drew heavily from the ideas of John Locke.\textsuperscript{30} In 1748, Montesquieu published *The Spirit of the Laws*,\textsuperscript{31} in which he described separation of powers in government. Montesquieu, who was heavily read by the American colonists,\textsuperscript{32} divided government into a legislative department, an executive department for foreign affairs, and an executive department for civil affairs.\textsuperscript{33} This last department exercised the judicial power. Montesquieu also supplied a strong defense for the separation of powers doctrine:

> The political liberty of the subject is a tranquility of mind, arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as

\textsuperscript{26} Lock, *Two Treatises of Government* (Laslett ed. 1960).
\textsuperscript{27} Parker, *supra* note 20, at 1013.
\textsuperscript{28} 2 Lock, *Two Treatises of Government* Chap. XI §134-160 (Laslett ed. 1960).
\textsuperscript{29} Parker, *supra* note 20, at 1015.
\textsuperscript{30} Fairlie, *supra* note 21, at 396 ("His [Montesquieu's] classification was clearly based on a study of the English Government and of Locke.").
\textsuperscript{33} Montesquieu, *The Spirit of the Laws*, Book XI, Ch. 6 (Nugent trans. D'Alembert ed. 1873).
one man need not be afraid of another.

When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be then no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor. 34

Because they studied these writers, the founding fathers had a strong belief in separation of powers. 35 In fact, separation of powers became a principal part of "informed" public opinion in the American colonies. 36 The separation of powers doctrine became so widely accepted in the American colonies that at the Constitutional Convention, the tripartite form of government was part of the initial proposal for a Constitution made by Virginia. 37 This initial proposal was sent to a "Committee of Detail" merely for the purpose of filling in details of organization of the proposed three branches. 38 However, after the drafting of the Constitution had been completed and the final document submitted for ratification, it became clear that the particular form which separation of powers had taken in the new Constitution was not recognized by some persons. 39 There was also some popular opposition to ratification. 40 Consequently, a series of papers, titled The Federalist, were written by the Hamilton, Madison and Jay. 41

Madison's task in The Federalist letters 47 to 51 was to explain and defend the doctrine of separation of powers in the form which it had taken in the proposed Constitution and persuade the populace that separation of powers had been included as part of

34. Id.
38. Id.
39. Id.
the Constitution.\textsuperscript{42} Some persons believed that the form of separation of powers which had been incorporated into the Constitution was radically different from the doctrine described by Locke and Montesquieu.\textsuperscript{43} Madison himself recognized that there were serious objections to the proposed document. The most important argument made against the proposed Constitution was that total separation of powers had not been observed.\textsuperscript{44} Thus, Madison's principal tasks were generally to explain separation of powers and to defend the form which that doctrine had taken in the proposed Constitution.

\textit{B. Madison's General Explanation of Separation of Powers}

Madison emphatically made the point that problems of separation of power were difficult to handle. He explained that the separation doctrine was difficult to articulate and draft into a constitution because it is almost impossible to define clearly what ought to constitute the entire structure of the three branches of government.\textsuperscript{45} Madison found it even more difficult to define the respective powers of the three branches.\textsuperscript{46} In any event, Madison made it clear that incorporation of separation of powers concepts was a central objective of the drafters of the Constitution:

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Consti-

\textsuperscript{42} Id. at 406, n. 53.
\textsuperscript{43} Kurland, \textit{supra} note 40, at 597.
\textsuperscript{44} One of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct. In the structure of the [proposed] federal government, no regard, it is said, seems to have been paid to this essential precaution in favor of liberty. \textit{The Federalist} No. 47, at 323 (J. Madison) (J. Cooke ed. 1961).
\textsuperscript{45} \textit{The Federalist} No. 307, at 236, 237 (J. Madison).
\textsuperscript{46} Experience has instructed us that no skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive, and Judiciary; or even the privileges and powers of the different Legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science. \textit{The Federalist} No. 37, at 235 (J. Madison).
tution therefore really chargeable with this accumulation of power or with a mixture of powers having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself however, that it will be made apparent to everyone, that the charge cannot be supported, and that the maxim on which it relies, has been totally misconceived and misapplied. In order to form correct ideas on this important subject, it will be proper to investigate the sense, in which the preservation of liberty requires, that the three great departments of power should be separate and distinct.\textsuperscript{47}

Madison defended the separation principles written into the Constitution by an appeal to the reasoning of Montesquieu:

The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. 'When the legislative and executive powers are united in the same person or body,' says he, 'there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.' Again, 'were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.'\textsuperscript{48}

However, as pointed out above,\textsuperscript{49} the real argument was not about whether separation of powers should be included in the Constitution, but whether as drafted separation had been incorporated into the proposed Constitution. Madison devoted most of The Federalist letters from 47 to 51 to demonstrating that it was.\textsuperscript{50}

The principal concern of persons who opposed the proposed Constitution was "blending," which was the term used to describe the exercise of several powers by one branch or the exercise of powers which might be thought to belong to one branch by another. The power of the President in the Constitution to veto legislation was an example of blending: the executive was exercising a power which affected the enactment of legislation, a power which concededly belonged to the legislature. Madison's defense drew on Montesquieu, who had not absolutely precluded blending, but pre-

\textsuperscript{47} The Federalist No. 47, at 324 (J. Madison).
\textsuperscript{48} Id. at 326-27.
\textsuperscript{49} See supra notes 35-40 and accompanying text.
\textsuperscript{50} The Federalist No. 47-51, at 323-353 (J. Madison).
cluded only those mixtures of functions where one branch exercised the whole power of another branch. In fact, Madison demonstrated at length that Montesquieu had used the British Constitution as his model and that particular constitution was filled with examples of blending. Madison explained power has "an encroaching nature." In using this description, he was probably referring to the danger of power being gathered by the legislature:

In a government, where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire . . . . But in a representative republic, where the executive magistracy is carefully limited both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; . . . it is

51. "... [T]he fundamental principles of a free constitution are subverted ... [W]here the whole power of one department is exercised by the same hands which possess the whole power of another department." The Federalist No. 47, at 325-326 (J. Madison).

52. The oracle who is always consulted and cited on this subject, is the celebrated Montesquieu . . . .

On the slightest view of the British Constitution we must perceive, that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns, which when made have, under certain limitations, the force of legislative acts. All the members of the judiciary department are appointed by him; can be removed by him on the address of the two Houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department forms also, a great constitutional council to the executive chief; as on another hand, it is the sole depositary of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction, in all other cases. The judges again are so far connected with the legislative department, as often to attend and participate in its deliberations, though not admitted to a legislative vote.

From these facts by which Montesquieu was guided it may clearly be inferred, that in saying "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates;" or "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no partial agency in, or no control over the acts of each other.

Id. at 324-25.

53. The Federalist No. 48, at 332 (J. Madison).
against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions.

The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can, with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.\(^{54}\)

One of the most important parts of Madison's defense of the Constitution was his argument in favor of blending of powers. Madison argued that Montesquieu had not advocated absolute separation, nor had the American states in their constitutions followed absolute separation.\(^{55}\) Moreover, mere prohibitions on paper against one branch exceeding the powers assigned to it had been wholly ineffective.\(^{56}\) He therefore undertook the task of fashioning a practical means to enforce separation of powers.\(^{57}\) In order to preserve separation of powers, paper barriers in constitutions are not sufficient:

To what expedient then shall we finally resort for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? . . . [T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary Constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract

\(^{54}\) Id. at 333-334 (J. Madison).
\(^{55}\) The Federalist No. 47, at 327-330 (J. Madison).
\(^{56}\) Id. at 327.
\(^{57}\) . . . [T]he next and most difficult task, is to provide some practical security for each against the invasion of the others . . . . Will it be sufficient to mark with precision the boundaries of these departments in the Constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American Constitutions. But experience assures us, that the efficacy of the provision has been greatly over-rated; and that some more adequate defence is indispensibly necessary for the more feeble, against the more powerful members of the government.

The Federalist No. 48, at 332-33 (J. Madison).
ambition.  

It is clear that Madison explained and defended the form which separation of powers took in the Constitution, but he also suggested changes from earlier writers and made a major change of the separation doctrine itself in the Constitution. He began with an explanation of the separation doctrine which defined it as a device to control power in order to preserve individual liberty. He then explained that for pragmatic reasons, in operation, separation would only work if powers were not hermetically sealed off but slightly shared between branches, so that each branch would act as a check on the other. This system of checks and balances, fueled by the competing ambitions of persons holding governmental office, was the practical device which translated the abstract and absolute doctrine of separation of powers into a workable device. Madison is justly celebrated for his creation and defense of the check and balance device. What is overlooked, however, is his idea that blending of powers is necessary in a constitution which utilizes separation of powers, because it is impossible to precisely define powers.

III. THE APPOINTMENTS CLAUSE

The Constitution is full of ambiguities and the question of the relationships among the three branches of the federal government has been, and continues to be, one of the most perplexing of these ambiguities. When faced with ambiguity in interpreting the Constitution, the Supreme Court, and indeed any court, first must look to the constitutional text for a solution. The text of Article II, Clause 2, which provides for the executive appointment and removal power, provides as follows:

... [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by law vest the Appointment of

58. THE FEDERALIST No. 51, at 347-349 (J. Madison).
59. Kurland, supra note 40, at 597.
60. THE FEDERALIST No. 47, at 324 (J. Madison).
61. THE FEDERALIST Nos. 47-48, at 324-338 (J. Madison).
such inferior Officers, as they think proper, in the President' alone, in the Courts of Law, or in the Heads of Departments.63

This text is less than clear and a mere reading of it in isolation produces many questions. Not surprisingly, the power of the executive branch to remove officers under this clause has been the focus of considerable controversy ever since it was drafted. For example, the removal power was involved indirectly in the early Supreme Court case of Marbury v. Madison.64 Also, one of the earliest actions of the first United States Congress involved the question of the removal power of the executive branch.65 Even a cursory reading of the Appointments Clause reveals many questions. For example, who are “Officers of the United States?” Who are the “Officers . . . whose Appointments are not herein otherwise provided for?” Who are “inferior Officers” whose appointment the Congress can control or delegate? The most important question is not covered by express language in the quoted constitutional clause, nor anywhere in the Constitution: what are the removal powers of the executive and legislature, respectively?

The text of the Constitution does not expressly give the executive the power to remove. In The Federalist, Alexander Hamilton had the job of defending the Appointment Clause, and he also addressed the related problem of removal. He wrote:

64. 5 U.S. (1 Cranch) 137 (1803). President Jefferson refused to honor appointment of federal Magistrate Marbury, who had been appointed by Jefferson’s predecessor, President Adams. At bar, counsel in their argument linked the answer to the question of whether the commission had to be delivered to the question of whether President Jefferson had the power to remove Marbury:

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed . . . .

Mr. Marbury, then, since his commission was signed by the President, and sealed by the Secretary of State, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country.

Id. at 162.
65. Corwin, Tenure of Office and the Removal Power under the Constitution, 27 Colum. L. Rev. 353, 360-363 (1927). Madison introduced a bill which provided that the head of the Department of Foreign Affairs was to be “removable from office by the President of the United States.” Id. at 360.
It has been mentioned as one of the advantages to be expected from the co-operation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint. A change of the chief magistrate therefore would not occasion so violent or so general a revolution in the officers of the government, as might be expected if he were the sole disposer of offices.\textsuperscript{66}

The principal debate in connection with Article II was over the nature of the appointment power. Hamilton defended the virtues of nomination by the executive.\textsuperscript{67} He argued that the principal advantage of executive appointment would be that the danger of excessive patronage, which a multimember political body like Congress would inevitably fall into, would be reduced.\textsuperscript{68} He also argued that the provisions of Article II would prevent the Senate from having too much power or influence over the executive.\textsuperscript{69} There was serious doubt about Article II, and much was written against it by the antifederalists.\textsuperscript{70}

The arguments in \textit{The Federalist}\textsuperscript{71} and \textit{The Antifederalist}\textsuperscript{72} papers were merely a reflection of the same dissention which had gripped the Constitutional Convention. Indeed, the problem of how to handle appointments under the Constitution was one of the most divisive problems faced at the Convention. For example, one suggestion was to permit the legislature to appoint all judges.\textsuperscript{73} The counter position was taken by some at the Convention that the executive alone should do all appointing.\textsuperscript{74} Others argued that the power of appointment was too great to be held by a single person.\textsuperscript{75} After several days of debate on the subject, Madison unsuccessfully attempted a compromise which consisted of nomination by the President with concurrence by a specified minority of the

\textsuperscript{66} \textit{The Federalist} No. 77 at 515 (A. Hamilton).

\textsuperscript{67} \textit{The Federalist} No. 76 (A. Hamilton).

\textsuperscript{68} \textit{Id}.

\textsuperscript{69} \textit{The Federalist} No. 77 (A. Hamilton).

\textsuperscript{70} \textit{See} \textit{The Anti-Federalist} at 214 (H. Storing ed.) (M. Dry ed., 1985).

\textsuperscript{71} \textit{The Federalist} Nos. 75-77, at 503-521 (A. Hamilton).

\textsuperscript{72} \textit{The Anti-Federalist} 210-221 (H. Storing ed.) (M. Dry ed. 1985).


\textsuperscript{74} 1 \textit{M. Farrand}, \textit{The Records of the Federal Convention of 1787} at 119 (Yale ed. 1966).

\textsuperscript{75} \textit{Id}.
The Convention deadlocked and Madison pleaded for a spirit of compromise. The members of the entire Convention then rewrote the proposal of the Committee of Detail on appointments and a vigorous debate with numerous amendments ultimately produced the Appointments Clause in its present form. The exchanges and debate on the Appointments Clause were dictated by "partisan politics" and "practical necessity" as part of a "struggle over the proper allocation of powers." The resulting language was clearly a compromise between those persons who desired to give the entire power to appoint and remove to the executive and those who wished to give the entire power to the legislature.

IV. THE DECISION OF 1789

The extent of the disagreement over the power to appoint and remove was revealed in the year after the adoption of the Constitution. On May 18, 1789, in the House of Representatives of the First Congress, James Madison moved for the establishment of three executive departments to deal with foreign affairs. Each department would be directed by a secretary. This secretary was to be appointed by the President with the advice and consent of the Senate; however, the language of the proposed statute provided that he could be removed by the President alone. This executive removal provision of the proposed statute prompted an acrimonious debate, as it should have, since several of the participants in the First Congress of 1789 also had been signatories of the Constitution and since the matter of appointment had been the subject of long debate in the Constitutional Convention. Perhaps as a result of the debate, the framers left the Appointments Clause full of ambiguities. The matter of removal, except for impeachment, was also left unsettled by the constitutional text. The proposed statutory language, however, appeared to recognize a removal power in the President acting alone. It permitted the executive branch to

77. Id. at 398-409.
78. Id. at 680-683. For a complete review of the history of the Appointments Clause, see Blumoff, supra note 35, at 1067-1068.
80. 1 Annals of Congress 370 (1789).
81. See supra notes 73-79 and accompanying text.
82. "... [T]here shall be established ... the Department of Foreign Affairs, at the head of which there shall be an officer ... to be removable by the
exercise a substantial power which had not been mentioned in the
text of the Constitution and which the framers had been unable to
settle. The congressional activity in connection with this bill has
come to be known as "The Decision of 1789."

After the bill was introduced, a protracted debate occurred. That
debate was joined over the issue of whether the President
had inherent removal power. Several approaches to that question
soon became apparent. One was that the power of removal was a
plenary power which belonged entirely to the President and that
this position was the intent of the framers of the Constitution. A
second position in the debate was that the Constitution provided
that the removal power was shared by the President and legisla­
ture acting in concert. A third position was that the Constitution
did not settle the question of removal, and it was therefore within
the power of the legislature to provide for it under the necessary
and proper clause. After several days of debate, the House voted
on this language, which provided that the President acting alone
had the power to remove the new Secretary of Foreign Affairs. It
was approved. However, several days later a motion was made to
amend the language of the statute. This proposed amendment in­
cluded the provision that "whenever the principal officer shall be
removed from office by the President . . . ." This amendment mo­
tion ultimately passed the House. After more acrimonious debate,
the Senate passed the amendment on a tie vote which was broken
by the Vice President.

V. SUPREME COURT DECISIONS ON REMOVAL

A. Marbury v. Madison

Although celebrated in American Supreme Court history as
the decision which established judicial review, the controversy in

President." 1 ANNALS OF CONGRESS 370-371 (1789).
83. See supra notes 63-70 and accompanying text.
84. 1 ANNALS OF CONGRESS 460-608 (1789).
85. 1 ANNALS OF CONGRESS 373 (1789) (Rep. Benson).
86. 1 ANNALS OF CONGRESS 372 (1789) (Rep. Smith).
87. Corwin, supra note 65, at 360-361.
88. 1 ANNALS OF CONGRESS 606-607 (1789).
89. 1 ANNALS OF CONGRESS 599 (1789).
90. 1 ANNALS OF CONGRESS 601 (1789).
91. Burkoff, Appointment and Removal Under the Federal Constitution:
Marbury v. Madison\(^{92}\) involved presidential removal power. In Marbury, President John Adams appointed Marbury Justice of the Peace for the District of Columbia. President Adams signed a commission naming Marbury for a term of five years, but his term of office expired before that commission was delivered. Thomas Jefferson, the next President, refused to deliver the commission. Marbury then sought a writ of mandamus from the Supreme Court. The Court did not issue the writ because the statute which purported to confer the power to issue mandamus on the Supreme Court was unconstitutional.\(^{93}\) Chief Justice Marshall, in response to argument of counsel stated:

The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the President, and sealed by the Secretary of State, was appointed; and as the law creating the office, gave the officer a right to hold it for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country.\(^{94}\)

Although an argument can be made that this language was dictum, one analyst has made the point that if the President had the power to remove Marbury, it would not have been necessary for the Court to decide the constitutionality of the mandamus statute which is the conceded holding of the case.\(^{95}\) Thus, a necessary implication of the Marbury decision is that presidential removal power is limited with respect to non-executive officers. The Marbury decision displays Chief Justice Marshall's understanding of the removal power. In discussing the Decision of 1789,\(^{96}\) Chief Justice Marshall stated:

By the Constitution of the United States, the President is vested with certain important political powers, in the exercise of

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92. 5 U.S. (1 Cranch) 137 (1803).
93. Id. at 172.
94. Id. at 162.
96. See supra notes 80-91 and accompanying text.
which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases their acts are his acts; and whatever discretion may be used, still there exists and can exist no power to control that discretion. The subjects are political. They respect the Nation, not individual rights, and, being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of Congress for establishing the department of Foreign Affairs. This officer as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is to be communicated."

In this passage, Chief Justice Marshall indicated that his understanding of the constitutional removal power of the President is almost wholly determined by the nature or character of the particular office involved. For example, certain positions are clearly executive or political in nature, such as those which deal with foreign affairs. In this arena, the President has absolute removal power. In the case of a minor judicial officer, such as Justice of the Peace, Marbury, who is in no way a member of the executive branch or a purely political officer, the President’s power of removal is circumscribed. Chief Justice Marshall’s reasoning that the Marbury decision did not prevent Congress from appointing minor officers was based upon his understanding of the Decision of 1789.

B. Ex Parte Hennen

In the case of *Ex parte Hennen*, the law clerk for a federal district court judge in Louisiana brought a mandamus action to seek reappointment after being removed by a judge of that court. The clerk had been appointed pursuant to a federal statute which gave the courts the power to appoint their clerks. Congress had enacted this law, of course, under its power to appoint inferior officers under the Appointments Clause. This statute did not fix

99. *Id.* at 372-373.
100. 38 U.S. (13 Pet.) 230 (1839).
101. *Id.* at 258.
102. See supra note 63 and accompanying text for the provisions of the Appointments clause.
the tenure or term of office of the clerks. The Court reasoned that:

[a]ll offices, the tenure of which is not fixed by the Constitution or limited by law, must be held either during good behaviour, or (which is the same thing in contemplation of law) during the life of the incumbent; or must be held at the will and discretion of some department of the government, and subject to removal at pleasure.\textsuperscript{103}

The Court then mentioned the maxim that the power to remove followed the power to appoint and referred to the Presidential removal power even though presidential power was not involved in the \textit{Hennen} case:

In the absence of all Constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment . . . . This [earlier disputes over removal] related, however, to the power of the President to remove officers appointed with the concurrence of the Senate: and the great question was, whether the removal was to be by the President alone, or with the concurrence of the Senate both constituting the appointing power. No one denied the power of the President and Senate jointly, to remove, where the tenure of the office was not fixed by the Constitution; which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted, as the practical construction of the Constitution, that this power was vested in the President alone.\textsuperscript{104}

However, with regard to clerks in Hennen's position, the court went on to reason that:

These clerks fall under that class of inferior officers, the appointment of which the Constitution authorizes Congress to vest in the head of the department. The same rule, as to the power of removal, must be applied to offices where the appointment is vested in the President alone. The nature of the power, and the control over the officer appointed, does not at all depend on the source from which it emanates. The execution of the power depends upon the authority of law, and not upon the agent who is to administer it. And the Constitution has authorized Congress, in certain cases, to vest this power in the President alone, in the Courts of law, or in the heads of departments; and all inferior officers appointed under each, by authority of law, must hold their office

\textsuperscript{103} 38 U.S. (13 Pet.) at 259.
\textsuperscript{104} Id.
at the discretion of the appointing power. Such is the settled usage and practical construction of the Constitution and laws, under which these offices are held. 105

The extensive quotes above from the *Hennen* opinion are necessary in order to illustrate the meandering reasoning of the Court and to appraise the authoritativeness of the opinion upon the question of the removal power. There are several problems with the Court's reasoning in the case. First, the statements of the Court regarding presidential removal power are dictum. They have nothing to do with a case involving the removal of a judicial clerk by a federal judge, and are simply not necessary or relevant to the decision before the Court.

Second, the theory invoked by the relator in the case was that the intent of the Congress in enacting the Judiciary Act of 1789 was to adopt English common law practice as to the judicial power to appoint and remove. Such practice or power had been extensively used in the American colonies and was contemplated by the drafters of the Judiciary Act of 1789. 106 Evidently, the attorneys trying the case did not perceive the relevance of presidential removal power. Even more importantly, these arguments shed light on the genesis of the Court's insistence that the power to remove always and necessarily follows the power to appoint. A principal part of the argument made by the relator was that the appointment power is an inherently "naked" power, which, once it has been exercised, utterly exhausts the appointer's power relative to the employee. 107 The *Hennen* Court's use of the maxim that the power to remove follows the power to appoint was made in response to the relator's strongly argued English law position. The Court in the *Hennen* decision took great pains to reject this maxim and the Court's reasoning at least indirectly involved looking at

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105. *Id.* at 260.
106. In the country from which we have borrowed so many of our constitutional and legal doctrines, the same practice extensively prevailed. It is believed it generally existed among the colonies. Wherever it did prevail, the power of appointment was considered as a naked power, which was exhausted by the act itself; and then slumbered until another vacancy awakened it again to life.
As a general principle of the common law, in all cases of appointments under powers, the appointment is not revocable unless expressly made so at the creation of the power.
*Id.* at 236.
107. *Id.* at 236-237.
the history of the Appointments Clause. The Hennen Court reasoned that although the Constitution is silent about removal, Congress in the Decision of 1789 had adopted a “practical” construction of the Constitution which vested the complete power to remove in the President.108

Third, the Court in Hennen recognized a distinction between the situation before it and the issue of Presidential removal power in holding that the power to appoint clerks is vested exclusively in the district court and the Supreme Court therefore has no power to issue mandamus.109 The import of this holding is that the Supreme Court and no other branch of the government has the power to interfere with the removal power of the district court. As the Hennen Court stated, the appointment and removal power in the Constitution was “no doubt intended to be exercised by the department of government to which the officer to be appointed most appropriately belonged.”110 This principle applies to the power to remove, as well, and means that when Congress has the power under the Constitution to delegate the power to appoint employees to a particular branch or department, as it does in connec-
tion with inferior officers under the Appointment Clause, and
makes a delegation without fixing a term of office for the employee,
then several consequences follow. First, the employee is hired at
will and has no judicially recognizable personal right to a particu-
lar term in office. Second, only the particular department or
branch of which he is a part and to whom the appointment power
has been delegated by Congress can remove him, for such branch
or department is the only "appropriate" removing authority. These
conclusions would appear obvious from a careful reading of the
case; however, as will be seen, the Hennen opinion has been relied
upon as precedent to support several contradictory versions of
presidential appointment and removal power.

C. Ex Parte Siebold

The next major case involving appointment and removal
power is Ex Parte Siebold.\textsuperscript{111} In Siebold, a federal statute con-
ferred power on federal circuit court judges to appoint election
commissioners for federal elections. The statute was intended to
work in conjunction with state statutes on elections and partially
preempt state power. The petitioners made several arguments.
Their principal arguments involved several variations on the the-
ory that although the federal government had the power to pre-
empt the states, it could exercise this power only exclusively or
totally, and not partially.\textsuperscript{112} In a closely related vein, the petition-
ers also argued that the power to keep the peace belonged to the

\textsuperscript{111} 100 U.S. 371 (1879).

\textsuperscript{112} The general positions contended for by the counsel of the petitioners are
stated in their brief as follows:

We shall attempt to establish [sic] these propositions:
1. That the power to make regulations as to the times, places, and man-
nner of holding elections for representatives in Congress, granted to Con-
gress by the Constitution, is an exclusive power when exercised by
Congress.
2. That this power, when so exercised, being exclusive of all interference
therein by the States, must be so exercised as not to interfere with or
come in collision with regulations presented in that behalf by the States,
unless it provides for the complete control over the whole subject over
which it is exercised.
3. That when put in operation by Congress it must take the place of all
State regulations of the subject regulated, which subject must be entirely
and completely controlled and provided for by Congress.

\textit{Id.} at 382-383.
The petitioners then challenged, almost as an afterthought, the power of the circuit courts under the legislation to appoint election commissioners. These officers who were not members of the judiciary; therefore, petitioners argued that separation of powers had been violated, for the judicial branch was exercising executive power. The Supreme Court stated that:

It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to his effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged.

The Court distinguished the *Hennen* decision by stating that the position taken by the *Hennen* Court that the appointing power in the clause referred to

"was no doubt intended to be exercised by the department of the government to which the official to be appointed most appropriately belonged" was not intended to define the constitutional power of Congress in this regard, but rather to express the law or rule by which it [Congress] should be governed.

In other words, the statement in *Hennen* referring to the power of appointment and removal by the “appropriate” branch was not an implied constitutional stricture which defined the only branch which could exercise a particular power. Instead, it de-

113. Somewhat akin to the argument which has been considered is the objection that the deputy marshals authorized by the act of Congress to be created and to attend the elections are authorized to keep the peace; and that this is a duty which belongs to the State authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States.

*Id.* at 394.

114. Finally, it is objected that the act of Congress imposes upon the Circuit Court duties not judicial, in requiring them to appoint the supervisors of election, whose duties, it is alleged, are entirely executive in their character. It is contended that no power can be conferred upon the courts of the United States to appoint officers whose duties are not connected with the judicial department of the government.

*Id.* at 397.

115. *Id.*

116. *Id.* at 398.
scribed a power of Congress to vest the appointment and removal power of inferior officers in whatever branch is appropriate, so long as the congressional placement of that power does not involve an "incongruity." 117 Although the Siebold Court did not describe what would constitute an "incongruity" on the part of Congress in bestowing the appointment and removal power, the Court did state that "[i]t cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depositary of official power capable of exercising it." 118 In Siebold, a leading case on the subject of the appointment and removal power, there was no reference to history, except for the reference to the Hennen opinion for the purpose of distinguishing it. There was no attempt even to give any reasons for distinguishing the ambiguous language of Hennen, historical, or otherwise. And thus, the breadth of the Hennen decision, which suggested that only the branch of which an inferior officer was a part had full power under the Constitution to appoint and remove, appeared to be the law on removal at that time and after the Siebold decision.

D. Myers v. United States

In 1926, the Supreme Court decided the case of Myers v. United States, 119 which has been regarded as one of the major cases on executive removal power. A United States statute provided that postmasters "... shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law." 120 Myers, the postmaster for Portland, Oregon, was removed by the President without action by the Senate. The court of claims denied Myers' claim for wages, and the Supreme Court affirmed in a majority opinion written by Chief Justice Taft. The question, according to the majority opinion, was "... whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate." 121

117. Id.
118. Id.
119. 272 U.S. 52 (1926).
121. Myers, 272 U.S. at 106.
The principal government argument was that under Article II of the Constitution, the power of removal of the President for officers appointed with the advice and consent of the Senate was "full and complete" without the requirement of consent by the Senate.122

In an elaborate majority opinion, Chief Justice Taft concluded in broad and sweeping terms as follows:

Our conclusion on the merits, sustained by the arguments before stated, is that article 2 grants to the President the executive power of the government—i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that article 2 excluded the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent; that the provisions of the second section of article 2, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed, and not to be extended by implication; that the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by implication extend to removals the Senate's power of checking appointments; and, finally, that to hold otherwise would make it impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed.123

Thus, the constitutional language that the majority opinion appears to rest upon is the Article II provision that the President is charged with the duty to see that the laws are faithfully executed. Chief Justice Taft's analysis also relied upon a maxim of statutory interpretation: that the power to remove is an incident of the power to appoint.124 However, the Chief Justice's principal sources

122. Id. at 108.
123. Id. at 163.
124. . . . [T]he express recognition of the power of appointment in the second section [of Article II] enforced this view on the well-approved principle of constitutional and statutory construction that the power of
for his sweeping support of an almost absolute executive removal power were historical analysis and inference, since there is no express power of removal given to the President in the text of Article II or elsewhere in the Constitution.\textsuperscript{125} His historical analysis consisted of seeking the intent of the framers of the Constitution in the Constitutional debates, in The Federalist Papers, and in an examination of the Decision of 1789.

Chief Justice Taft acknowledged that there is no express provision for removal in the Constitution except through impeachment.\textsuperscript{126} He then examined the proceedings of the Constitutional Convention to ascertain if such a power was implied by the language of the Constitution.\textsuperscript{127} He concluded that it was. He began by observing that Edmund Randolph had, as part of the Virginia Plan, introduced a resolution which gave to the President all of the executive power of the Congress under the Articles of Confederation.\textsuperscript{128} Since the Congress, under the Articles of Confederation, had exercised a power of removal, Chief Justice Taft therefore reasoned that the Virginia resolution was intended to include the same power of removal by the executive under the United States Constitution as had existed under the Articles of Confederation.\textsuperscript{129}

Chief Justice Taft conceded that the original resolution, which was introduced by Randolph at the Constitutional Convention, was modified by the Committee of the Whole and the Committee of Detail at the Constitutional Convention. The Chief Justice's view was that those committees simply made minor modifications or ignored the removal provisions of the Virginia Plan. He reasoned that the compromises later adopted at the Constitutional Conven-

\begin{quote}
removal of executive officers was incident to the power of appointment . . .

This principle of statutory construction, then generally recognized, has been recognized ever since . . . . The reason for the principle is that those in charge of and responsible for administering functions of government, who select their executive subordinates, need in meeting their responsibility, to have the power to remove those whom they appoint.
\end{quote}

\textit{Id.} at 119.

\textsuperscript{125} See supra note 65 and accompanying text.
\textsuperscript{126} Myers, 272 U.S. at 109.
\textsuperscript{127} Id. at 110-111.
\textsuperscript{128} Id. at 110.
\textsuperscript{129} "... It [the resolution] gave to the executive "all the executive powers of the Congress under the Confederation," which would seem therefore to have intended to include the power of removal which had been exercised by that body as incident to the power of appointment." \textit{Id.} (This quotation is contradicted in the following paragraph of the opinion.).
tion focused upon such matters as representation by the large and small states. According to Chief Justice Taft, the matter of removal was never mentioned nor was it the subject of compromise at the Constitutional Convention. Thus, he argued that the matter of removal was in a fashion implicitly incorporated by reference into the Constitution from the Virginia Plan. He reasoned that, since it was not removed and was part of the Articles, then it must have been the intent of the framers to include the extensive removal power of the executive in the Constitution.

Chief Justice Taft found further evidence of the existence of an absolute removal power in the executive in the Decision of 1789,130 introduced above.131 The Justice reasoned that, although the House had debated the question, "[s]hall the words 'to be removable by the President be struck out?'," that issue was not settled by the House.132 Instead, the result of the debate was that Representative Benson offered a compromise motion which, after describing the State Department and officers, provided for removal with the phrase "whenever the principal officers shall be removed from office by the President of the United States."133 This lan-

130. In the House of Representatives of the First Congress, on Tuesday, May 18, 1789, Mr. Madison moved in the committee of the whole that there should be established three executive departments, one of Foreign Affairs, another of the Treasury, and a third of War, at the head of each of which there should be a Secretary, to be appointed by the President by and with the advice and consent of the Senate, and to be removable by the President . . . .

On June 16, 1789, the House resolved itself into a committee of the whole on a bill proposed by Mr. Madison for establishing an executive department to be denominated the Department of Foreign Affairs, in which the first clause, after stating the title of the officer and describing his duties, had these words "to be removable from office by the President of the United States." After a very full discussion the question was put: "Shall the words 'to be removable by the President be struck out?'"

Id. at 111.

131. See supra notes 80-91 and accompanying text.

132. Myers, 272 U.S. at 112.

133. Id. at 113. The compromise motion of Representative Benson provided in its entirety is as follows:

That there shall be in the State Department an inferior officer to be appointed by the said principal officer, and to be employed therein as he shall deem proper, to be called the chief clerk in the Department of Foreign Affairs, [sic] and who, whenever the principal officers shall be removed from office by the President of the United States, or in any other case of vacancy, shall, during such vacancy, have charge and custody of all records, books and papers appertaining to said department.
guage was to be used in place of previous language which provided generally that the officers of the State Department were removable by the President. The amendment was carried by a vote of thirty-one to nineteen. An amendment to remove the language “to be removable by the President” from the earlier motion was also carried. Chief Justice Taft concluded that this sequence of motion-debate-amendment-debate-passage-of-amendment established several propositions very clearly. He argued that the history of the motion established that the exact question on which the House voted was the power of the President to remove and that there is no doubt at all that the House vote was a legislative declaration that the President alone had the power to remove officers of the United States.

Chief Justice Taft analyzed the position of James Madison in the debate. The Madisonian position, according to Chief Justice Taft, consisted of several propositions. First, that Article II, in granting executive power to the President, gave him the power to appoint and remove. Second, he argued that Madison recognized and argued that the power of removal was incident to the power of appointment. Third, he also reasoned that Madison had argued that the Congress had the power to make express provision for removal under Article I, section 8.

After further protracted discussion, Chief Justice Taft reached several sweeping conclusions. First, he concluded that Article II grants the President the power to appoint and remove executive

Id.

134. See supra note 80.
135. Myers, 272 U.S. at 113-114.
136. It is very clear from this history that the exact question which the House voted upon was whether it should recognize and declare the power of the President under the Constitution to remove the Secretary of Foreign Affairs without the advice and consent of the Senate. That was what the vote was taken for. Some effort has been made to question whether the decision carries the result claimed for it, but there is not the slightest doubt, after an examination of the record, that the vote was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone, and until the Johnson Impeachment trial in 1886 its, meaning was not doubted even by those who questioned its soundness.

Id. at 114.
137. Id. at 113-114.
138. Id. at 115.
139. Id. at 119.
140. Id. at 125.
officers as part of his duty to take care that the laws be faithfully executed; second, that Congress has no power over appointments and removals except in cases of inferior officers under the Appointment Clause; and third, that the power of Congress to provide for appointment and removal of inferior officers in branches other than the executive branch is a power which is in derogation of the President's broad power and therefore must be narrowly construed. Chief Justice Taft's explanation for the breadth of this holding was that:

In all such cases, the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it. In this field his cabinet officers must do his will. He must place in each member of his official family, and his chief executive subordinates, implicit faith. The moment that he loses confidence in the intelligence, ability, judgment or loyalty of any one of them, he must have the power to remove him without delay. To require him to file charges and submit them to the consideration of the Senate might make impossible that unity and co-ordination in executive administration essential to effective action.

The duties of the heads of departments and bureaus in which the discretion of the President is exercised and which we have described, are the most important in the whole field of executive

141. Our conclusion on the merits, sustained by the arguments before stated, is that Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers — a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that Article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent; that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not be extended by implication; that the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by implication extend to removals the Senate's power of checking appointments; and finally that to hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed.

Id. at 163-64.
that, except as to inferior officers, the power of removal is not an
enumerated power and therefore not part of the executive power.
His position is that this interpretation of executive power was so
obvious to the framers that they did not believe that they had to
state it.

Several writers have analyzed the historical origins of the App­
pointments Clause and its drafting at the Constitutional Conven­
tion.148 Their conclusions do not support Chief Justice Taft's his­
tory in the Myers opinion. None of these writers found any
discussion or debate of the removal power at the Constitutional
Convention. They did find, however, considerable discussion and
debate about the Appointments Clause and the intent of the fram­
ers in drafting it.149 For example, there was protracted debate over
the appointment provisions of the Virginia Plan, introduced by
Randolph of Virginia, which provided for judicial appointments to
be made by the national legislature. This plan was rejected and a
compromise was proposed by Madison, which provided for nomi­
nation by the executive and confirmation by the Senate. Madison's
position prevailed, but:

[W]hat is curious about the debates . . . is the near total absence
of theoretical discussion about the proper entity to exercise the
appointing power . . . . Rather, the debate focused largely on two
questions: Was the Executive or the Legislature more likely to
abuse its power? And which entity, the Executive or the Legisla­
ture, was more likely to be jealous and create discord if it was not
given a rule in the [appointment] process.150

This led the analyst to several conclusions which completely un­
dercut Chief Justice Taft's position in the Myers opinion on the
subject of the intent of the framers.

. . . [W]hen one examines the history of the Appointments Clause,
however, one finds no evidence of shared convictions or purposes.
Indeed, but for the need to lodge an appointing power some­
where, one suspects that the delegates might never have agreed
on Article II, section 2, Clause 2 of the Constitution . . . .
. . . Given the dynamics which generated the Appointment
Clause—partisan politics and unguided practical necessity—[an]
uncompromising view of the Clause is indefensible. On every side
the Clause was viewed, not as a “self-executing safeguard,” but

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148. Blumoff, supra note 35; Burkoff, supra note 91.
149. See, e.g., Blumoff, supra note 35, at 1062-1070.
150. Id. at 1066.
rather as a permanent stop gap measure borne from what was largely an unprincipled struggle over the proper allocation of powers.\textsuperscript{151}

In addition to error in his view of the framing of the Appointments Clause, Chief Justice Taft's version of the Decision of 1789 was badly flawed.\textsuperscript{152} The Decision of 1789 has already been generally analyzed.\textsuperscript{153} As discussed above, it is often urged that the Decision of 1789 is one of the most important indicators of the intent of the framers of the Constitution because so many of the representatives who participated in that decision were signatories of the Constitution.\textsuperscript{154} Of course, that assertion is accurate for there were many signers of the Constitution who were members of the First Congress in 1789, including James Madison. However, the significance of the overlap has been grossly overstated. It is one thing to note that some members were the same and quite another to examine the positions of the members of the House of Representatives, especially the members of the House who participated in the "Great Debate." The leading critic of the Myers opinion did so and concluded that the history employed by the Chief Justice was nearly fictional. After examining the Decision of 1789, Edward Corwin, one of the leading scholars on presidential power, concluded that the House and the Senate both were divided into numerous factions on the question of presidential removal power in the Debate of 1789. Moreover, he concluded that only "a mere fraction of a fraction, a minority of a minority" of the House believed that there was any inherent removal power in the executive.\textsuperscript{155} Other analysts have concluded that the First Congress clearly did not decide that the executive possessed any inherent removal power. Even those participants who favored the language which appeared to grant to the President an unfettered hand in removal did so only because the Secretary of Foreign Affairs was to be a political officer who would be an ally and agent of the President.\textsuperscript{156} The most serious criticism of Chief Justice Taft's history was Justice Brandeis' writing in dissent to the majority position in

\textsuperscript{151} Id. at 1061, 1078 (citations omitted).
\textsuperscript{152} Supra notes 119-142.
\textsuperscript{153} See supra notes 80-91 and accompanying text.
\textsuperscript{154} See supra note 144 and accompanying text.
\textsuperscript{155} Corwin, supra note 65, at 362.
\textsuperscript{156} Donovan and Irvine, The President's Power to Remove Members of Administrative Agencies, 21 Cornell L. Q. 215, 218-219 (1936).
Myers. After maintaining that the issue in “the Great Debate” over the Decision of 1789 was not whether the President had “uncontrollable” power, Justice Brandeis then addressed the House and Senate positions in the debate. In the Senate the vote was even. However, in the House, he observed that only twenty-four of fifty-four members participated in the debate. Of the twenty-four who participated, “only six appear to have held the opinion that the President possessed the uncontrollable power of removal.” The balance of the twenty-four were divided into a veritable hodge-podge of differing positions. As he observed, the vote in the Decision of 1789 was aided by those representatives who believed that it was “expedient” for Congress to confer the power to remove on the President acting alone. This meant, of course, that it was emphatically not the understanding of the majority, or even of a large number of representatives who participated in the debate and Decision of 1789, that the President possessed inherent removal power.

E. Humphrey’s Executor v. United States

Much of this changed in 1935, when the Supreme Court decided the case of Humphrey’s Executor v. United States. Humphrey was a commissioner of the Federal Trade Commission who had been appointed for a term of seven years by President Hoover. During Humphrey’s term of office as a commissioner, President Roosevelt sent a demand for his resignation. This demand was repeated in a subsequent communication in which the President stated that:

You will, I know, realize that I do not feel that your mind and my

157. Myers, 272 U.S. at 284 (Brandeis, J., dissenting).
158. Id.
159. Justice Brandeis noted that in addition to the six who held the position that the President had an inherent, unlimited power of removal, Madison himself at first conceded that the President shared the power with the Congress; seven representatives held the position that removal was subject to congressional action; five held the position that the power of removal was shared by the President and the Senate; two held that impeachment was the sole method of removal; three representatives made “desultory” remarks which could not be classified one way of the other; and one representative, Ames, “was only certain that the Senate should not participate in removals. . . .” Id. at 285 n. 73.
160. Id. at 285-86, nn. 74, 75.
162. Hereinafter FTC.
mind go along together on either the policies or the administering
of the Federal Trade Commission, and, frankly, I think it is best
for the people of this country that I should have a full
confidence.163

After Humphrey refused to resign, President Roosevelt wrote a let­
ter to him which stated that he was “removed” from the office of
commissioner of the FTC.164

The Supreme Court recognized two issues in the case. First,
whether provisions of the Federal Trade Commission Act which
provide that the President can remove a commissioner for enume­
rated causes limits the power of the President to remove only for
those enumerated causes;165 and, second, whether the Congress has
the power under the Constitution to limit the power of the Presi­
dent to remove Federal Trade Commissioners.166

On the first issue, the Court held that the intent of Congress
was to limit the President to the enumerated causes for removal.
In resolving this issue, the Court carefully analyzed the powers
that Congress had delegated to the FTC. The Court found that the
FTC, under its power to police unfair methods in interstate com­
erce, had been given the power to issue complaints, investigate,
prosecute, and in some cases hold hearings.167 The Supreme Court
carefully examined the purposes of Congress in creating the FTC.
It found those purposes to be the creation of a “non-partisan”
commission, whose duties are “neither political nor executive, but
predominantly quasi-judicial and quasi-legislative.”168 To exercise
those quasi-judicial and quasi-legislative powers, the objective of
Congress was to create a body of experts who would act with com­
plete impartiality (as distinguished by the Court from ones who
would act politically).169 The Supreme Court reasoned that the
only way that this expertise could be developed was appointments
for a fixed term of years, the method chosen by Congress.170 The

164. Id.
165. The resolution of this issue concerns statutory interpretation, and not
the constitutional issue of whether the President or Congress or the both of them
have removal power; however, the Supreme Court analysis of the FTC statute
sheds considerable light on its approach to the second constitutional issue.
166. Humphrey’s Executor, 295 U.S. at 619.
167. Id. at 620-21.
168. Id. at 624.
169. Id.
170. Id.
Court concluded that recognizing an unrestricted power of removal in the President would thwart that objective.\textsuperscript{171}

On the second issue of the constitutionality of limiting removal to enumerated causes in the Federal Trade Commission Act, the Supreme Court took considerable pains to distinguish the \textit{Myers} opinion.\textsuperscript{172} The Court based its distinction in part on the nature or character of the office concerned. The Court reasoned that \textit{Myers} involved a postmaster, "an executive officer restricted to the performance of executive functions."\textsuperscript{173} The Supreme Court reasoned that the FTC, on the other hand, was "created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to

\begin{footnotesize}
\begin{enumerate}
\item[171.] Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, \textit{except in its selection}, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office. \textit{Id.} at 625,626. (emphasis in original).
\item[172.] ". . . [T]he narrow point actually decided [in the \textit{Myers} decision] was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress." \textit{Id.} at 626.
\item[173.] In explaining the limitation under the principle of \textit{stare decisis}, Justice Sutherland drew upon \textit{Cohens v. Virginia} as authority:
\begin{quote}
It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.
\end{quote}
\textit{Id.} at 627 (quoting \textit{Cohens v. Virginia}, 19 U.S. (6 Wheat.) 264, 399 (1821)).
\end{enumerate}
\end{footnotesize}
perform other specified duties as a legislative or as a judicial aid."

After expressly distinguishing and limiting the Myers decision, the Court directly addressed the issue of the power of the President under the Constitution to remove officers and the power of Congress to create officers who would act independently of the executive and who could be removed by the executive during their terms only for cause as defined by the Congress. The principal rationale was separation of powers theory. Justice Sutherland explained that separation of powers in removal cases consists of

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174. Id. at 628.
175. The Court concluded that "[t]o the extent that it [the FTC] exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government." Id.
176. In the course of the opinion of the Court [in Myers], expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of stare decisis. In so far as they are out of harmony with the views here set forth, these expressions are disapproved. Id. at 626.
177. Relying upon the Myers decision, the Solicitor General argued squarely that the Executive has an inherent power of removal with which the Congress cannot interfere:

If the Court should be of the opinion that §1 of the Federal Trade Commission Act deprives the President of the power to remove a Commissioner except for one or more of the causes stated, we submit that the provision is unconstitutional.

A statute limiting the President's removal power to removal for certain causes is as unwarranted an interference with the executive power as is a statute requiring participation by the Senate in a removal . . . .

If Congress can provide that the President may remove only for inefficiency, neglect of duty, or malfeasance in office, it presumably could provide that he might remove only for malfeasance in office or only for neglect of duty. The result would be that the President would have no power, even with the aid of the Senate, to remove an admittedly inefficient officer in the executive branch of the Government. Humphrey's Executor, 295 U.S. at 616 (argument for the United States).

178. The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. Id. at 629-30.
the principle "that makes one master in his own house" and that this "precludes him from imposing his control in the house of another who is master there."\textsuperscript{179} Applied in \textit{Humphrey's Executor}, this meant that the "master-in-your-own-house" idea would be violated if the executive's assertion of unrestricted power to remove were recognized, for it would exercise a coercive influence which would threaten to impair the impartial and independent functioning of an agency which discharged legislative and judicial duties.\textsuperscript{180}

As part of its discussion of separation of powers issues, the Supreme Court in \textit{Humphrey's Executor} analyzed the Decision of 1789. The analysis was partially under the guise of testing the validity of the history cited in the \textit{Myers'} opinion.\textsuperscript{181} The \textit{Humphrey's Executor} opinion simply concludes that a reading of the "Great Debate" clearly indicates that substantial presidential removal power was only contemplated in connection with executive officers.\textsuperscript{182} The \textit{Humphrey's Executor} Court observed that even Madison, the representative who introduced the original motion which appears to recognize an inherent executive power to remove in the First Congress, appeared to believe that this expansive power applied only to purely executive officers.\textsuperscript{183} The ultimate holding in the \textit{Humphrey's Executor} decision was that the President's power of removal, as opposed to congressional removal for cause, depends on the "character of the office." The \textit{Myers'} holding was confined to "purely" executive officers and no removal could be made of FTC commissioners or other like officers except for statutorily defined cause.\textsuperscript{184} The \textit{Humphrey's Executor} opinion recognized that it had not disposed of all ambiguity, for doubt would exist in the future as to which offices were purely executive and which were partially legislative or judicial.\textsuperscript{185}

A major criticism of \textit{Myers} made in the \textit{Humphrey's Executor} decision was that the framers' intent had not been, as \textit{Myers} asserted, to give the executive an extensive power of removal.\textsuperscript{186} It is here that Justice Sutherland made the most serious criticism of

\textsuperscript{179} Id. at 630.
\textsuperscript{180} Id.
\textsuperscript{181} Id. at 631.
\textsuperscript{182} Id. at 630-31.
\textsuperscript{183} Id.
\textsuperscript{184} Id. at 631-32.
\textsuperscript{185} Id. at 632.
\textsuperscript{186} Id. at 629.
the Myers opinion’s treatment of the history of removal\(^{187}\) Justice Sutherland, referring to the “Great Debate,” noted that James Madison and others had thought that any inherent removal power that the President might have was limited to purely executive officers.\(^{188}\) The Humphrey opinion includes later argument by James Madison that the Comptroller of the Treasury was not purely executive but judicial as well. Therefore, he could not be removed by the President acting alone.\(^{189}\) Madison’s argument makes it quite clear that he understood that only officers performing wholly executive duties could be removed by the President. He argued:

> It will be necessary . . . to consider the nature of this office, to enable us to come to a right decision on the subject; in analyzing its properties, we shall easily discover they are not purely of an executive nature. It seems to me that they partake of a Judiciary quality as well as Executive; perhaps the latter obtains in the greatest degree . . . . This partakes strongly of the judicial character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government.\(^{190}\)

This debate occurred one week after the “Great Debate of 1789,” which makes it difficult to see how Madison could have believed as Chief Justice Taft, in Myers, had insisted he believed.\(^{191}\) Moreover, Justice Sutherland, writing in Humphrey’s Executor, was correct in stating that many of the participants in the “Great Debate” voted for the bill only because it was clear that the office being created was to be a tool of the President.\(^{192}\) For example, one representative argued that “[t]he argument of convenience is strong in favor of the President; for this man is an arm or an eye to him: he sees and writes his secret despatches, he is an instrument over which the President ought to have complete command . . . .”\(^{193}\) Another representative argued:

> If, then, the Secretary of Foreign Affairs is the mere instrument of the President, one would suppose, on the principle of expediency, this officer should be dependent upon him. It would seem

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187. Id. at 630-31.
188. Id. at 631.
189. Id.
190. 1 ANNALS OF CONGRESS, col. 611-12.
191. See supra, notes 137-140 and accompanying text.
192. Corwin, supra note 65, at 362.
193. Id. at 365 (citing 1 ANNALS OF CONGRESS, col. 531-32).
incongruous and absurd, that an officer who, in the reason and nature of things, is dependent on his principal, and appointed merely to execute such business as is committed to the charge of his superior, (for this business, I contend, is committed solely to his charge); I say it would be absurd, in the highest degree, to continue such a person in office contrary to the will of the President.

There are numerous other statements of representatives in the "Great Debate" which disclose that the position which the Supreme Court took in the Humphrey's Executor opinion was the historically correct one regarding the framers' intent. The intent of the framers who participated in the "Great Debate" was that the President have the plenary power to remove only officers with totally executive duties or ones who were to be members of the executive branch who assist the President (a concept very close to an inferior officer under the Appointments Clause). Thus, it was clear that the historical inquiry into the framers' intent in the Humphrey's Executor decision was more accurate, and therefore more persuasive, than the sweepingly asserted positions in the Myers decision. Although persuasive, the Humphrey's Executor decision disclaimed an intent to settle all issues of presidential removal power and purposely left open many questions to be settled in the future.

194. Id. (citing 1 ANNALS OF CONGRESS, col. 542).
195. For example, when the First Congress took up the subject of creating the Foreign Affairs office, on Tuesday, May 19, 1789, they made it clear that they were all, from the beginning of the debate and throughout, concerned with executive departments, that is, departments which were part of the Executive branch. The subject was introduced by Representative Boudinot:

Mr. Boudinot: I rise Mr. Chairman . . . to introduce a subject to the consideration of the Committee . . . . The great Executive departments which were in existence under the late Confederation, are now at an end, at least so far as not to be able to conduct the business of the United States. If we take up the present Constitution, we shall find it contemplates departments of an Executive nature in and of the President: it then remains for us to carry this intention into effect. . . .

Mr. Benson: wished the Committee to consider what he judged to be a previous question, namely how many departments there should be established? He . . . would . . . move that there be established in aid of the Chief Magistrate [the President], three Executive departments . . . .

1 ANNALS OF CONGRESS, cols. 368-370. (emphasis added).
196. To the extent that, between the decision in the Myers case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend
F. Wiener v. United States

The next Supreme Court case which dealt with the removal power of the executive was *Wiener v. United States*.\(^{197}\) In the *Wiener* case, Congress created the War Claims Board to "receive and adjudicate according to law,"\(^{198}\) claims for compensation for internees, prisoners of war, and religious organizations who suffered personal injury or property damage inflicted by the enemy during World War II.\(^{199}\) The Commission consisted of three members, two of whom had to be lawyers.\(^{200}\) The statute by which Congress created the War Claims Board provided that the commissioners were to be appointed by the President with the advice and consent of the Senate.\(^{201}\) The statute also provided that the Commission would wind up its affairs three years after the statute of limitations for filing claims.\(^{202}\) The statute contained no other definition of the terms of the commissioners and there were no provisions for removal by the President or otherwise.\(^{203}\)

Wiener was nominated by President Truman and confirmed in 1950. In 1953, President Eisenhower requested his resignation, but Commissioner Wiener refused. President Eisenhower then removed Wiener.\(^{204}\) Wiener subsequently sought back pay from the time of his removal until the War Claims Board was dissolved.

to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they arise.


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198. Id. at 350.
199. Id.
201. Id.
203. Id.
204. *Wiener*, 357 U.S. at 350 (the President stated in removing Wiener: "I regard it as in the national interest to complete the administration of the War Claims Act of 1948, as amended, with personnel of my own selection").
The Supreme Court, in an opinion written by Justice Frankfurter, held that Wiener had been unconstitutionally removed by the President.\textsuperscript{206} The opinion recognized the \textit{Myers} and \textit{Humphrey's Executor} opinions as the leading Supreme Court pronouncements on the subject of presidential removal. The Court noted that the \textit{Humphrey's Executor} decision, which had drastically limited the scope of the \textit{Myers} precedent, was now the controlling precedent.\textsuperscript{206} The Court also noted that in the present case, Congress had said nothing about removal. In such case, under the \textit{Humphrey's Executor} principal holding, with respect to an officer who was not purely executive\textsuperscript{207} and who was to exercise his judgment without permission or interference of any other officer of government,\textsuperscript{208} the power of removal by the President exists only if Congress has conferred it.\textsuperscript{209} The \textit{Wiener} opinion interpreted the rationale of \textit{Humphrey's Executor} for this distinction between the absolute executive power of removal in case of purely executive officers on the one hand and those whose job requires freedom from executive interference on the principle that one who “holds his office only during the pleasure of another”\textsuperscript{210} will not be able to exercise independent judgment. Thus in \textit{Wiener}, the Supreme Court interpreted \textit{Myers} and \textit{Humphrey's Executor} together to stand for the following ideas: first, from \textit{Myers}, the President has inherent removal powers over purely executive officers; second, with officers who perform duties which are to involve independent judgment, it is entirely within the power of Congress to define the terms of removal of such officers; and third, in such case the President has only such power as the Congress has conferred upon him.

In the \textit{Wiener} case, Justice Frankfurter reasoned that these principles required the Court to search for the intent of Congress regarding removal.\textsuperscript{211} The way to discover that intent in spite of the Congressional lack of explicitness was, according to Justice Frankfurter, to examine the “nature of the function[s]” and the

\begin{footnotes}
\item[205] \textit{Id} at 356.
\item[206] \textit{Id.} at 352.
\item[207] \textit{Id}.
\item[208] \textit{Id.} at 353.
\item[209] \textit{Id}.
\item[210] \textit{Id}. (quoting \textit{Humphrey's Executor}, 295 U.S. at 625-26).
\item[211] “... And can the inference fairly be drawn from the failure of Congress to provide for removal that these Commissioners were to remain in office at the will of the President? For such is the assertion of power on which petitioner’s removal must rest.” \textit{Id}. at 353-54.
\end{footnotes}
duties which Congress delegated to the War Claims Board. After reviewing the history of the legislation which created the War Claims Board, the Court had no difficulty concluding that the Board was created as an adjudicatory body which was to decide cases on the merits and according to law. This meant that Congress intended the Board to be free from control or coercive influence. It must be inferred that Congress did not wish the “Damocles sword of removal by the President” to hang over the Board because the executive wished to have his own men on that body.

Wiener did not engage in any historical analysis, but merely interpreted and applied the *Humphrey’s Executor* decision as a precedent. Nevertheless, the Wiener interpretation carried the *Humphrey’s Executor* holding several steps further and added several refinements to the holding of that case. First, in *Wiener*, the President’s removal power with regard to officers who were not purely executive was held to be strictly restricted, even though Congress had said nothing at all about removal, whether for cause or otherwise. This was arguably an extension of *Humphrey’s Executor* in that Congress had made some provision for removal for cause there, but had said absolutely nothing about removal for cause or otherwise in *Wiener*. Second, the Supreme Court in the *Wiener* decision made the nature of the function or duty which the agency was to perform serve as a principal indicator of congressional intent on the subject of removal. This position assumes that these duties and functions can be consistently described or characterized in order to determine congressional intent. Needless to say, this approach vests very substantial power of interpretation or power to announce congressional intent in the Supreme Court.

**G. Bowsher v. Synar and Morrison v. Olson**

More recently, the Supreme Court decided two cases which deal with the removal power. These cases were *Bowsher v. Synar*, and *Morrison v. Olson*. In *Bowsher*, Congress passed the Balanced Budget and Emergency Deficit Control Act of

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212. *Id.* at 353.
213. *Id.* at 354-55.
214. *Id.* at 355.
215. *Id.* at 356.
1985,\textsuperscript{218} also known as the Gramm-Rudman-Hollings Act. Gramm-Rudman-Hollings was an attempt by Congress to reduce the federal deficit. Generally, the Act attempted to gradually reduce the federal deficit by establishing a procedure for several officers to follow each year over a five year period.\textsuperscript{219} This procedure would reduce federal expenditures until the deficit had been reduced. The Act provided that the Director of the Office of Management and Budget (OMB) and the Director of the Congressional Budget Office (CBO) would estimate the deficit for a current year, then decide how much it would be necessary to cut from the budget in that year.\textsuperscript{220} OMB and CBO would transmit their estimate to the Comptroller General, who would review it, and decide how to reach the statutorily mandated reduction in the deficit for that year.\textsuperscript{221} The Comptroller General would then transmit a report to the President, who was obligated to issue sequestration orders to reduce spending on various programs.

The Act was attacked on separation of powers principles.\textsuperscript{222} The United States District Court for the District of Columbia held that the Act was not an unconstitutional delegation of legislative power, but that it was unconstitutional because it assigned an executive function to an officer, the Comptroller General, who was removable by Congress. Since the Congressional removal power meant that the legislature had "here and now subservience"\textsuperscript{223} over an executive officer, the district court reasoned that the principle of separation of powers had been violated.\textsuperscript{224}

The Supreme Court affirmed the decision in a majority opinion written by Chief Justice Burger.\textsuperscript{225} Generally, the Chief Justice reasoned that the principles of separation of powers and checks and balances mean that each branch must be independent of the

\textsuperscript{218} Pub. L. 99-177, 99 Stat. 1038, 2 U.S.C.A. § 901 et seq. This statute will hereinafter be referred to as the Act or Gramm-Rudman-Hollings.
\textsuperscript{219} 2 U.S.C.A. § 901.
\textsuperscript{220} 2 U.S.C.A. § 901(a)(2).
\textsuperscript{221} 2 U.S.C.A. § 903.
\textsuperscript{222} The action attacking the statute was brought by a U.S. Representative, Michael Synar, and several other representatives on the basis that an unconstitutional delegation had occurred, and co-plaintiffs were the members of a federal union.
\textsuperscript{224} A direct appeal was taken to the Supreme Court under a statutory provision for such appeal contained in section 275 of the Act.
\textsuperscript{225} Justices Brennan, Powell, Rehnquist and O'Conner joined in the majority opinion.
others. Therefore, the power of removal cannot be exercised by one branch over officers of another branch.\textsuperscript{226} The majority then reasoned and concluded: first, that the Comptroller General performs executive functions under Gramm-Rudman-Hollings;\textsuperscript{227} second, that he is removable by the legislature under provisions of the statute which created the office of Comptroller General;\textsuperscript{228} and therefore, Gramm-Rudman-Hollings is unconstitutional because the removal power over the Comptroller General, exercisable by the legislature makes him, an executive officer, subservient to another branch, the legislature.\textsuperscript{229} The process of reasoning and analysis in reaching these conclusions was as follows. First, the majority reasoned that because the statute which creates the post of Comptroller General provides for removal for five different enumerated causes, the Comptroller General can be removed by impeachment or by joint resolution of both houses of Congress.\textsuperscript{230} Arguments to the contrary notwithstanding, the Chief Justice then turned to the legislative record and found evidence that the intent of the removal for cause provision was to bring the Comptroller General under the control of Congress.\textsuperscript{231} He argued that not only was this the intent of Congress, but also that the effect of removal provisions of such breadth was to make the Comptroller General subservient to Congress. Moreover, in response to an argument in Justice White's dissent that a realistic look at these removal provisions indicates that the Comptroller General is "unlikely" to be removed by Congress.\textsuperscript{232} The Chief Justice’s response illustrated

\textsuperscript{226} Bowsher, 478 U.S. at 722.
\textsuperscript{227} Id. at 732-33.
\textsuperscript{228} Id. at 728.
\textsuperscript{229} Id. at 727.
\textsuperscript{230} Id.
\textsuperscript{231} . . . This [for cause removal] provision was included, as one Congressman explained in urging passage of the Act, because Congress "felt that (the Comptroller General) would be brought under the sole control of Congress, so that Congress at the moment when it found he was inefficient and was not carrying on the duties of his office as he should and as the Congress expected, could remove him without the long, tedious process of a trial by impeachment . . . .

. . . Representative Hawley commented: "[H]e is our officer, in a measure, getting information for us . . . . If he does not do his work properly, we, as practically his employers, ought to be able to discharge him from office."
\textit{Id.} at 728.
\textsuperscript{232} Id. at 730.
ion was incorrect: first, in focusing upon a feature of the legislative scheme which is of minimal significance and secondly, in concluding that a statutory scheme which does not pose a substantial threat to fundamental separation of powers themes is unconstitutional.\textsuperscript{239} The first part of his argument was that the limitation on removal by the President, which Congress imposed in the Act, was not a violation of separation of powers because it does not prevent the executive branch from performing its constitutionally assigned functions.\textsuperscript{240} He also reasoned that, "[o]nly where the potential for disruption [of the executive branch]"\textsuperscript{241} is present, do separation concerns become paramount. In making the inquiry into whether that disruption has occurred and whether it is justified by a need to promote objectives within the constitutional power of Congress, "formalistic and unbending " rules should not be followed.\textsuperscript{242} In the case before the Court, Justice White argued that determining levels of federal spending is not a function central to the presidency and appropriations matters are peculiarly within the power of Congress.\textsuperscript{243} Moreover, Congress created a precise set of criteria for the Comptroller General to follow in the Act in order to minimize the policy of setting power and duties of that officer.\textsuperscript{244} Thus, the core functions of the executive branch were not interfered with by Gramm-Rudman-Hollings.

In addition, Justice White rejected any argument based upon the Chadha decision which was relied upon by the majority. In the first place, he argued that the removal power which was described by the majority as having considerable "breadth,"\textsuperscript{245} is in fact quite narrow. This is so, he argued, because removal can occur only for violation of one of five precisely drawn reasons, and because removal requires a majority of both houses and a failure of the President to veto.\textsuperscript{246} Therefore, as a practical matter, it would be nearly impossible for Congress to remove the Comptroller General. Justice White argued that certainly such difficult-to-satisfy removal provisions prevented any subservience by the Comptroller General.

\begin{itemize}
\item \textsuperscript{239} \textit{Id.}
\item \textsuperscript{240} \textit{Id.} at 762.
\item \textsuperscript{241} \textit{Id.} at 763.
\item \textsuperscript{242} \textit{Id.} at 763.
\item \textsuperscript{243} \textit{Id.}
\item \textsuperscript{244} \textit{Id.} at 764.
\item \textsuperscript{245} \textit{Id.} at 729.
\item \textsuperscript{246} \textit{Id.} at 767.
\end{itemize}
to the Congress. Moreover, he persuasively argued that the Gramm-Rudman-Hollings’ provisions for removal satisfy the bicameral passage and presidential presentment provisions which the Supreme Court insisted upon in the Chadha opinion for any type of legislative action. The most vigorously argued portion of Justice White’s dissent was his position that the true question in the case was whether there was a real threat of “encroachment or aggrandizement” by the legislature. The “for cause” provisions for removal and the President’s role in removal make it impossible for Congress to be encroaching or aggrandizing. He argued that the practical result of these substantive and procedural provisions is to make the Comptroller General one of the most independent officers in government and he concluded that thus, there is absolutely no threat to separation of powers principles.

One of the most interesting portions of the Bowsher opinion is the majority’s view of separation of powers. This view was built on examination of the intent of the framers of the Constitution, upon the Decision of 1789, and upon the precedents of Myers v. United States, Humphrey’s Executor v. United States, and Wiener v. United States. Beginning with a general recognition that the framers of the Constitution adopted separation of powers in order to diffuse power and secure individual liberty, the Court also recognized that checks and balances were an integral part of separation theory. This meant, according to the Chief Justice, that the framers provided for “a vigorous legislative branch and a sepa-

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247. Id.
248. Id. at 767-68.
249. Id. at 770.
250. Id.
251. Id. at 733.
252. See supra notes 119-142 and accompanying text.
253. See supra notes 155-189 and accompanying text.
254. See supra notes 190-199 and accompanying text.
255. . . . The declared purpose of separating and dividing the powers of government, of course, was ‘to diffus[e] power the better to secure liberty.’ Justice Jackson’s words [in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1953)] echo the famous warning of Montesquieu, quoted by James Madison in THE FEDERALIST No. 47, that ‘there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates’ . . .

Bowsher, 478 U.S. at 721 (citations omitted).
256. Id. at 722.
rate and wholly independent executive branch. According to the Chief Justice, this means that in the removal area, the Constitution does not "contemplate" an active role for Congress in supervising officers who execute laws. Once an appointment has been made on the nomination of the executive with the advice and consent of the Senate under Article II, section 2, Congress can remove the appointee only by impeachment. The Chief Justice concluded that any direct congressional role in removal of officers involved in execution beyond impeachment is inconsistent with principles of separation of powers.

The Chief Justice found justification for these conclusions in the Decision of 1789, and the Myers, Humphrey's Executor and Wiener decisions. There, Justice Burger argued, Madison's position, that the Congress could have no role in removal of executive officers except by impeachment, had prevailed. The Chief Justice then analyzed briefly the Myers, Humphrey's Executor, and Wiener decisions. Surprisingly (to this writer) he concluded that those decisions were perfectly consistent. He distinguished Humphrey's Executor from Myers on the basis that a different issue emerged in Humphrey's Executor: whether Congress could limit the president's power of removal of a Federal Trade Commissioner. He also noted that the Humphrey's Executor decision itself reaffirmed its holding that Congressional participation in the removal of executive officers is unconstitutional on the basis of "crucial" separation of powers considerations. The Chief Justice observed that the Wiener decision simply followed Humphrey's Executor and concluded that "in light of these precedents," Congress cannot remove an officer charged with executive duties except by impeachment.

Those parts of the majority opinion in Bowsher which relate to the intent of the framers, the Decision of 1789, and the Myers, Humphrey's Executor and Wiener decisions are inaccurate or con-

257. Id.
258. Id. at 722.
259. Id. at 723.
260. Id.
261. Id. (The Chief Justice also argued that the Decision of 1789 was "weighty evidence" of the Constitution's meaning because so many of the members of the First Congress were framers of the Constitution).
262. Id. at 725.
263. Id.
264. Id. at 725-726.
fused. There can be no doubt that the majority's understanding of the history of separation of powers and of the removal power of the executive and legislature, as expressed by the Chief Justice, were powerful determinants of the outcome. That understanding was based in large part on a version of separation of powers and removal which is questionable, and which, as a result, seriously undermines the authoritativeness of the majority opinion. Direct comparison with the majority position illustrates numerous problems.

In the first place, the major source relied upon by Chief Justice Burger for his version of the framers' intent and the meaning of the Decision of 1789 was the Myers opinion. It has already been pointed out how seriously the historical inaccuracies in the Myers opinion undermine the authority of that case as a precedent. There is considerable agreement that the Decision of 1789 did not represent the understanding of more than a few of the signers of the Constitution that the executive had inherent removal power. In fact, the majority, who voted for that decision, did so not because they believed that the executive had inherent general removal power, but because of wholly different opinions about the removal power. The Chief Justice's position that the meaning of James Madison's arguments in the "Great Debate" was that the executive possessed extensive inherent removal power is probably inaccurate. It has been pointed out above, in connection with the Humphrey's Executor opinion, that one week after the "Great Debate," Madison clearly and unequivocally stated that the executive should have removal power only over officers who are members of the executive branch.

The Chief Justice's analysis of the Humphrey's Executor precedent was also inaccurate. His reconciliation of the Humphrey's Executor decision with the Myers decision stated that those cases had virtually the same holdings on the subject of separation of powers and removal. However, the Humphrey's Executor deci-

265. Id. at 723. (for example, the citation which the Chief Justice offers in Bowsher for his explanation of the Decision of 1789 is the Myers case).
266. See supra notes 145-160 and accompanying text.
267. Myers, 272 U.S. at 284-85. (Brandeis, J. dissenting) (eighteen representatives of twenty-four who participated in the "Great Debate" did not hold the position that the executive had unlimited removal power).
268. See supra notes 157-160.
269. See supra notes 189-191 and accompanying text.
270. The Chief Justice rested primarily upon a very general statement of sep-
sion did not hold as the Chief Justice claimed.\textsuperscript{271} Instead, the decision in \textit{Humphrey's Executor} drew a clear distinction between officers whose duties were wholly or purely executive, such as a postmaster, and other types of officers who did not have wholly executive duties but who were required to perform legislative and judicial duties, such as members of the Federal Trade Commission, in which they were required to exercise independent judgement in applying a statute.\textsuperscript{272} The statements which the Chief Justice wrote in the majority opinion about the \textit{Humphrey's Executor} and \textit{Myers} decisions resting on identical separation of power principles is accurate at a level of generality which is nearly useless, that is both opinions recognize separation of powers, since that concept is undeniably part and parcel of the Constitution. On the other hand, the version of separation of powers which each of those opinions follows to reach their holdings are wholly dissimilar. \textit{Myers} reasons that separation of power in connection with the Appointments Clause and removal means that the executive has almost unlimited inherent removal power because of implications from the doctrine of separation of powers. \textit{Humphrey's Executor} reasons that whenever Congress has created an officer who has executive, quasi-judicial and quasi-legislative duties which require independent judgement, then the executive cannot remove him except for causes specified in the statute creating the office. This position is also premised in large part on the \textit{Humphrey's Executor} majority's understanding of the doctrine of separation of powers. The Chief Justice's reconciliation in the \textit{Bowsher} opinion of the case of \textit{Wiener v. United States}\textsuperscript{273} with the \textit{Myers} and \textit{Humphrey's Executor} opinions was equally unpersuasive, for in the same fashion he simply stated that the \textit{Wiener} opinion reaffirmed basic separation of powers principles just as \textit{Myers} and \textit{Humphrey's Executor} had

\textsuperscript{271} See supra notes 161-196 and accompanying text.

\textsuperscript{272} \textit{Humphrey's Executor}, 295 U.S. at 628.

\textsuperscript{273} 357 U.S. 349 (1958).
done. The Wiener decision did far more than that. In the first place, Wiener expressly accepted the position of the Supreme Court in Humphrey's Executor, and not of Myers, on the subject of separation of power and removal. Based upon the Humphrey's Executor decision, Wiener held that, "if an officer is not purely executive and is to exercise independent judgement, then, not only does the President not have the inherent general power to remove him, but the President only has such power if the Congress gives it to him." To state it another way, Humphrey's Executor and Wiener interpret the executive removal power in the context of separation of power principles to mean that, with officers who exercise executive functions but who also exercise judicial and legislative functions, the Constitution does not confer inherent, much less extensive, removal power on the executive. Moreover, Congress defines the power which the executive does possess by statute, for the President can remove such officers only for the causes specified in the statute creating the office, and only if the statute provides for removal for cause by the executive. The statements in Bowsher which suggest that the Myers, Humphrey's Executor and Wiener decisions are consistent in their understanding of separation of powers and the history of that doctrine are thus confusing at best, and misleading at worst. The short of it is that the opinion of the majority in Bowsher contradicts the holdings of Humphrey's Executor and Wiener. It also expresses a different version of the intent of the framers on the genesis, history, and interpretation of the appointment and removal powers and the concept of separation of powers.

The historical understanding of the Bowsher majority is also flawed in another, equally serious, but less obvious way. The Chief Justice assumes in the Bowsher majority opinion that there are clear, bright lines which separate the three branches of government and that there is a structural purity of function intended to be part of the Constitution which was drafted into it by the framers. This "bright line" concept of separation of powers assumes or implies that it is easy to separate executive, judicial, and legislative function, and that each branch performs only "pure" functions appropriate for that branch. Under this concept, the executive branch performs only totally executive function, the legislative

275. See supra notes 197-215, and accompanying text.
276. See supra notes 207-209 and accompanying text.
branch performs only wholly legislative function, and the judicial branch performs only utterly judicial functions.\textsuperscript{277} The flaw in this line of reasoning is that this interpretation of separation of powers did not exist at the time the Constitution was drafted, nor at the time of the Decision of 1789. For example, a major objection to the concept of separation of powers was that, as drafted into the proposed Constitution, it did not maintain clear separation of powers, but permitted what was then known as "blending."\textsuperscript{278} James Madison's defense of the Constitution in the Federalist papers vigorously defended the concept of blending and there can be no doubt that the understanding of Madison himself (and this is the same James Madison who was cited by the majority in \textit{Bowsher} for the proposition that absolute separation must be maintained\textsuperscript{279}) was that there was no absolute, purely structural separation of powers in the Constitution.\textsuperscript{280} In fact, it was the very concept of blending of powers which was the cornerstone of Madison's concept of checks and balances.\textsuperscript{281} To imply or assume that Madison was a believer in absolute, bright line separation of powers is simply to ignore the historical record and the writings of Madison on the topic of separation of powers. Thus, the majority opinion in the \textit{Bowsher} case rests upon dubious history and precedents. It misunderstands and misdescribes the debates over separation of powers and appointment and removal at the Constitutional Convention. It also misinterprets the meaning of the Decision of 1789 and propagates those errors in its interpretation of the principal precedents on the subject of the executive removal power.

The most recent case on the removal power, \textit{Morrison v. Olson},\textsuperscript{282} is a considerable change from the approach of the \textit{Bowsher} majority on the subject of the removal power and separation of power. The Ethics in Government Act\textsuperscript{283} established a procedure for appointing an "independent counsel" to investigate violations

\begin{footnotes}
\item[277] E.g., Chief Justice Burger wrote in the majority opinion in \textit{Bowsher} that the Federal government is divided into "three defined categories." 478 U.S. at 721. "The framers recognized that, in the long term, structural protections against abuse of power were critical . . . ." Id. at 730.
\item[278] See supra notes 42-48 and accompanying text.
\item[279] \textit{Bowsher}, 478 U.S. at 723.
\item[280] See supra notes 50-59 and accompanying text.
\item[281] Id.
\end{footnotes}
of federal criminal law by high ranking officers of the Executive Branch. The Act provides that, upon receipt of information which discloses that there may have been a violation of federal criminal law, the Attorney General is to conduct a preliminary investigation. After the investigation is completed, the Attorney General is required to report to a panel of the federal Courts, called the Special Division, which has the task of appointing independent counsel. If the Attorney General has determined that there are reasonable grounds to believe that further investigation is justified, then he is required to apply to the Special Division for appointment of independent counsel. After receiving this application from the Attorney General, the Special Division is required to appoint an independent counsel and define that counsel’s jurisdiction. After appointment, the independent counsel has virtually all of the powers of the Attorney General to investigate the crimes within his jurisdiction as defined by the statement of the Special Division. The Attorney General is required to suspend his investigation at that time. The independent counsel remains in office until his investigation or prosecution is completed, or until he has been removed for good cause by the Attorney General.

In Morrison v. Olson, Olson, the appellee, was an assistant attorney general for the Office of Legal Counsel for the EPA. In connection with a dispute over the “Superfund Law,” and in compliance with the advice of the Justice Department, the President ordered the Administrator of the EPA to claim executive privilege and withhold certain documents from subcommittees of the House of Representatives which were holding hearings on the Superfund. Although the controversy was ultimately compromised with the release of part of the documents which the House Subcommittees sought, the House Judiciary Committee later began an investigation into the part played by the Justice Department in the

286. Morrison, 108 S. Ct. at 2603 (the judicial panel will be hereafter referred to as the Special Division).
289. 108 S. Ct. at 2604.
290. 108 S. Ct. at 2604-05.
"Superfund Hearing" controversy. Olson testified before a judiciary subcommittee.

Later, members of the Judiciary Committee issued a report which suggested that Olson had given false or misleading testimony at the subcommittee hearing. This report was sent to the Attorney General. He conducted a preliminary investigation, and concluded that an independent counsel should be appointed to investigate and/or prosecute Olson in accordance with the Act, and applied to the Special Division for appointment of a special counsel. Olson refused to respond to subpoenas issued at the request of the special counsel on the basis that the Act was unconstitutional. After the district Court held that it was not unconstitutional, the court of Appeals for the District of Columbia Circuit reversed. The court of appeals held: first, that the special counsel was not an inferior officer under the Appointments Clause and therefore had to be appointed by the President with the advice and consent of the Senate; second, that the Act also violated the Appointments Clause because it gave the power to a judicial officer to appoint an official performing a "core" function in the executive branch; third, that the delegation of several powers under the Act to the special Division, a part of the judicial branch, violated Article III of the Constitution; fourth, that the provisions of the Act which prevent the Attorney General from removing the special counsel from office violate separation of powers; and fifth, that the Act interferes with the executive's duty to faithfully execute the laws.

In a majority opinion authored by Chief Justice Rehnquist, the Supreme Court reversed. Justice Scalia dissented. Specifically, the majority held that the special counsel is an inferior officer under the Appointments Clause. Therefore, Congress has the power to provide for his appointment, that the power of the Special Division to appoint the special counsel is not a prohibited interbranch appointment under the Appointments Clause; that the duties of the Special Division do not violate Article III; that the Act does not interfere with the executive's duty to faithfully execute the laws. The majority analysis of the Appointments Clause and of separation of powers concepts are matters of particular importance for the analysis of removal and separation of powers;

293. 108 S. Ct. at 2606.
294. 108 S. Ct. at 2607.
therefore, those issues from the *Morrison* opinion will be analyzed in some detail.

The Supreme Court rejected appellee's argument that the special counsel was a principal officer under the Appointments Clause. Although the majority conceded that there was little guidance in the Appointments Clause on the difference between inferior and principal officers, the Court concluded that the circumstances in the present case clearly indicate that the special counsel is an inferior officer. The Court reasoned that numerous factors combine to lead to the conclusion that the special counsel is an inferior officer. These factors are: she is subject to removal by a higher executive branch official, under the Act, she has limited duties, the office is of limited jurisdiction in that the special counsel can only act within the special and specific jurisdiction defined by the Special Division in her appointment and her tenure is limited.

The majority also rejected the argument that the Special Division's power to appoint constituted an interbranch appointment which was prohibited by the Appointments Clause. The analysis first examined the text of the Appointments Clause and used the case of *Ex Parte Siebold* as its major precedent. The Court noted that the *Siebold* case vested "significant discretion" in Congress to vest appointment power of inferior officers and that there was no reason to depart from the law as it had been defined in

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295. "The line between "inferior" and "principal" officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn." 108 S. Ct. 2608.

296. *Id.*

297. *Id.* (The Special Prosecutor may be removed by the Attorney General for cause).

298. The Supreme Court reasoned that the "appellant is empowered by the Act to perform only certain, limited duties." *Id.* The majority conceded that the special prosecutor had full power within the area of his jurisdiction. However, the Court noted that the special prosecutor may only prosecute against certain specific officers, and for certain specified federal crimes, and there is no power to formulate policy. *Id.* at 2608-09.

299. Not only is the Act itself restricted in applicability to certain federal officials suspected of certain serious federal crimes, but an independent counsel can only act within the scope of the jurisdiction that has been granted by the Special Division pursuant to a request by the Attorney General.

108 S. Ct. at 2609.

300. *Id.*

301. *See supra* notes 111-118 and accompanying text.
The Court also relied upon the history of the drafting of the Appointments Clause at the Constitutional Convention. The majority observed that the principal problem which the delegates debated was who should have the authority to appoint judges. Several proposals to transfer this power to the President were defeated. Only after agreeing on the language at the beginning of the Appointments Clause for Presidential appointment with advice and consent of the Senate for principal officers, was the excepting Clause proposed by Governor Morris. Madison replied that the proposed Clause did not go far enough because it did not give the power of appointment below heads of departments. The majority observed that there was nothing stated in the debate nor in the text of the Appointments Clause about interbranch appointments, and it is clear that Congress intended to have substantial power in the area.

A major part of the Morrison opinion examined and rejected the argument that the Act violated separation of powers principles. Chief Justice Rehnquist reasoned that there were two separation

303. Id.
304. Id. (citing 1 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION, 232-233 (1966)).
305. "[A]mbassadors, and other public Ministers, Judges of the Supreme Court, and all other Officers of the United States whose appointments are not otherwise herein provided for." 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION, 498-499 (1966) (as cited in, Morrison, 108 S. Ct. at 2610).
306. 108 S. Ct. at 2610 (citing 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION, 627 (1966)). The entire exchange is even more emphatic than the Supreme Court opinion reveals:

Art. II. sect. 2 (paragraph 2) to the end of this, Mr. Morris moved to annex "but the Congress may by law vest the appointment of such inferior Officers as they think proper, in the President alone, in the Courts of law, or in the heads of Departments." Mr. Sherman made the motion.

Mr. Madison. It does not go far enough if it be necessary at all—Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices.

Mr. Morris. There is no necessity. Blank Commissions can be sent—2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 627 (1966).
307. Morrison, 108 S. Ct. at 2611. The Court also pointed out, however that the power of Congress was not unlimited, and as held in the Siebold decision, it is limited by separation of power concerns, so that the function of one branch cannot be impaired by the assignment of the appointment power, and the Siebold principle that there could be no incongruity between the functions normally performed by the assignee of the appointment power and the performance of their normal duties.
issues posed by the Act. The first was whether the removal provisions of the Act which restricted the executive's representative, the Attorney General, from removing the special counsel except for cause, "impermissibly interferes with the President's exercise of his Constitutionally appointed functions." The second issue was whether the Act, taken as a whole, violated separation of powers principles by limiting the President's capability of controlling the prosecutorial powers which the special counsel exercises under the Act.

In dealing with the first issue, the majority was immediately faced with the Bowsher and Myers precedents. For the majority, those cases were clearly distinguishable. Bowsher was distinguishable because it involved an attempt by Congress to reserve to itself power of removal over an officer who was engaged in executing the law. Myers was distinguishable because it involved a Congressional attempt to involve itself in the removal of an executive official. However, the majority reasoned that the Act does not involve a Congressional attempt to play a role in removal of executive officers but places that removal power squarely and clearly in the hands of the executive. The Court reasoned that such placement of removal power in the executive branch makes the Morrison facts more akin to the facts of Humphrey's Executor and Wiener. The majority in Morrison believed that the statements in Myers, that the President had all-inclusive or inherent removal power over all officers in government who were not part of the judicial or legislative branch, were mere dicta. The Supreme Court reaffirmed that the Humphrey's Executor decision had recognized that Congress, in creating agencies which discharge judicial and legislative functions as well as executive ones, has the power to fix the term of office of officials within the agency and to define the causes for removal. The majority also observed that in the Wiener decision, the failure to fix any cause for removal for officers with adjudicatory tasks which were intended by the legislature to be performed in a non-political fashion, was sufficient to insulate such officers

308. 108 S. Ct. at 2616.
309. Id.
310. Id.
311. See supra notes 119-159 and 216-278 and accompanying text.
313. Id.
314. Id. at 2617.
315. Id.
from removal by the executive. Thus, in considering the question of which precedents control on the issues of whether restrictions on the removal power of the executive interfere with the President's power to faithfully execute the laws, the majority held that Humphrey's Executor and Wiener control, provided that Congress is not the agency given the power to remove or that Congress is not attempting to arrogate to itself an executive duty or function.

The appellee strenuously argued that the Humphrey's Executor and Wiener precedents were not relevant because the Act involves interference with a "core executive function" and because the special counsel is a "pure executive" officer. Under Myers, he argued, the President must have complete discretion to remove such an official. The position of the majority in rejecting this position is the heart of the separation of powers analysis of the opinion. The Chief Justice explained that the decision on the question of whether Congress can impose restrictions on removal by the executive cannot turn on such rigid classifications as whether the office involved is "purely executive" or not. This follows for several reasons. First, it is simply too difficult to define or create classifications of "purely executive" or "purely legislative" officials.

... [t]he analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the "executive power" and his Constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II. We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his Constitutional duty, and the functions of the officials in question must be analyzed in that light.

316. Id.
317. 108 S. Ct. at 2622.
318. 108 S. Ct. at 2617.
319. 108 S. Ct. at 2618.
320. "The difficulty of defining such categories of "executive" or "quasi-legislative" officials is illustrated by a comparison of our decisions in cases such as Humphrey's Executor, Buckley v. Valeo, 424 U.S. 1, 140-141, and Bowsher, supra 478 U.S., at ______, 106 S. Ct. at 3211." 108 S. Ct. 2618, n. 28.
321. 108 S. Ct. at 2619.
Applying this test to the Act, the majority concluded that the imposition of a good cause standard neither interfered with executive authority generally, nor did it interfere with the power of the executive to control or supervise the special counsel in a way that was not permitted by the Constitution.\textsuperscript{322}

The majority also concluded that the Act, taken as a whole, does not violate the concept of separation of powers by interfering with the duties and rules of the executive branch.\textsuperscript{323} One of the starting points of the analysis was the observation that, while the framers viewed separation of powers as a self-executing safeguard against encroachment by one branch against another, they did not believe that the three branches of government were to work with total independence.\textsuperscript{324} In examining separation of powers problems, the Court noted that the first and principal inquiry must be whether one branch seeks to usurp the powers of another.\textsuperscript{325} In \textit{Morrison}, although members of Congress could request the Attorney General to apply to the Special Division for appointment of special counsel, the Attorney General has no duty to do so, and the other Congressional duties under the Act were limited principally to receiving reports and oversight.\textsuperscript{326} Thus, there was no legislative usurpation of the executive function. Nor was there any judicial usurpation of executive function, for the rule of the Special Division was quite limited.\textsuperscript{327} The majority reasoned, finally, that the

\textsuperscript{322} Id. The Chief Justice concluded that executive authority was not generally interfered with (e.g., a core function was not disturbed), because the Special Prosecutor is an inferior officer with limited jurisdiction and discretion, and the Majority "simply do not see how the President's need to control the exercise of that [limited] discretion is . . . central to the functioning of the Executive Branch . . . ." The Chief Justice concluded that executive power to control or supervise the Special Prosecutor was not unduly confined because power to remove had not been completely stripped from the executive, and because under the for cause removal provisions the executive has the power to insure that the Special Prosecutor is performing the duties specified by the Act.

\textsuperscript{323} 108 S.Ct. at 2620.

\textsuperscript{324} Id. (the majority opinion cited James Madison in \textit{The Federalist}, No. 47 for this proposition).

\textsuperscript{325} "We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch . . . [T]his case simply does not pose a "dange[r] of congressional usurpation of Executive Branch functions." 108 S.Ct. 2620.

\textsuperscript{326} 108 S.Ct. at 2621.

\textsuperscript{327} . . . We note nonetheless that under the Act the Special Division has no power to appoint an independent counsel \textit{sua sponte}; it may only do so upon the specific request of the Attorney General, and the courts are
Act does not unconstitutionally undermine the powers of the executive branch.\textsuperscript{328} The principal reasons for this conclusion were that the executive has a measure of control through the Attorney General to supervise or remove a special counsel who does not properly execute the Act.\textsuperscript{329}

Justice Scalia’s dissent focused principally upon separation of powers analysis. He began by considering the command of Article II, section 1, clause 1 that the executive power is vested in the President. He argued that this means the President has \textit{all}, not some, of the executive power.\textsuperscript{330} Therefore, he argued if the conduct of a criminal prosecution is the exercise of purely executive power, and if the Act deprives the President of exclusive control over that power, then the Act violates separation of powers principles and is therefore unconstitutional.\textsuperscript{331} Justice Scalia carefully examined these questions and answered both of them in the affirmative. In the first place, he argued, law enforcement functions are “typically” executive in nature and have “always” been conducted by the executive.\textsuperscript{332} Secondly, he argued, there can be no

\begin{itemize}
\item specifically prevented from reviewing the Attorney General’s decision not to seek appointment. In addition, once the court has appointed a counsel and defined her jurisdiction, it has no power to supervise or control the activities of the counsel.
\end{itemize}

\textit{Id.}

\textsuperscript{328} \textit{Id.}

\textsuperscript{329} It is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises . . . . Nonetheless, the Act does give the Attorney General several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel. Most importantly, the Attorney General retains the power to remove the counsel for “good cause,” a power that we have already concluded provides the Executive with substantial ability to ensure that the laws are “faithfully executed” by an independent counsel. No independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General’s decision not to request appointment if he finds “no reasonable grounds to believe that further investigation is warranted” is committed to his unreviewable discretion. The Act thus gives the executive a degree of control over the power to initiate an investigation by the independent counsel. . . . [I]n our view these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.

\textit{Id.} at 2621-2622.

\textsuperscript{330} \textit{Id.} at 2626 (emphasis in original).

\textsuperscript{331} \textit{Id.}

\textsuperscript{332} \textit{Id.} at 2726.
doubt that the Act deprives the President of control for such deprivation is the "whole object of the statute." The fact that the Attorney General has "some" control in the language of the majority, and through him the executive branch, is a misnomer for Justice Scalia, for he argues that in fact the Act accomplished a substantial reduction in the power of the President to control criminal investigations and prosecutions. He concludes this part of his analysis with the observation that, when the majority concedes that it is undeniable that the Act reduces executive control, then "the case is over," because any reduction in the executive's control over investigation and prosecution violates separation of powers principles. For Justice Scalia, the language of Article II is clear and definite: the President's duties include complete control over investigation and prosecution.

In a second part of his analysis, he argued that the majority opinion is a clear break with the Supreme Court precedents, for it substitutes a balancing test for measuring incursions against the President's power instead of traditional separation of powers concepts. That test, he argues, is a standardless, ad hoc announcement which is utterly without precedent. As a result, it cannot be predicted where the incursions on the President's duties will cease.

The approach of the majority in the Morrison case was per-

333. 108 S.Ct. at 2627.
334. Id.
335. . . . Instead, the Court points out that the President, through his Attorney General has at least some control. That concession is alone enough to invalidate the statute, but I cannot refrain from pointing out that the Court greatly exaggerates the extent of that "some" presidential control. "Most important," the Court asserts, is the 'power to remove the counsel for 'good cause.' This is somewhat like referring to shackles as an effective means of locomotion. As we recognized in Humphrey's Executor v. United States, —indeed, what Humphrey's Executor was all about—limiting removal power to "good cause" is an impediment to, not an effective grant of, presidential control.

108 S.Ct. at 2627 (emphasis in original) (citations omitted).
336. 108 S.Ct. at 2628.
337. 108 S.Ct. at 2629.
338. Id.
339. 108 S.Ct. at 2629-2630. Justice Scalia also argued that the majority's interpretation of the Appointments Clause was erroneous and not consistent with Supreme Court precedents, and that the primary check against prosecutorial abuse is a political one.
suasive, and certainly more consistent with history and precedent than the Bowsher case. The analysis of the Appointments Clause questions in Morrison is as good as one could expect from the cryptic Constitutional language. The examination of the inferior officer issue in a manner which is textual and pragmatic makes sense, especially in view of the fact that the majority searched for guidance in the intent of the framers but found none. The handling of the interbranch appointment issue was also carefully analyzed. The majority turned to the pragmatic approach of the Siebold precedent after finding that history gave no guidance because the framers were arguing about other matters. In short, the majority approach in Morrison was a balanced, reasonable one which, in the absence of express textual guidance in the Appointments Clause, sought to reach a realistic result by interpreting that Clause in the context of the Constitutional concept of separation of powers. The majority used Constitutional context to give meaning to the language of the Appointments Clause. This method was preferable to imbuing meaning into that Clause as a result of ideology, as the majority had apparently done in the Bowsher opinion.

The majority treatment of the separation of powers issues was historically and conceptually more accurate than the treatment of that problem in Bowsher. In the first place, the reliance of Humphrey’s Executor and the rejection of Myers helped to insure that the decision of the Supreme Court in Morrison would be consistent with the framers’ conceptions of separation of powers. This was so because the position of the Court in the Humphrey’s Executor decision correctly assessed the intent of the participants in the “Great Debate” on the Decision of 1789 and the debates at the Constitutional convention on separation of powers and removal. This was especially true for the description of Madison’s position. The Morrison majority was also well-advised to reject the Bowsher decision, for the majority in Bowsher unsuccessfully attempted to reconcile the inconsistent precedents in the Myers, Humphrey’s Executor, and Wiener decisions and relied for its history of the framers’ intent on Myers, which was clearly inaccurate. The historical record simply did not reveal enough about the framers’ intent in drafting the Appointments Clause, and the Morrison majority was perceptive enough to realize this inadequacy. The position which they took, to look pragmatically in context at whether the power of the President to execute the laws has been impeded by

340. 108 S.Ct. at 2609.
imposing for cause removal restrictions, has the advantage of preserving the general objectives of separation of power as well as can be gathered from the historical record.

The majority's resolution of the second separation issue, whether the Act as a whole limits the Presidential power to prosecute and thus is unconstitutional, contains the most important insight in the opinion. The recognition that the concept of separation of powers does not define bright line boundaries which exactly seal off and identify each of the three types of powers exercised by the branches under the Constitution is consistent with the ideas of the framers. They recognized that blending—the idea that the powers of the respective branches would not be absolutely sealed off one from another—was an essential part of the American Constitution, and in this feature it differed from the concepts of separation of powers with which the Colonists were familiar. That difference was the subject of spirited debate and discussion before the adoption of the Constitution. Madison staunchly defended it and since the version which Madison defended was the form of Constitution which was finally adopted, it is safe to assume that blending is part of the concept of separation of powers in the United States Constitution. Finally, the crucial inquiry which the *Morrison* majority recognized—whether realistically one branch is seeking to usurp the powers of another—appears to be fully consistent with the philosophy and intent of the framers. And, although it is an inquiry which is general in nature, it does have the advantage of preserving and giving effect to the central idea and purpose of the separation doctrine.

VI. Conclusion

*Morrison v. Olson* is the most recent case involving the executive removal power, and in that case the Supreme Court has addressed two issues which have been part of our jurisprudence since the Constitution was adopted. The Supreme Court dealt with those issues, the extent and breadth of Presidential removal power, and the meaning and impact of separation of powers in removal cases, in a fashion which is consistent with the intent of the framers and with the historical meaning on these subjects.

The *Morrison* decision was consistent with the history and concept of separation of powers. Originating for the colonists with Locke and Montesquieu, that doctrine began as a device to preserve individual rights and liberties by limiting the power of the king along functional lines. However, as explained by these earlier
writers, the doctrine was never concise, and the inability to exactly define the powers of each branch created a major problem in drafting the Constitution. The task of explaining the form which separation of powers took in the then-proposed Constitution fell to James Madison. His argument was essentially that, although exact definitions of the powers of the three branches of government were very difficult, nevertheless separation of powers was a crucial part of the Constitution. Madison argued that attempts to spell out rigid boundaries and precise paper definitions had failed in the state Constitutions which preceded the Constitution. Because of this inability to draw exact boundaries and to exactly define the powers of each branch, Madison defended what was then known as "blending" or mixing of powers of the branches. Madison's classic defense of separation of powers, the doctrine of checks and balances, recognized that powers were difficult to exactly define. Thus there would be some overlap, mixing of function and lack of definition, and that in that situation each branch would act to check the other. Under Madison's scheme of separation of powers a process was created in which ambiguous boundaries and overlap permitted officers of different branches to claim powers claimed by other branches. The very lack of definition and fuzziness of boundaries is what made this dynamic, self-correcting Constitutional process work.

Viewed against this background, it is possible to assess the major decisions and cases on the subject of removal in a new light, and to see that the Morrison decision is fully consistent with earlier precedents which also correctly perceived the intent of the framers.

The earliest was the decision of the First Congress, which has come to be known as the Decision of 1789. Although later cases argued that the language of the statute involved there recognized an inherent executive power of removal, that position only took into account one version of the text of the statute. Upon more careful analysis, the record of the debates discloses that the Decision of 1789 did not stand for the proposition that a large number of Framers of the Constitution believed that the President had inherent removal power. On the contrary, only a few, perhaps as few as six members of the First Congress, believed so.

In the case of Myers v. United States, Chief Justice Taft, who had himself been President before he became a Justice of the

341. 272 U.S. 52 (1926).
Supreme Court, wrote a hymn of praise to the Presidency in which he held that the executive possessed extensive inherent removal power. His chief analytical tool was to conduct a historical search for the framers’ intent at the Constitutional Convention and in the Decision of 1789.

Justice Taft reasoned that the Virginia Plan at the Convention transferred all executive power to the President, but that under the Articles of Confederation, Congress had exercised executive power. He concluded that therefore, this transfer of executive power from Congress to the President meant that the power to remove was transferred to the President along with the general executive power. It can be persuasively argued that Chief Justice Taft’s reasoning is merely unsupported assumption or even speculation. As one Myers dissenter pointed out, it was also true that all Presidential powers were carefully enumerated in the Articles of Confederation, and the same scheme of enumeration of Presidential powers was followed in the Constitution. Therefore, particular Presidential powers exist only if and as enumerated. Since removal is nowhere mentioned except in connection with impeachment, the President has no inherent removal power. A second flaw in the sweeping assertions of inherent Presidential removal power in the Myers decision was its assumption of a broad general concept or philosophy under which the President of necessity had removal power. This concept simply did not exist at the Constitutional Convention. Partisan political battle, practical necessity and realistic political compromise, rather than shared abstract convictions or purposes, were the processes which resulted in the drafting of the Appointments Clause and the various sections of the Constitution dealing with Presidential and Congressional power.

The Chief Justice’s reading of the Decision of 1789 was equally questionable. He relied principally upon the text of the statute which the first Congress enacted for his conclusion: first, that the President’s removal power was the principal issue in the passage of that statute; and second, for his conclusion that the majority of the Representatives believed that the executive possessed broad inherent removal power. He also interpreted remarks which James Madison made in the “Great Debate” on the subject of the President’s removal power literally and out of context. In short, the Chief Justice’s interpretation was simplistic. There were many issues joined at the “Great Debate”, and more importantly, many reasons for representatives to vote for the statute other than a belief in extensive, inherent executive removal power. Probably only
a few representatives of the First Congress believed that the President had inherent removal power. And there is cause to believe that, even among those who argued that the President had broad removal power, they held this belief only because the specific office being created in the Decision of 1789 was clearly and wholly political, a point which James Madison made one week after the Decision.

The reliance of the majority in the *Morrison* case upon *Humphrey’s Executor v. United States* was sound, for that precedent was more probably accurate about the framers’ intent. The Supreme Court in *Humphrey’s Executor* relied on the distinction made in the case of *Marbury v. Madison* that the nature or character of the office concerned is important in a general way to define the extent of the removal power. This was, once again, almost certainly the understanding of James Madison, and very probably the understanding of many other framers. Applied to the Decision of 1789, this reading of the removal power of the President was consistent not only with the text of the statute, but also with the positions taken by most factions in the House in the “Great Debate.”

The *Morrison* majority was also probably closer to the framers’ intent in rejecting or distinguishing the opinion in *Bowsher v. Synar*. The reliance in *Bowsher* on a rigid, structural, sharply bounded concept of separation of powers was, as has been seen, not consistent with the concept of separation of powers as that doctrine existed prior to the adoption of the Constitution or as that doctrine was incorporated into the Constitution. The *Bowsher* opinion is filled with what appear to be historical inaccuracies or misunderstandings. Chief Justice Burger in *Bowsher* relied on the *Myers* decision for his historical analysis, but the historical analysis on the subjects of removal and separation of powers in *Myers* was almost certainly incorrect. The assertions in the *Bowsher* opinion that *Humphrey’s Executor* and *Myers* are similar were disingenuous, for while those opinions both recognize the Constitutional concept of separation of powers generally, as they must, any similarity between the two opinions ends there. The two opinions assert almost wholly opposed versions of the Presidential removal power, which are based upon two inconsistent readings of the his-

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343. 5 U.S. (1 Cranch) 137 (1803).
tory and context of that doctrine and does not reflect the intent of the framers. The assumption of rigid boundaries and definitions for the powers of the three branches simply does not match the understanding of the framers as expressed in The Federalist by Madison. It was recognized there that the problems of definition and overlap between the branches could not be solved in any absolute, rigid manner and so “blending” was necessary in the Constitution.

The decision in Morrison v. Olson is an important opinion, for the Supreme Court in it squarely faced several major removal and separation issues. The holding that for cause restrictions on Presidential removal powers is not an unconstitutional invasion of the power of the executive so long as Congress does not reserve the power to remove to itself is consistent with the history of separation of powers and with the intent of the framers. The Supreme Court’s resolution of that issue realistically recognizes the implications of the “blending” of function which was built into the Constitution: as applied in the Morrison decision, this meant that some overlap, some mixed functions between branches may exist, and that there are no exact boundaries or absolute definitions of power usually specified in the text of the Constitution. Thus, the argument that the case should be decided on the basis of a rigid definition of pure executive power was correctly rejected. The conclusion of the majority in the Morrison opinion that the real test in removal cases is whether realistically one branch is seeking to usurp the power of another is consistent with understanding about separation of powers when the Constitution was drafted, and with the pragmatic political accommodations respecting the power of the branches which the framers included in the Constitution.