Nos. 19-422 & 19-563

IN THE

Supreme Court of the United States

PATRICK J. COLLINS, *et al.*,

Petitioners,

v.

STEVEN T. MNUCHIN, SECRETARY OF THE TREASURY, *et al.*,

Respondents.

STEVEN T. MNUCHIN, SECRETARY OF THE TREASURY, *et al.*,

Petitioners,

v.

PATRICK J. COLLINS, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* JED H. SHUGERMAN IN SUPPORT OF THE COURT-APPOINTED *AMICUS CURIAE*

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INTERESTS OF AMICUS CURIAE[1]

Amicus Curiae Jed Shugerman is a Professor of Law at Fordham University. He is an expert in American legal history. He recently conducted extensive research on the historical records of the first Congress, focusing on the "Decision of 1789." This brief offers new evidence about the original public meaning of Article II and shows that, in fact, the first Congress rejected the unitary executive theory both in debate and in statute. His findings and analysis are contained in recent academic papers,[2] and are part of a forthcoming book on Article II. They are presented to the Court in support of the Court-appointed Amicus Curiae, Professor Aaron Nielson, Esquire.

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1. The parties have consented to the filing of amicus briefs in this case. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No such monetary contributions were made by anyone other than amicus and their counsel.

2. Jed Shugerman, *The Indecisions of 1789: Strategic Ambiguity and the Imaginary Unitary Executive (Part I)*, Fordham Law Legal Studies Research Paper No. 3596566 (May 8, 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3596566; Jed Shugerman, *The Decisions of 1789 Were Non-Unitary: Removal by Judiciary and the Imaginary Unitary Executive (Part II)*, Fordham Law Legal Studies Research Paper No. 3597496 (May 10, 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3597496; Jed Shugerman, *The Executive Vesting Clause Did Not Imply Exclusive Removal* (unpublished manuscript) (on file with author).

SUMMARY OF ARGUMENT

Petitioners and the *en banc* Court of Appeals below have rested their contention that the Constitution grants the President at-will removal authority over the head of the Federal Housing Finance Agency (FHFA) on historical claims about the first Congress's ostensible "Decision of 1789." In so doing, Petitioners are following Chief Justice Taft's account in *Myers v. United States*, upon which this Court relied on in 2010 and again last term for an originalist interpretation of Article II. New historical research shows that *Myers* was incorrect. The "Decision of 1789" actually *supports*, rather than undermines, Congress's power to limit presidential removal.

Myers asserted that the first Congress's "Decision of 1789" declared that the Constitution assigned removal power to the President alone: "[T]here is not the slightest doubt, after an examination of the record, that the [Foreign Affairs] 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." 272 U.S. 52, 117 (1926). New evidence calls for a re-examination of this record, raising more than just a doubt.

Originalism depends upon clear historical evidence of public meaning. *Seila Law LLC v. Consumer Financial Protection Bureau* noted that the first Congress's view "provides contemporaneous and weighty evidence of the Constitution's meaning.'" 140 S. Ct. 2183, 2197 (2020) (internal quotation omitted). Overlooked Senate records show no consensus in the first Congress to

support *Myers*'s interpretation. To the contrary, this new evidence suggests a very different decision in 1789. The first Congress rejected "presidentialism," the more general constitutional claim that the President alone can remove principal officers confirmed by the Senate, even the heads of the Departments of Foreign Affairs, War, and especially Treasury; and it rejected the more specific claim of exclusive or "indefeasible" presidential removal under Article II (a claim by the Petitioners here), that presidential removal is "at pleasure" or "at will."

The most significant new evidence:

1) Senator William Maclay's diary[3] reveals initial opposition to presidential removal (of any source) in the Senate, which is the most plausible explanation for Madison's sudden retreat from a clear removal clause to an ambiguous one. Madison's opponents and allies identified this shift as evasion or reconciliation with the Senate.

2) The first head-count of the House by constitutional categorization demonstrates that only about one third of the House supported the "presidential" interpretation, and a wide majority rejected it.

3) New evidence from the Treasury debate and from a series of statutes reveal further rejection of exclusive

3. *See 9 the Diary of William Maclay and Other Notes on Senate Debates (Volume 9)* (Kenneth R. Bowling & Helen E. Veit, 1988). Also available as *9 Documentary History of the First Federal Congress*, 1789-1791 (Charlene Bangs Bickford *et al.* eds, 2004) [hereinafter DHFFC]; and at the University of Virginia's Rotunda digital edition (containing all of these DHFFC records) at https://rotunda.upress.virginia.edu/founders/FFCP.

presidential removal, especially in the domain of finance. Congress delegated removal power, even of the Secretary of Treasury, to the judiciary.

4) This widespread opposition to presidentialism in 1789 prompts a re-reading of the Constitution's text, the Convention, and the Ratification debates. New research on "vesting" shows that this text likely did not have a public meaning of "exclusive" or "indefeasible."

Myers was mistaken. The first Congress opposed this interpretation of Article II, forced the deletion of the clear removal language in the Foreign Affairs bill, and then enacted six anti-presidentialist removal clauses. It would be an error in terms of originalism to rely on the first Congress or the Executive Vesting Clause to invalidate the FHFA structure.

ARGUMENT

I. An Overlooked Senate Diary and the House Debates Show a Broad Majority of the First Congress Rejected Exclusive Presidential Removal

The Supreme Court recently stated, "Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010) ; *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2198 (2020). New evidence from the first Congress suggests no such understanding, and likely a contrary original public meaning.

Legal scholars from across the spectrum have questioned *Myers*'s interpretation of the first Congress.[4] One nagging problem for an originalist argument for presidentialism has been that the Senate, which tied 10-10 on the bill, had no official records of debate. However, scholars on both sides of the debate overlooked a senator's detailed diary and other senators' notes. The new evidence reveals initial Senate opposition, explaining why Madison retreated to ambiguity in order to pass the Foreign Affairs bill.

A. The Foreign Affairs Bill and the Four Camps

The "Decision of 1789" was shorthand, apparently first used in the 1830s, for a series of debates and votes on establishing the first three executive branch departments, with secretaries whom the president could remove. Vice President John Adams, then-Representative James Madison, and a handful of senators were eager to claim a constitutional consensus from these votes, and over time,

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4. Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Colum. L. Rev. 353, 368-69 (1927); David P. Currie, *The Constitution in Congress: The Federalist Period*, 1789-1801, 37-42 (1997); Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm. & Mary L. Rev. 211 (1989); Peter Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 Geo. Wash. L. Rev. 696, 717 (2007); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 Mich. L. Rev. 545, 662-63 (2004); John Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 2030-31 (2011); Jerry Mashaw, *Creating the Administrative Constitution (2012)*; Jonathan Gienapp, *The Second Creation: Fixing the Constitution* 139, 160-62 (2018); *cf.* William Baude, *Constitutional Liquidation*, 71 Stan L. Rev. 1, 53-55 (2019).

they shaped perceptions. New evidence shows that they were engaging in spin, to portray retreat as victory. This is a story of Madison's cunning parliamentary skill, of strategic ambiguity, and of a deliberately messy legislative history—fraught with the problem of finding one's friends in the party, to paraphrase Justice Scalia.

In May 1789, Madison proposed the Foreign Affairs bill, with language that provided that the Secretary would be removed by the President.[5] A committee recommended language in June 1789, reflecting Madison's proposal:

> [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 President.**[6]

After four full days of debate, the House adopted this language on Friday, June 19. Then, on Monday, June 22, Madison suddenly reversed course, and proposed replacing the existing language—which clearly gave the President the removal power—with unclear language:

> [T]here shall be an inferior officer . . . who, **whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy,** shall during such vacancy have the charge and custody of all records, books and papers appertaining to the said department.[7]

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5. 1 Annals of Cong. 370 (1789).

6. *Id.* at 370-71 (emphasis added).

7. Foreign Affairs Act, ch. 4, § 2, 1 Stat. 28, 29 (1789) (emphasis added).

As a textualist matter, this clause could be read as assuming a pre-existing removal power, or alternatively, foreseeing that a future Congress or President might assert a removal power against a department head, in which case, a contingency plan with a back-up officer already would be in place.

Then Madison and his allies pushed for three key votes that ostensibly concluded the "Decision of 1789": first, to add this ambiguous language; second to remove the explicit "removable" clause (both on Monday, June 22); and third (on June 24), to pass the bill.

The unitary executive theory claims that a majority of Congress intended it to signal that Article II had established presidential removal. Among the senators and representatives at the time, there were four views of how the removal power should be distributed.[8] The first group, a small number of representatives, believed that the Constitution recognized impeachment and only impeachment. The second group, a substantial number of representatives, argued that the traditional rule was that the removal power mirrored the appointment power—so if the Senate confirms appointments, the Senate must also share a power to confirm firings (the "senatorialists"). The majority, meanwhile, thought that the president alone should be able to remove, but this bloc was divided into two groups: A third group (the "congressionalists") that believed Article II did not establish removal, but Congress could and should enact presidential power; and the fourth and final group ("presidentialists") who thought the Constitution itself established this power, and thus the Senate could not prevent presidential removal.

8. *See* Corwin, *supra* note 4. for these labels.

The "Decision of 1789" supposes that a House majority, in order to imply preexisting presidentialism and not a congressional delegation, replaced the explicit "removable by the President" clause with the ambiguous contingency-plan clause. Critics have pointed out that Madison's proposal divided and conquered: The congressionalists voted with Madison's presidentialists to add the contingency plan, but the presidentialists relied on the anti-presidential senatorial bloc to remove the explicit removal clause (as strange bedfellows with polar opposite views). A recent attempt to revive the unitary executive theory (an expansive version of presidentialism) suggested that the presidentialists and congressionalists overlapped, and that many of the members voted "no" on deleting the explicit clause because they wanted to be even clearer about presidential power.[9]

Maclay's diary helps resolve a fundamental mystery about Madison's strategy: Why did Madison think an ambiguous contingency-plan clause was preferable to an explicit removal clause for a stronger constitutional position? The best reading of the evidence is that he and his colleagues knew such a clear statement lacked the votes in the Senate. The new Senate evidence explains the presidentialists' turn to strategic ambiguity, revealing retreat and evasion—and a closer reading shows that both Madison's allies and opponents knew it.

9. Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021 (2006).

B. Maclay's Diary Indicates Senate Opposition and House Retreat

The Senate has always been a formal problem for the "Decision of 1789," and not just because its 10-10 tie was hardly evidence of consensus. The Senate also had no official legislative record, and it was difficult to know if all ten votes were "presidentialist," if some were congressionalist, or some were merely practical, untheorized, expedient compromise, or simply a desire to pass a bill and move on with an urgent summer agenda.

Senator William Maclay's diary indicates, first, that two swing votes for the bill were late and tepid reversals, likely political logrolling with no constitutional view; and second, the Senate debate was confusing, so that even after days of debate, several speakers remained unclear about the ambiguous clause's meaning; and third, proponents of the bill offered confusing denials and incoherent changes to the clause to save the bill. These notes offer more evidence that the proponents of the bill had purposely deleted clear texts as a retreat from the opposition.

It is puzzling why judges and scholars have not examined Senator Maclay's detailed notes on the removal debate.[10] His diary is a widely cited and definitive resource for the first Senate's proceedings, filling in the gap in the Senate's records. Maclay was a cynical grouch, but there is little reason to be cynical about his diary. Maclay

10. Charles Thach, in taking a presidentialist interpretation of the first Congress in 1923, quoted from Maclay's notes only from the early days of the debate, but did not turn to the most significant moments. Charles Thach, Jr., *The Creation of the Presidency*, 1775-1789, 140-41 (1923).

went to his grave apparently expecting his diaries to remain hidden and unpublished. 9 DHFFC xiii-xvi. His description of the debate is roughly consistent with other Senators' more fragmentary notes, but Maclay's notes are far more detailed, and he was the only one to record each day. Maclay was a well-respected lawyer, a veteran of the Revolution, a member of the Pennsylvania executive council, and a state judge. He had been almost unanimously elected by the state legislature to the new U.S. Senate. 9 DHFFC xii. When he was recording a debate that reflected widespread confusion about the meaning of this clause, it was more likely that the bill's supporters were confusing (or obfuscating) than that Maclay was confused.

Maclay's diaries were first published in 1890, and then the Documentary History of the First Federal Congress series published his diaries in 1988. Scholars and this Court have relied on his accounts of the first Congress's drafting of the Judiciary Act,[11] and in July 2020, Justice Thomas quoted Maclay's diary in his dissent in *Trump v. Vance*, 140 S. Ct. 2412, 2435 (2020) (Thomas, J., dissenting). Chief Justice Taft cited Maclay's diary for a vote count on the Foreign Affairs bill. *Myers*

11. *See, e.g*, *Clinton v. Jones*, 520 U.S. 681 (1998) ; Prakash, *supra* note 9; Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923); Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 Harv. L. Rev. 701 (1995); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum. L. Rev. 830 (2006); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. Pa. L. Rev. 1569 (1990); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 Case W. Res. L. Rev. 1451 (1997).

v. United States, 272 U.S. 52, 115 n.1 (1926). But until now, the Supreme Court and contemporary legal scholars have not examined Maclay's detailed day-by-day account of the Senate debate on removal, covering ten pages of the print edition.

First, Maclay's diary indicates that when the Senate took up the Foreign Affairs bill in July, there was no majority for even the watered-down removal language. From Maclay's account, the bill had been poised to fail by a vote of 8 to 12, or perhaps 7 to 13, but several last-minute switched or surprise votes delivered a tie. Maclay suggested that at least two of those votes were due to late political deal-making (Dalton and Bassett, at Maclay, 9 DHFFC 118-19). Paterson's vote also surprised Maclay. If the opaque language passed only by a tie-breaker, it seems the presidentialists had reason to worry about offering an even more explicit clause to a hostile Senate.

Maclay's account of last-minute backroom lobbying included a note that Representative Fisher Ames, Madison's House ally, was presumably coordinating with pro-Administration Senators in July. *Id.* at 113. The most plausible explanation for Madison's reversal between June 18 and June 22 is that members of the House and Senate often talked, and Madison and Benson learned that the original explicit "removable" language risked defeat in the Senate. This whip-counting landscape makes sense of another puzzle: Madison had emphasized the practical importance of clarity in the original bill's removal language on June 18, but then reversed. He first explained, "we ought to know by what tenure the office should be held" to avoid the risk that "gentlemen may hesitate . . . Hence it is highly proper that we and our constituents

should know the tenure of office."[12] 11 DHFFC 986-87 (Madison) (June 18, 1789). But after the weekend, Madison and his ally Egbert Benson moved to replace this clear clause with an unclear one.

Their explanation—that only an ambiguous clause signaled their constitutional theory—should be understood as pretextual, just as their opponents understood it. Their new clause failed to clarify the source of the removal power, but even more confusing, its text also obscured whether a presidential removal power existed at all. If Madison and Benson said they wanted to express a constitutional basis in the statute, it is odd that they not add a common explanatory clause to the bill, such as a "whereas" clause or a preamble. The Constitution famously has its own preamble, and Madison and George Mason added a long preamble to Virginia's 1776 Constitution. The first Congress added many explanatory "purposes" and "whereas" clauses to statutes,[13] including one of the first statutes, the Impost (or Duty Act), signed on July 4, 1789, and the Northwest Territory Act of 1789.[14]

Instead, Benson acknowledged a need for "reconciling both sides of the house" from the beginning: "[H]e also hoped his amendment would succeed in reconciling both sides of the house in the decision, and quieting the minds of gentlemen." 11 DHFFC at 1028. This phrasing is the

12. 1 Annals of Cong. 546.

13. North Carolina Cession Act, 6 DHFFC at 1544, 1546-47; Coasting Act, § 37, 1 Stat. 55, 65 (Sept. 1, 1789); Sinking Fund Act of 1790, 1 Stat. 186 (Aug. 12).

14. The Duty Act, § 1, 1 Stat. 24 (July 4, 1789); *id.* at § 38; Northwest Territory Act of 1789, 1 Stat. 50, 50-51 (Aug. 7, 1789).

opposite of using the language to make a presidentialist statement and a rejection of the congressionalists. Benson was signaling compromise: an ambiguous clause would let each side claim its own interpretation. The final speaker on this debate was Representative Vining, a presidentialist who also conceded an uphill battle in the Senate and a shift away from a text of "positive relinquishment": "[H]e thought it more likely to obtain the acquiescence of the senate on a point of legislative construction on the constitution, than to a positive relinquishment of a power which they might otherwise think themselves in some degree intitled to." *Id.* at 1035. It is implausible that Vining thought a permanent constitutional concession was more acceptable to the Senate than a reversible statutory delegation. The only likely explanation is that the House presidentialists knew of the same Senate opposition, consistent with Maclay's diary, and they needed to switch from explicit "positive relinquishment" to ambiguity open to "legislative construction."

House opponents also understood this context and mocked this move as a retreat: for "shifting the ground in the matter now proposed, the journal would not declare truly the question which had so long been contested," *id.* at 1028; for "pretend[ing] to carry their point by a side blow, when they are defeated by fair argument on due reflection"; for not being "more candid and manly to do it in direct terms than by an implication like the one proposed," *id.* at 1029; for having "evacuated untenable ground." *Id.* at 1030.

Madison and Benson could have silenced these critics with a simple prefatory clause about the Constitution, but it is revealing that they still did not.

C. A Head Count of the House Shows a Wide Majority Rejected Exclusive Presidential Removal

Another puzzle of *Myers*'s presidentialist claim is that scholars and judges have never offered a whip count or a tally on the constitutional question to show a majority.[15] Here, the first such constitutional-category count finds the presidentialists fell far short, roughly 30% to 39%, depending upon whether to include less-clear stances. *See* Table, *infra* 1a.

The "senatorial" opposition had 16 Representatives. An "impeachment-only" splinter group had three.

The line between "presidentialist" and "congressionalist" is less simple, partly because both camps supported giving the President removal power and made similar arguments before June 22. One common mistake in the studies on both sides of this debate is weighing earlier statements equally with those on June 22, when the Madison-Benson proposal starkly divided the camps, and representatives finally had to choose sides. There are 16 members of the "presidentialist" camp: 13 who voted "yes" on all three motions, plus three members whose speeches and letters endorsed presidentialism.

There are six explicit congressionalists, four of whom voted yes/no/yes. Six others voted yes/no/yes without giving reasons. The evidence suggests that they were

15. J. David Alvis, Jeremy Bailey, and F. Flagg Taylor offered a chart of members by vote patterns, not by interpretive camps. *See* J. David Alvis *et al.*, *The Contested Removal Power*, 118-21 (2013).

more likely congressionalists or had no constitutional positions at all.

To understand those six "silent" yes/no/yes Representatives, we need to examine the thirteen who voted yes/no/yes.[16] This vote sequence more often was the hallmark of the "congressionalists," voting "no" on the second motion, so as to keep the explicit "removable" clause. Thomas Hartley, a congressionalist leader, announced on the floor that the middle vote of "no" would be the vote of "every gentleman . . . who was not fully convinced that the power of removal vested by the constitution in the president." 11 DHFFC at 1035. Of the 13 members who voted yes/no/yes, only one (Boudinot) endorsed presidentialism on the House floor. Another (Fitzsimons) only hinted at presidentialism in a letter two months later. Four others were expressly congressionalist (Hartley, Lee, Sedgwick, Silvester). One other (Laurance) mixed both interpretations. Six were "silent" yes/no/yes voters. Of these 13, those who expressed a view on the floor were much more likely to endorse congressionalism over presidentialism (4 to 1). *See* Table, *infra*, 1a.

Furthermore, it is problematic to interpret their silence as a vote in favor of the most permanent constitutional principle, rather than the more flexible or moderate position. It is also problematic to rely on silence as a statement of clear original public meaning. The more likely explanation for why a half-dozen or so Members

16. One of these thirteen (Boudinot) missed the first vote, and then voted no/yes. Based on his speeches, he would have voted yes in the first vote. Prakash, *supra* note 9, characterizes this group of 13 as "enigmatic."

voted yes/no/yes: they were either congressionalist, like most of the yes/no/yes members who spoke, or they simply supported a policy of presidential removal as a practical matter. A pragmatic member would have been exhausted from spending the entire week before on an abstract question, would have preferred a clear text, and would have wanted to move on to more urgent matters like the debt, revenue, salaries, establishing the other departments and the courts, and the crucial Bill of Rights amendments.

A fair count shows the presidentialists added up to only 16 out of 53 participating House members (30%). If one tallies only the Members whose views can be identified, presidentialists were still only 16 out of 41 (39%). And even if one counts all six "silent" yes/no/yes voters as presidentialists, this charitable approach still does not produce a majority (only 22 out of 53 voting Members, 42%).

D. Maclay's Diary Records Strategic Ambiguity, Confusion, and Retreat by the Presidentialists

Maclay's notes, along with the notes of Vice President Adams and other senators, show senators playing out Madison's strategy of ambiguity and obfuscation.

Maclay's diary recounts that the Senate debated the ambiguous language for several days, with confusion up through the final day. On the first day, Senator William Johnson condemned "the Decept[io]n" of this provision: "We all know That the Const[itutio]n in this point was defendd on the ground I contend for." 9 DHFFC at 467. Senator Johnson also ridiculed the bill arriving in so

"Quest[ionabl]e a shape." *Id.* at 448. After four days of debate, Johnson and Maclay still had questions about the bill's shape and meaning. They were still trying to clarify whether the bill in fact excluded the Senate from any role in removal, which is possible only if the Senate debate remained confusing by accident or by design. After pointing out how it was obvious that the clerk would take care of the department papers in case of any removal, Maclay asked rhetorically, "What then is the Use of the Clause?" Apparently he felt that the point was still not clear: Was the clause meant to empower the President? He concluded that it was, and "the design is but illy concealed." 9 DHFFC at 118. Maclay suggested the bill intentionally used ambiguity to conceal the bill's effect of disempowering the Senate.

Perhaps perceiving that the Senate vote could tip against both the clause and the entire bill, its supporters immediately suggested a compromise and possibly deleting parts of the clause. Senator Johnson, also an opponent of the bill, "glanced something at the Conduct of the other House and as what I [Maclay] said leaned the same way." *Id.* According to Maclay, Johnson seemed to be issuing the same warning: The House sponsors had said they intended this wording of the statute to mean removal was only the president's power, and not the Senate's. Senator Robert Morris, the former Superintendent of Finance and a supporter of executive power, answered: "Mr. [Robert] Morris said Whatever the particular View might be of the member who brought in this clause, he acquitted the House, in general of any design against the Senate." *Id.* Morris meant that the House authors' intent was irrelevant, and even so, he denied that the House had "any design against the Senate." *Id.*

After the final 10-10 vote that day in July, Maclay wrote that the proponents had hidden a power in "cloaked" or "modifyed" language. *Id.* at 119. Just as the House's skeptics denouncing Madison's move as a "side blow," Maclay called it a "Sidewind," the opposite of "plain dealing." *Id.* Vice President Adams himself recorded, against his own interest, similar accusations of evasive "Sidewinds" and criticisms of "inferentially" claiming constitutional meaning. *Id.* at 448.

A presidentialist might suggest that the Senate was surrendering its own institutional power, so this rare public-spirited moment of sacrifice must have been driven by constitutional principle. However, the Senate had a substantial "pro-administration" majority, later forming into the Federalists. The Senate votes for the bill roughly followed proto-partisan lines, and the pro-administration side's lobbying diminished the likelihood of a principled meaning.

Maclay's diary indicates that the Senate was initially far short of a majority for the bill, which explains why Madison and Benson deleted the clear language; and it illustrates how the strategic ambiguity and denial played out in the Senate to get their bill passed.

II. The First Congress's Other Debates and Statutes Demonstrate the Rejection of Exclusive Presidential Removal

After the presidentialists in Congress retreated in the Foreign Affairs debate, other debates and statutes in the summer of 1789 further rejected the presidentialist constitutional theory—both in debate and more concretely in a series of anti-unitary removal clauses.

A. The First Congress Voted Against "At Pleasure" Removal

First, it is crucial to note a broad scholarly consensus that any "Decision of 1789" did not include presidential "at pleasure" removal. Saikrishna Prakash observed, "the Decision of 1789 did not endorse the view that Congress lacked authority to modify the Constitution's grant of removal power to the President."[17] New evidence from the debates and statutes after the Foreign Affairs debate shows that the first Congress understood such modifications were possible. Very few members of Congress (only about four or five) spoke in favor of presidential removal at pleasure in 1789.[18] Moreover, Representative John Page, an opponent of removal, moved to delete the language in the Treasury bill that the head would "be removable at the pleasure of the President." 11 DHFFC 1045 (June 26, 1789). Page's motion passed without debate. Members discussed justiciability of for-cause removals in the English writ tradition (*mandamus*, and otherwise, *scire facias*, *quo warranto*), suggesting an oversight role for Congress and the courts.

B. Madison Proposed a Comptroller Who Would Serve "During Good Behaviour," and the First Congress Understood That a Term of Years Limited Presidential Removal

Soon after the Foreign Affairs debate, Madison proposed a Comptroller who would serve during good behavior, not at the pleasure of the President. This

17. Prakash, *supra* note 9, at 1073.

18. *See generally* Shugerman, *supra* note 2.

Court, in *Free Enterprise Fund*, interpreted this proposal to permit at-will removal by the President. *Free Enter. Fund*, 561 U.S. at 500 n.6. However, the Court misunderstood this proposal because it had not yet seen recent scholarship on the English and American law of offices: When an office by statute had a fixed term of years, the default rule was that the officer could not be removed sooner.[19] This long-standing rule is evidence against the assumption of executive removal, and it also explains a puzzle in *Marbury v. Madison*: why neither Chief Justice Marshall nor President Jefferson resolved the conflict with simple presidential removal. The Justice of the Peace served a fixed term of years with no language permitting removal.

Madison's comptroller proposal permitted presidential removal, but this debate shows that there was no assumption that removal was at will. Madison's exchanges with his colleagues showed that they all understood he was proposing tenure "during good behaviour." After Madison said the comptroller "should not hold his office at the pleasure of the executive branch of the government," a colleague replied with an understanding that Madison was proposing that the comptroller "would hold his office by the firm tenure of good behaviour," and Madison's answer implicitly confirmed. 11 DHFFC at 1080, 1082 (June 29, 1789). This discussion in late June was consistent with Madison's earlier statement in May: "[I]t is in the discretion of the legislature to say upon what terms the

19. *See* Jane Manners & Lev Menand, *Removal Permissions and the Forgotten Tenure of a Term of Years*, Colum. L. Rev. (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3520377.

office shall be held, either during good behaviour, or during pleasure." 10 DHFFC 729-30 (May 19, 1789). Two other congressmen also described a similar rule of non-removability for offices held for a term of years.[20]

The first Congress wrote the Judiciary Act reflecting the same understanding, because it included removal "at pleasure" only for the offices with a term of years, because otherwise those offices would have been protected against removal. Relying on *expressio unius*, it is notable how rarely "at pleasure" was used in the first Congress's statutes regarding removal, suggesting a default rule against "at pleasure."

C. The First Congress Enacted Removal by the Judiciary

The first Congress passed a series of statutes giving removal power to judges and juries, and many subsequent Congresses followed suit throughout the Founding and Antebellum eras. The Treasury Act's anti-corruption clause established removal by the judiciary, empowering relatively independent prosecutors and judges to check presidential power. Immediately before Madison proposed his "good behaviour" Comptroller, Aedanus Burke of South Carolina offered an anti-corruption mechanism for prosecutors and judges to remove principal Treasury officers:

> [I]f any person shall offend against any of the prohibitions of this Act, he shall be deemed

20. Laurance, 11 DHFFC at 907 (June 17, 1789); Livermore, 11 DHFFC at 984 (June 18, 1789). *See* Shugerman, *The Decisions of 1789 Were Anti-Unitary*, *supra* note 2.

> guilty of a high misdemeanor, and forfeit to the United States the penalty of three thousand dollars, and **shall upon conviction be removed from Office**, and forever thereafter incapable of holding any office under the United States.[21]

This act's prohibitions generally covered conflicts of interest and ethics rules, more than traditional criminal questions of bribery. Burke explained that this clause was "to prevent any of the persons appointed to execute the offices created by this bill, from being directly or indirectly concerned in commerce, or in speculating in the public funds under a high penalty, and being deemed guilty of a high crime or misdemeanor." 11 DHFFC 1080 (June 29, 1789).

Madison appears to be describing this clause to Jefferson: "The business will be so arranged as to make the comptroller and the other officers checks on the Head of the Department."[22] In the Founding era, there was no Department of Justice, and the Comptroller supervised the federal district attorneys—but only loosely. Prosecutors were relatively independent in this era. The statutory text suggests either that presidents needed good cause to remove an officer (in which case a president's mere will was *not sufficient*) or an anti-presidential removal approach (in which case a president's will *was not necessary*), and judges could remove an official that a president wanted to retain.

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21. An Act to Establish a Treasury Department (Act of Sept. 2, 1789), ch. 12, § 8, 1 Stat. 65, 67 (emphasis added).

22. Letter from James Madison to Thomas Jefferson (June 30, 1789), *in* 12 *Papers of James Madison*, at 271 (Charles Hobson and Robert Rutland, eds., 1979).

The first Congress passed a total of six clauses establishing removal by the judiciary: two for the Treasury department, three for customs and duties, and one for bribery.[23] Following the English law of offices, these statutes mirrored English writs to remove an officer (such as *mandamus*, *quo warranto*, and *scire facias*). The penalties were less like criminal fines, but more like the traditional financial penalties in the law of offices in the form of losing sureties and financial bonds. "High misdemeanor," the phrase used most often in these removal statutes, includes abuses of office, and not necessarily statutory crimes.

Congress in the 1790s added eight more removal-by-judiciary provisions on top of the six other clauses passed in the first Congress. Some of these clauses were in the most famous and salient statutes in the traditionally executive domains of foreign policy, war, peace, and immigration: the Neutrality Acts,[24] the Sedition Act of 1798,[25] the Logan Act of 1799,[26] and in the next decade, the Embargo Acts.[27] Congress extended removal-by-judiciary in at least 15 other statutes before 1820,[28] and more

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23. Act of July 31, 1789, § 12, 1 Stat. 29, 39; *id.* § 35, at 46; Act of April 30, 1790, § 21, 1 Stat. 112, 117; Act of March 3, 1791, § 49, 1 Stat. 199, 210; Act of March 3, 1791, § 1, 1 Stat. 215.

24. Neutrality Act, 1 Stat. 381 (1794).

25. Sec. 1, 1 Stat. 596, 596 (1798).

26. 1 Stat. 613 (1799).

27. Embargo Act of Jan. 9, 1809, § 1, 2 Stat. 506.

28. Act of May 8, 1794, ch. 23, § 11, 1 Stat. 354, 359; Act of June 5, 1794, ch. 49, § 14, 1 Stat. 378, 380; Act of Feb. 23, 1795, ch. 27, § 2,

thereafter.[29] Congress, in other words, was empowering relatively independent prosecutors and judges to remove executive officials for ethics rules and misbehavior in office, even without the support of the President, even against the President's wishes, and without a felony conviction or the context of prison. This is further evidence that the first Congress and the following Congresses for decades rejected the notion that the President has exclusive removal power.

III. What this New 1789 Evidence Tells Us About the Constitution's Text, the Convention, and Ratification

This new evidence from the first Congress connects back to the Convention and Ratification debates with a consistent theme of a congressional role in removal, especially in the Treasury. This clear "congressionalist" evidence from 1787-1789 leaves untenable the originalists' claims for indefeasible presidential removal.

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1 Stat. 419; Act of April 18, 1796, ch. 13, § 3, 1 Stat. 452, 453; Act of April 21, 1806, ch. 49, § 3, 2 Stat. 404, 405; Act of April 21, 1806, ch. 48, § 6, 2 Stat. 402, 403; An Act to Prohibit the Importation of Slaves, ch. 22, §§ 5, 7, 2 Stat. 426 (1807); Embargo Act of Jan. 9, 1809, § 1, 2 Stat. 506; Embargo Act of Dec. 17, 1813, 3 Stat. 88; Act of April 20, 1818, § 4, 3 Stat. 447, 448; Act of April 25, 1812, § 10, 2 Stat. 716, 717; Act of Dec. 18, 1812, 2 Stat. 788.

29. Act of May 7, 1822, ch. 107, § 17, 3 Stat. 693, 696; Act of July 4, 1836, ch. 352, § 14, 5 Stat. 112; Act of July 17, 1854, ch. 84, § 6, 10 Stat. 306; Act of June 11, 1864, ch. 119, 13 Stat. 123; Act of March 3, 1869, ch. 125, § 3, 15 Stat. 321; Act of June 20, 1864, ch. 136, § 2, 13 Stat. 137, 139; Act of Feb. 12, 1873, ch. 131, § 1, 17 Stat. 424.

A. Madison, Hamilton, and the Convention

Madison was a presidentialist in the Foreign Affairs debate, but before and after it, he supported congressional limits. In June 1789, he acknowledged that he initially favored the senatorial position, the same as Hamilton in *Federalist* No. 77: "The consent of [the Senate] would be necessary to displace as well as to appoint." [30] 11 DHFFC 845, 846 (June 18, 1789). In 1790, Hamilton supported Congress's power to establish a non-unitary Sinking Fund Act, which gave executive power to the non-removable Chief Justice and Vice President. [31]

If one is looking for clear original public meaning, Madison and Hamilton took all three major interpretations (presidentialist, congressionalist, and senatorial). Madison was more consistently congressionalist from 1787 through 1789. 10 DHFFC 729-30 (May 19, 1789). Madison wrote in *Federalist* No. 39: "The tenure by which the judges are to hold their places, is, as it unquestionably ought to be, that of good behavior. The tenure of the ministerial offices generally, will be a subject of legal regulation, conformably to the reason of the case and the example of the State constitutions." [32] Madison clarified his more specific views on "the reason on the case" in the Treasury debate: A Comptroller, arbitrating sensitive financial disputes,

30. *The Federalist* No. 77.

31. Sinking Fund Act of 1790, 1 Stat. 186. *See* Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, Notre Dame L. Rev. (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3458182.

32. *The Federalist* No. 39.

should serve during "good behaviour"; and Madison supported decentralized checks within the Treasury, likely the removal-by-judiciary clause. 11 DHFFC 1080-82 (June 30, 1789).

The Convention had similar discussions that have been too often overlooked. When James Wilson suggested an implied expansive meaning of "executive power," Madison replied with a narrow interpretation: "executive powers *ex vi termini*, do not include the Rights of war & peace &c. but the powers should be confined and defined—if large we shall have the Evils of elective Monarchies."[33] This approach was consistent with Madison's emphasis on limited enumeration of powers (*Federalist* 14 and 45). Another overlooked moment in Madison's notes was Gouverneur Morris's proposal for "during pleasure" presidential removal that died in the Convention. On August 20, Morris proposed an executive council of six department heads who would serve "during pleasure,"[34] but it died in the Committee of Detail. A pro-presidentialist scholar described the failure as "*pro tanto* an abandonment of the English scheme of executive organization."[35]

The bottom line is that the debates from the Convention, the Ratification Debates, and the first Congress all point clearly in the same direction: for a congressional role on removal conditions, especially for Treasury offices.

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33. 1 Max Farrand, *Records of the Federal Convention 70* (June 1, 1787) (1911).

34. *Id.* at 342.

35. Charles Thach, Jr., *The Creation of the Presidency*, 110 (citing Morris's acknowledgment of its rejection at 2 Max Farrand, *Records of the Federal Convention*, 342).

B. The Executive Vesting Clause Did Not Mean "Indefeasible" or Exclusive Removal

Once the "Decisions of 1789" are properly understood as congressionalist, what is left of the originalist unitary executive arguments in *Myers*?

Some attempt to read exclusivity back into the text in the Constitution, despite its textual absence. In his *Morrison v. Olson* dissent, Justice Scalia wrote of the Vesting Clause, "[T]his does not mean *some* of the executive power, but *all* of the executive power." [36] However, the text of Article II's Vesting Clause does not include the word "all." [37] The Framers used the word "all" elsewhere to convey entirety in Article I's vesting clause and in Article III on jurisdiction, but not in Article II. It is telling that textualists are adding words to the text, instead of noting their conspicuous absence (*expressio unius*).

The words "the," "executive power," and "vested" do not establish exclusivity either.[38] Recent scholarship demonstrates that the phrase "executive power"

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36. *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

37. Victoria Nourse, *Reclaiming the Constitutional Text from Originalism*, 106 Cal. L. Rev. 1, 3, 23-25 (2018).

38. *See* Shugerman, Vesting, *supra* note 2. *See also* Peter Shane, *The Originalist Myth of the Unitary Executive*, 19 U. Penn. J. Con. L. 324 (2016); Robert G. Natelson, *The Original Meaning of the Constitution's Executive Vesting Clause*, 31 Whittier L. Rev. 1 (2009); Bradley & Flaherty, *supra* note 4, at 553-56 (2004).

encompassed less than many judges have assumed,[39] so it is a stretch to suggest it included indefeasible power. If "executive power" meant a capacious and exclusive power grant, it is unclear how Article II shared the appointment power (a broader and more established power than removal) between the president and the Senate.

Eighteenth-century dictionaries and early American usage indicate that the word "vested" did not have a meaning of "exclusive" or "indefeasible." The word "vested" was almost never used in colonial charters, and then it suddenly emerged in some early state constitutions in the 1770s without a clear meaning.[40] For example, "vested" appears in the Articles of Confederation —but in a remarkably temporary and explicitly revocable way: in Article X for Congress during recess to "vest with" a "Committee of the States, or any nine of them" some executive powers "from time to time." The Articles of Confederation found other ways to convey "sole" and "exclusive" power: by using those exact words, rather than "vest": "The United States in Congress assembled, shall have the *sole and exclusive right and power* of determining on peace and war." Articles of Confederation, Art. IX, Sec. 1 (emphasis added); *see also id.* Sec. 4. The Framers knew how to communicate "sole" and "exclusive" power by using the words "sole" and "exclusive." There is little evidence that the word "vest" had such a connotation.

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39. Julian Davis Mortenson, *Article II Vests the Executive Power, not the Royal Prerogative*, 119 Colum. L. Rev. 1169 (2019); Julian Davis Mortenson, *The Executive Power Clause*, 167 U. Penn. L. Rev. *(forthcoming Fall 2020).*

40. *See* Shugerman, Vesting, s*upra* note 2.

There may be a separate originalist argument that the Take Care clause could be a basis for some degree of removal power, but that power arguably would be limited by "faithful execution," with a role for Congress to require cause as an indication of good faith.[41] This originalist argument is beyond the scope of this brief.

CONCLUSION

New evidence from Senator Maclay's diary, the House debates, and the first Congress's statutes show that *Myers* was wrong about the "Decision of 1789." This historical evidence reveals at least indecision about Article II on removal, and more likely, a rejection of the presidentialist and exclusivist positions in favor of congressional limits. The presidentialists had to retreat and obfuscate, but meanwhile, congressionalists—likely with Madison's support—passed concrete statutes delegating removal to the courts. The first Congress reflected an original public meaning against exclusive presidential removal, and in favor of congressional power to regulate and delegate removal more broadly, especially with respect to financial matters.

There may be other historical or functionalist arguments against the single-head structure of the FHFA (or the CFPB), but the first Congress provides ample historical evidence in favor of the FHFA. The original public meaning of Article II does not support

41. Andrew Kent, Ethan J. Leib, & Jed Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111 (2019); Jed Shugerman & Ethan J. Leib, *Will The Supreme Court Hand Trump Even More Power?*, N.Y. Times (Oct. 8, 2019), https://www.nytimes.com/2019/10/08/opinion/trump-supreme-court-fed.html.

Petitioners' argument that the structure of the FHFA is unconstitutional or that *Humphrey's Executor* should be overturned.

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APPENDIX

APPENDIX — TABLE: POSITIONS ON REMOVAL POWER

Representatives who voted yes/no/yes, the pivotal bloc, are in bold. An "x" indicates a representative did not vote in one of these three votes.

	Presidential (generally YYY)	Silent YNY	Explicitly Congressional (generally YNY)
More clear	Ames Baldwin YYx Benson **Boudinot**[i] **xNY** Brown Burke Clymer Goodhue Griffin Madison Moore Muhlenberg Scott Sinnickson Vining	**Carroll** **Contee** **Gilman** **Hiester** **Seney** **Trumbull**	**Hartley**[ii] **Lee**[iii] **Sedgwick**[iv] **Silvester**[v] Tucker[vi] NNN
Less Clear	**Fitzsimons**[vii]	**Laurance**[viii] Huger xxY Schureman xNY	Cadwalader[ix] NNY
Total	16	9	6

Appendix

	Opposed/ unclear	Opposed, Senatorial (generally NYN)	Opposed, impeachment only
More clear	Leonard YYN Thatcher YNN	Coles Gerry Grout Hathorn Livermore Matthews Page Parker Partridge VanRenss. Sherman Smith (MD) Stone Sturges Sumter White	Smith (SC)
Less Clear	Wadsworth YNx		Huntington NYN Jackson xxN
Total	3	16	3

Appendix

Final vote counts:

- Based on available evidence, 16 Representatives were "presidentialist," out of 53 (30%).
- If only counting Representatives with identifiable votes or views, 16 out of 41 were "presidentialists" (39%).
- If adding the 6 "silent" yes/no/yes votes, 22 out of 53 were "presidentialists" (42%).

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[i] 11 DHFFC 1034 (June 22). Boudinot's speech indicates he was a presidentialist and would have voted "yes" on the first vote.

[ii] 11 DHFFC 886, 904-07 (June 17); *id.* at 1035 (June 22). Hartley's August correspondence is consistent with his congressionalism. *See* Shugerman, "Indecisions of 1789," *supra* note 2; Letter to Jasper Yeates (Aug. 1, 1789), 16 DHFFC 1209; Letter to Tench Coxe (Aug. 9, 1789), 16 DHFFC 1261.

[iii] 11 DHFFC 962-65 (June 18); 1 Annals at 523-26 (June 18).

[iv] 11 DHFFC 983 (Sedgwick) (June 18); *Id.* at 1029-30 (June 22).

[v] 11 DHFFC 996, 1008-09 (June 19).

[vi] *Id.* at 1034-35.

[vii] A June 20, 1789 letter was too early to focus on the presidentialist/congressionalist divide. 16 DHFFC 819-20. An August 24, 1789 letter makes only an oblique reference two months after the vote. 16 DHFFC 1390.

[viii] Laurance was not "silent," but spoke for both views in two mixed speeches. 11 DHFFC at 887-89, 907-11 (June 17); *id.* at 1034 (June 22).

[ix] Letter from Lambert Cadwalader to James Monroe (July 5, 1789), 16 DHFFC 946-47. He voted against both of Madison's June 22nd proposals.