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## Interrogating the Historical Basis for a Unitary Executive

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**Abstract.** Drawing on claims about the supposed powers wielded by the King of Great Britain at the time of the Framing, proponents of the “unitary executive” theory of the presidency have long contended that the powers to remove and direct all executive-branch officials are inherent components of the “executive Power” vested in the President by Article II of the Constitution. These claims have had a powerful impact on judges and scholars attempting to discern the limits of Congress’s ability to shield special prosecutors and the heads of independent agencies from removal and other forms of presidential control.

As this Article shows, however, the unitarians’ claims about the original meaning of the executive power are largely unfounded. The ability to remove executive officials was not one of the prerogative powers of the British Crown. Moreover, the King neither appointed nor was able to remove all of his principal officers, many of whom held their offices for life or pursuant to other forms of tenure and who operated independent of the King’s direction or control. While the King possessed plenary authority to choose his high-level advisors and the officers who carried out his prerogatives over the military and foreign affairs, Parliament frequently regulated the appointment, qualifications, and tenure of other executive officials in Great Britain, including by protecting them from removal by the King or his ministers when there was good reason to do so.

The evidence surveyed in this Article has important implications for debates over the unitary executive theory in general and for debates over the constitutionality of independent agencies and officers in the United States in particular. It suggests that the Constitution does not proscribe efforts by Congress to insulate regulatory and law enforcement officials from political interference in appropriate instances.

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## Introduction

Congress's ability to insulate executive-branch officers from removal by the President, a perennial constitutional flashpoint,<sup>1</sup> has flared up yet again. In 2010, the Supreme Court invalidated the for-cause removal requirement devised for the heads of the Public Company Accounting Oversight Board (PCAOB) because the requirement unduly restricted the President's removal power.<sup>2</sup> Ten years later, the Court took the tenure protection granted to the Director of the Consumer Financial Protection Bureau (CFPB) in its crosshairs, holding that the CFPB's Director "must be removable by the President at will."<sup>3</sup>

Congress created the CFPB in the wake of the 2008 financial crisis to regulate the sale and provision of consumer financial products and services.<sup>4</sup> In an attempt to shield the CFPB's workings from political and industry influence, Congress structured the CFPB as an independent executive agency within, but not subject to the oversight of, the Federal Reserve Board.<sup>5</sup> Unlike most independent agencies, which are headed by a commission with multiple members on staggered tenures, the CFPB is headed by a single Director.<sup>6</sup> The Director is "appointed by the President, by and with the advice and consent of the Senate," to a five-year term.<sup>7</sup> The statute specified, however, that the President could "remove the Director for inefficiency, neglect of duty, or malfeasance in office."<sup>8</sup>

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1. See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3* (2008) ("One of the oldest and most venerable debates in U.S. constitutional law concerns the scope of the president's power to remove subordinates in the executive branch or to direct their actions.").
  2. See *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 484 (2010). On the potential implications of *Free Enterprise Fund* for the tenure of many of the administrative law judges in the federal system, see Robert S. Garrison, Jr., *Humphrey's Executor Squared: Free Enterprise Fund v. Public Company Accounting Oversight Board and Its Implications for Administrative Law Judges*, 37 J. NAT'L ASS'N ADMIN. L. JUDICIARY 558, 597 (2017).
  3. See *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020); see also *infra* note 107.
  4. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011(a), 124 Stat. 1376, 1964 (2010) (codified at 12 U.S.C. § 5491(a)).
  5. On the CFPB's aspirations to political asceticism, see Hosea H. Harvey, *Constitutionalizing Consumer Financial Protection: The Case for the Consumer Financial Protection Bureau*, 103 MINN. L. REV. 2429, 2430-31, 2450-51 (2019).
  6. See GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 275 (8th ed. 2019); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 794 (2013) (explaining that "[t]he members of most multimember agencies serve staggered terms"); cf. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935).
  7. 12 U.S.C. § 5491(b)(2), (c)(1).
  8. *Id.* § 5491(c)(3).

In 2020, the Supreme Court held this arrangement unconstitutional.<sup>9</sup> Writing for a 5-4 majority, Chief Justice Roberts located a presidential removal power in “Article II’s vesting of the ‘executive Power’ in the President.”<sup>10</sup> Even though the Supreme Court had previously sustained tenure protections for multimember regulatory commissions, Chief Justice Roberts explained, shielding the sole director of an executive agency from removal impermissibly “lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control.”<sup>11</sup> The Court thus invalidated the Director’s tenure protections, leaving her to serve at the pleasure of the President.<sup>12</sup>

The Constitution specifies how the principal and inferior officers of the executive branch are to be appointed, but it does not say how—or whether—they can be removed other than by impeachment.<sup>13</sup> Since 1789, Congress has generally left the President discretion to remove officers that he has appointed, but it frequently has created “independent” agencies headed by officers who serve for a fixed term and who can be removed only for cause.<sup>14</sup> Congress also has granted tenure protections to a wide variety of officers within the executive branch, from administrative law judges to special prosecutors assigned to investigate the President and other executive officials.<sup>15</sup> The Supreme Court has upheld many for-cause removal requirements against constitutional challenge, but the Court’s opinions have vacillated between “formalist” and “functionalist” interpretations of separation-of-powers

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9. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020). Both the Department of Justice and, more remarkably, the CFPB itself informed the Court that it considered the removal restriction unconstitutional. *See* Brief for the Respondent at 7, *Seila Law*, 140 S. Ct. 2183 (No. 19-7), 2019 WL 4528136.

10. *Seila Law*, 140 S. Ct. at 2205 (quoting *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 483 (2010)).

11. *Id.* at 2192. *But see id.* at 2240-44 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (refuting the majority’s reasoning on each of these grounds).

12. Although the Court found that the structure of the CFPB was unconstitutional, it nevertheless determined that the Director’s tenure protections were severable from the remaining provisions of the Dodd–Frank Act. *See id.* at 2211 (plurality opinion). The practical result of the opinion is that the CFPB can continue to function, but its Director is removable at will. *See id.* at 2209.

13. *See* U.S. CONST. art. II, §§ 2, 4; LAWSON, *supra* note 6, at 241.

14. *See Free Enter. Fund*, 561 U.S. at 483; *id.* app. A at 549-56 (Breyer, J., dissenting) (listing forty-eight federal agencies and offices, boards, and bureaus within departments subject to for-cause removal provisions).

15. *Id.* app. B at 556-86 (Breyer, J., dissenting) (listing 573 officers with for-cause removal protections); *id.* app. C at 586-88 (listing 1,584 administrative law judges with for-cause removal protections); *Morrison v. Olson*, 487 U.S. 654, 659-60, 660 n.2 (1988) (upholding a statute protecting an independent prosecutor from removal absent good cause).

principles, resulting in often diametrically opposed proclamations and narrow readings of prior precedent.<sup>16</sup>

Many judges and scholars, including Justice Antonin Scalia and professors Steven Calabresi, Saikrishna Prakash, Christopher Yoo, and John Yoo, have advanced a strong view of the President's constitutional role known as the "unitary executive" theory.<sup>17</sup> The unitary executive theory holds that Article II's declaration that "the executive Power shall be vested in a President of the United States of America"<sup>18</sup> means that there is one—and only one—person constitutionally authorized to wield the executive power: the President of the United States. Thus, all executive-branch officers exercise authority only as delegates of the President and must be subject to his control.<sup>19</sup>

"Unitarians," as they are sometimes known,<sup>20</sup> make varying claims about the degree of direct control the President must have over subordinate officers. But most believe that, at a minimum, the President should be able to remove all executive-branch officers, including the heads of independent regulatory agencies, at any time and for any reason.<sup>21</sup> The Supreme Court's failure to enforce this principle has allowed Congress, as Calabresi and Prakash put it, "to

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16. See LAWSON, *supra* note 6, at 246-52; PETER L. STRAUSS, TODD D. RAKOFF, GILLIAN E. METZGER, DAVID J. BARRON & ANNE JOSEPH O'CONNELL, GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 920-22, 938-40, 946-47 (12th ed. 2018). On the distinction between formalism and functionalism in the Court's separation-of-powers jurisprudence generally, see Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 225-35.

17. See, e.g., *Morrison*, 487 U.S. at 705, 709-10, 727-29, 732 (Scalia, J., dissenting); CALABRESI & YOO, *supra* note 1, at 3-9; JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 18-22, 55-56 (2005); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 544 (1994). For good summaries of the unitary executive theory, see generally LAWSON, *supra* note 6, at 276-79; and Calabresi & Prakash, *supra*, at 544-45.

18. U.S. CONST. art. II, § 1.

19. See CALABRESI & YOO, *supra* note 1, at 3-4.

20. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247 (2001).

21. See CALABRESI & YOO, *supra* note 1, at 3-4; see also, e.g., Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1225 (2014) (asserting that "[f]or adequate constitutional control of execution, the President must have the possibility of directing discretionary legal duties, even those assigned to other officers," and thus must be able to remove all executive officers, including the heads of independent agencies); John Harrison, *Addition by Subtraction*, 92 VA. L. REV. 1853, 1859-62 (2006) (characterizing executive-branch officers as "agents" of the President whom the President must be able to remove if they do not retain his trust); cf. *Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting) (contending that the President must have "plenary power to remove [all] principal officers," but that inferior officers can be made "removable for cause" so long as their appointing officers can dismiss them for "the failure to accept supervision" (emphasis omitted)).

carve up the executive department of the federal government into minifiefdoms independent of presidential control.”<sup>22</sup>

Beginning with Chief Justice William Howard Taft in the Supreme Court’s 1926 decision in *Myers v. United States*,<sup>23</sup> many unitarians have contended that the ability to remove subordinates is an inherent component of the executive power vested in the President, and thus cannot be regulated or constrained by Congress.<sup>24</sup> To establish this proposition, Chief Justice Taft asserted that the King of England possessed the power to appoint and remove royal officers.<sup>25</sup> Chief Justice Taft further asserted what is now sometimes called the “Royal Residuum” thesis: that the King’s prerogatives constituted the executive power in England and that such of those prerogatives not incompatible with republican government were incorporated into the U.S. Constitution.<sup>26</sup> Thus, because a removal power was not incompatible with republican government, this residuum of the royal prerogative became a vested and indefeasible power of the President.<sup>27</sup>

History has played an important role in American separation-of-powers jurisprudence and scholarship.<sup>28</sup> Given the relatively open-ended structural provisions of Article II<sup>29</sup> and the Constitution’s frequent reliance on common law terms and concepts,<sup>30</sup> the English system in particular has frequently been used to clarify and define the relationship between the President, Congress, and the many officials in the executive branch.<sup>31</sup> Chief Justice Taft’s claims thus

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22. Calabresi & Prakash, *supra* note 17, at 544.

23. 272 U.S. 52, 106, 161 (1926).

24. *See infra* notes 111-12 and accompanying text; *see also* Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1842-43 (2006) (“[I]f the Constitution grants the President a distinct removal power, an authority to retract delegations and disempower officers, or a power to set the tenure of executive officers, Congress cannot regulate such authority.”).

25. *Myers*, 272 U.S. at 118.

26. *Id.* For a description and critique of the “Royal Residuum” view of the executive power, *see* Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1171-73, 1181-84 (2019).

27. *See Myers*, 272 U.S. at 118.

28. *See* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1742-44 (1996).

29. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1971 (2011) (characterizing the language of Article II as “open-ended”).

30. *See* Stewart Jay, *Origins of Federal Common Law* (pt. 1), 133 U. PA. L. REV. 1003, 1033 n.138 (1985).

31. Such efforts date back at least to *The Federalist*. *See, e.g.*, Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 265-66 (2009) (discussing Alexander Hamilton’s defense of the Constitution’s structuring of the presidency in *Federalist No. 67*). For examples of the use of English history by modern scholars, *see id.* at 271-307; Prakash, *supra* note 24, at 1820-21; Mortenson, *supra* note 26, at 1191-1219; and Flaherty, *supra* note 28, at 1756-58.

have captured the imaginations of a vast array of scholars who have refined and repeated the now-conventional wisdom that the King possessed an unlimited power to dismiss executive officers in the British government.<sup>32</sup>

These claims have also shaped jurisprudence. In *Free Enterprise Fund*, for example, Chief Justice Roberts’s opinion for the Court described the “power to oversee executive officers through removal” as a “traditional” component of the executive power.<sup>33</sup> And his recent opinion for the Court in *Seila Law* similarly asserted that “the President’s removal power stems from Article II’s vesting of the ‘executive Power’ in the President,” characterizing all executive-branch officers as assistants “wield[ing] executive power on [the President’s] behalf.”<sup>34</sup>

Remarkably, however, claims about the King’s removal power have gone largely untested. Chief Justice Taft did not provide any support for his assertion in *Myers*,<sup>35</sup> and modern-day originalists have largely relied on generalizations and anecdotes supplied by historians.<sup>36</sup> Even those who have disputed claims of illimitable presidential removal power, such as John Manning and Robert Reinstein, have not questioned the conventional wisdom.<sup>37</sup>

This Article undertakes the first comprehensive investigation of whether the ability to remove and direct the activities of royal officers was an inherent feature of the executive power as it was practiced and understood in England at

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32. See, e.g., *infra* text accompanying note 125 (listing law professors who signed on to an amicus brief submitted in *Free Enterprise Fund*).

33. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 492 (2010).

34. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191, 2205 (2020) (quoting *Free Enter. Fund*, 561 U.S. at 483); see also *PHH Corp. v. CFPB*, 881 F.3d 75, 141 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting) (repeating Chief Justice Taft’s claim that “because the crown—the British executive—had the power to appoint and remove executive officers, ‘it was natural’ for the Framers ‘to regard the words “executive power” as including both’” (emphasis omitted) (quoting *Myers v. United States*, 272 U.S. 52, 118 (1926))), *abrogated by Seila Law*, 140 S. Ct. 2183.

35. See Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 860 (1989).

36. See *infra* Part I.C.

37. See, e.g., John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 45 n.268 (2014) (relying on *Myers* for the proposition that “[t]he executive power known to our English forebears assigned the crown limitless power to remove subordinates”); Manning, *supra* note 29, at 2027 (arguing that “to the extent that the Crown’s unfettered power to remove was associated with a coordinate power to appoint, translating the common law power of removal would require interpreters to account for the fact that the U.S. Constitution does not give the President unilateral appointment power”); Reinstein, *supra* note 31, at 288, 322 n.347 (“Except for the judges and members of Parliament, all office-holders served at the pleasure of the King and were removable at his will.”).

the time of the Framing.<sup>38</sup> The results of the investigation are surprising. Contrary to the conventional wisdom, there is no evidence to support the assertion that the removal of executive officers was a branch of the royal prerogative or that a general removal power was an inherent attribute of the “executive power” as it was understood in England.<sup>39</sup>

Although influential English legal theorist William Blackstone described the King, in terms reminiscent of modern unitarians, as the “supreme Executive Magistrate” of the nation and as vested with the whole of the executive power,<sup>40</sup> the King’s ability to remove and control executive officers was neither unlimited nor illimitable. The Crown could not directly instruct most law enforcement and regulatory officials.<sup>41</sup> Many officers were appointed and removable only by other officers or local magnates.<sup>42</sup> A large number of royal officers, from local law enforcement to exalted officials in the royal government, held their offices pursuant to life or hereditary tenure,<sup>43</sup> and there were even pockets of administration completely outside the King’s control.<sup>44</sup> And Parliament created many offices by statute, particularly regulatory and administrative offices, and when it did so it often specified the mode of appointment, the mode of removal, and the tenure of the office.<sup>45</sup>

This last fact is particularly important to the question of the legislature’s power to restrict or qualify removal. A review of the statute books shows that, throughout English history, Parliament altered modes of appointing or removing existing officers, transferred appointment or removal power from

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38. Cf. Mortenson, *supra* note 26, at 1191-255 (examining English history and political and legal theory to give content to Article II’s vesting of the executive power in the President); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2141-59 (2019) (canvassing English history for insights into the meaning of the Faithful Execution Clauses); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 338-52 (2016) (reviewing early state constitutional text and practice in relation to executive power); Prakash, *supra* note 24, at 1820-21 (discussing the Crown’s power to specify an official’s tenure in office and noting Parliament’s ability to constrain the Crown’s authority); Calabresi & Prakash, *supra* note 17, at 596 n.212 (speculating on, but not conducting, an inquiry into the royal removal power); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2-4 (1994) (conducting a historical critique of the unitary executive theory without examining English practice).

39. See *infra* Part II.

40. 1 WILLIAM BLACKSTONE, COMMENTARIES \*242-43, \*322, \*338.

41. See *infra* Part III.A.3.

42. See *infra* Part III.A.2.

43. G. E. AYLMER, THE KING’S SERVANTS: THE CIVIL SERVICE OF CHARLES I, 1625-1642, at 106-07 (rev. ed. 1974).

44. See *infra* Part III.A.1 (discussing franchises, liberties, and counties palatine).

45. See *infra* Part III.B.



the King to other officials, and specified qualifications for office.<sup>46</sup> It also had no compunction about regulating the tenure of most royal offices in the ordinary course.<sup>47</sup> While Parliament generally made executive officers removable at the pleasure of the King or some other appointing officer, it provided statutory tenure when it wished to make the officer independent of the King or when it had some other political or fiscal reason to do so. For example, in 1785, Parliament granted tenure during good behavior to members of an independent commission created to audit public accounts, presumably to shield them from the Crown's influence.<sup>48</sup> Parliament also granted tenure to law enforcement officers and a variety of regulators and administrators.<sup>49</sup>

Parliament balked at regulating the Crown's ability to remove officers only in a few discrete instances: first, the great officers of state, most of whom had existed from "Time immemorial,"<sup>50</sup> who were close advisers of the King, and who largely served as agents of the royal will; second, the membership of the King's Privy Council; and third, officers connected with the royal prerogative powers of commanding the armed forces and steering the kingdom's foreign policy.<sup>51</sup> In these domains, royal discretion was absolute and uncontrolled. Thus, either Parliament did not regulate the King's ability to remove these officials, or it did so in a way that acknowledged and respected the royal prerogative.

A more fully developed understanding of our historical inheritance from the Mother Isle can provide important insights into the modern debate over the constitutionality of the CFPB and other independent agencies. Because the historical record shows that the executive power vested in the President by Article II would not include an inherent removal power even if the Royal Residuum theory were correct, it is erroneous to begin, as some judges have

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46. See *infra* Parts III.B.1-2. The Framers were well familiar with the British statute books, which served as references in the library at the Constitutional Convention and were discussed during ratification, including in *The Federalist*. See James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1660-61 (2011). The statute books also appear to have served as models for constitutional language. See *id.* at 1658-62 (discussing linguistic similarities between Article III of the Constitution and the judicial provisions of the Acts of Union of 1707, which combined the kingdoms of England and Scotland). Compare 2 Geo. 3 c. 20, § 1 (1761) ("Whereas a well regulated Militia has been found to be of great Utility, and is of the utmost Importance to the internal Defence of this Country . . ."), with U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State . . .").

47. See *infra* Part III.B.3.

48. 25 Geo. 3 c. 52, § 4 (1785).

49. See *infra* Part III.B.3.

50. 4 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 174 (London, Catherine Lintot 1759).

51. See *infra* text accompanying notes 347-49.

done, with an assumption that congressional tenure regulations are an invasion of the executive province.<sup>52</sup>

Instead, the Constitution grants Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution [Congress’s legislative] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>53</sup> In creating the departments and offices of the executive branch pursuant to this power, Congress, like Parliament, has the discretion to provide for offices held for fixed terms, subject to removal for cause, where doing so is “necessary and proper” to carry its laws and the powers of the government into effect.

To be sure, there may be instances where a specific removal restriction “impermissibly interferes with the President’s exercise of his constitutionally appointed functions” or “impermissibly burdens the President’s power to control or supervise . . . an executive official, in the execution of his or her duties.”<sup>54</sup> Like the King, the President has a special role in certain areas, and British history thus supports the view that Congress may not constrain the

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52. To be clear, this Article does not claim that the Royal Residuum view is correct. Nor does it undertake to refute that view, as Julian Davis Mortenson has recently (and very eloquently) done. See Mortenson, *supra* note 26, 1172-73, 1181-84 (arguing that the executive power, as understood in England, was not equivalent to the royal prerogative but instead was simply the power to execute enacted laws). And I concede that, in attempting to excavate the meaning of the “executive Power” of Article II or the removal power specifically, it likely would be myopic to focus exclusively on the English understanding or experience. As Charles Thach and Peter Shane have shown, the experience of the founding generation under the post-independence state constitutions and the Articles of Confederation provide an important piece of the puzzle. See CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY* 25-53, 56-71 (1922); Shane, *supra* note 38, at 329, 336-37; see also *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2228 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (citing Shane, *supra* note 38, at 334-44, for the proposition that “many States at the time [of the Framing] allowed limits on gubernatorial removal power even though their constitutions had similar vesting clauses” to Article II’s). A complete excavation also would have to reckon with the extent to which the Framers departed from existing models and understandings to create a new political system. See Mark D. Rosen, *History: Limit or License in Constitutional Adjudication?* 2-4 (July 30, 2020) (unpublished manuscript) (on file with author). But there is no doubt that it was a view at the time of the Framing that, as Blackstone put it, the “authorities and powers” vested in the King comprise “the executive part of government.” See 1 BLACKSTONE, *supra* note 40, at \*242. Lawyers and politicians of the founding generation read and studied Blackstone, even if they did not always agree with his political views. See Pfander & Birk, *supra* note 46, at 1642-49. Moreover, given the dominance of the Royal Residuum view among today’s originalists, see Mortenson, *supra* note 26, at 1185, clarifying the content of the residuum serves a valuable function regardless of whether one subscribes to that view.

53. See U.S. CONST. art. I, § 8, cl. 18.

54. See *Morrison v. Olson*, 487 U.S. 654, 685, 692 (1988).

President's authority to remove close advisers, cabinet-level secretaries, and national defense and foreign policy officials.<sup>55</sup> But the flexibility with which Parliament regulated tenure suggests that for-cause removal requirements for domestic regulators and even law enforcement officials do not necessarily undermine the President's "exercise of the 'executive power'" or "his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II."<sup>56</sup>

This Article proceeds in four parts. Part I provides background regarding the debate over the President's removal power and the unitary executive theory. Part II discusses the royal prerogative powers that constituted the executive government in Great Britain in the eighteenth century. Part III surveys the King's ability to remove and control royal officers, the systems of tenure that permeated British governmental institutions, and Parliament's extensive regulatory authority over executive offices. Part IV analyzes the implications of this historical survey for the unitary executive debate in the United States.

## **I. The Enigma of Removal**

As explained below, the text of the Constitution provides no explicit guidance on the question of removal of executive officers. Courts and commentators have drawn diverging conclusions from implicit textual clues and the historical record. This Part surveys the textual and historical evidence and Supreme Court precedent, and it describes the ongoing debate over the unitary executive theory and its implications for the existence of—or limits on—the President's power to remove executive-branch officers.

### **A. Constitutional Text and History**

Article II of the Constitution states that "[t]he executive Power shall be vested in a President of the United States of America."<sup>57</sup> The Constitution also contemplates, however, that the executive branch will be populated by a variety of departments, staffed by a variety of officers.<sup>58</sup> To that end, Article II 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, . . . and all other Officers of the United States, whose Appointments

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55. See *infra* Part IV.

56. See *Morrison*, 487 U.S. at 690 (first quoting U.S. CONST. art. II, § 1, cl. 1; and then quoting *id.* art. II, § 3).

57. U.S. CONST. art. II, § 1, cl. 1.

58. See Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1875-76 (2015).

are not herein otherwise provided for, and which shall be established by Law.”<sup>59</sup> Congress can vest the appointment of “such inferior Officers” as it “think[s] proper,” however, “in the President alone, in the Courts of Law, or in the Heads of Departments.”<sup>60</sup>

But the Constitution does not explicitly say anything about whether or how most executive officers<sup>61</sup> can be removed from office, other than through impeachment.<sup>62</sup> The document’s silence on this issue has proved vexing. The records of the Constitutional Convention show no discussion or debate regarding how executive officers could be removed, leading some commentators to argue that the Framers simply overlooked this important constitutional issue.<sup>63</sup>

Evidence from the state ratifying conventions and other ratification-era statements is also sparse. The subject does not appear to have been debated at any of the state conventions.<sup>64</sup> In *Federalist No. 77*, Alexander Hamilton wrote that where Senate consent was necessary for the President to appoint an officer, the Senate’s consent would be needed to “displace” the officer as well,<sup>65</sup> a construction that has subsequently been rejected.<sup>66</sup> Some state and colonial constitutions vested the removal power in the legislature, a fact from which competing inferences have been drawn but which is hardly conclusive.<sup>67</sup> Less

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59. U.S. CONST. art. II, § 2, cl. 2.

60. *Id.*

61. The President and Vice President are granted four-year terms and can be removed only by impeachment. *See id.* art. II, §§ 1, 4.

62. LAWSON, *supra* note 6, at 241; John F. Manning, *The Independent Counsel Statute: Reading “Good Cause” in Light of Article II*, 83 MINN. L. REV. 1285, 1310-11 (1999); *cf.* U.S. CONST. art. II, § 4 (providing that “all civil Officers of the United States[] shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors”).

63. *See* Rosen, *supra* note 52, at 4 & n.13; *see also* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 39 (2012) (“The delegates to the Constitutional Convention seem to have been so fixated on the question of appointment that they virtually ignored the question of removal.”).

64. *See* *Myers v. United States*, 272 U.S. 52, 69 (1926) (argument of Sen. Pepper as amicus curiae) (describing the lack of evidence from the ratification period); *id.* at 80 (brief of Sen. Pepper as amicus curiae) (same); *see also* Prakash, *supra* note 24, at 1824-25 (describing the available evidence from the creation and ratification period and stating that “[t]he creation of the Constitution witnessed few specific discussions of whether the executive could remove officers or set tenure”).

65. THE FEDERALIST NO. 77, at 459 (Alexander Hamilton) (Clinton Rossiter ed., 1961). *But see* Seth Barrett Tillman, *The Puzzle of Hamilton’s Federalist No. 77*, 33 HARV. J.L. & PUB. POL’Y 149, 153-57 (2010) (speculating that the word “displace” may mean “replace” rather than “remove”).

66. *See Myers*, 272 U.S. at 119, 125.

67. *See* Manning, *supra* note 29, at 1964 n.134.

well known, in *Federalist No. 39*, James Madison stated that “[t]he 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.”<sup>68</sup>

During the creation of the Department of Foreign Affairs, the First Congress engaged in an extensive and sophisticated debate about how to provide for the removal of the department secretaries (an episode often referred to as “the Decision of 1789”).<sup>69</sup> While the Constitution might be read as permitting the removal of appointed officers only through impeachment, and some representatives at the First Congress agreed, most thought this interpretation unlikely.<sup>70</sup> One of the main debates concerned whether Congress could permit the President to remove the Secretary of Foreign Affairs on his own, or whether (as Hamilton stated in *The Federalist*) the Constitution required the Senate’s consent for removal as well as appointment. A majority of Congress voted in favor of the former interpretation.<sup>71</sup>

Scholars and judges alike have made varied claims about the implications of the Decision of 1789 for the removal debate.<sup>72</sup> But it is difficult to wring many convincing lessons out of the First Congress’s confusion.<sup>73</sup> The only question directly addressed by the First Congress was whether the Constitution permitted the President to remove cabinet secretaries without the consent of the Senate (or without asking the House to impeach them).<sup>74</sup>

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68. THE FEDERALIST NO. 39 (James Madison), *supra* note 65, at 242. As far as I can tell, Prakash is alone among scholars in noting the relevance of this statement to the removal debate, though he does not discuss it in any detail. See Prakash, *supra* note 24, at 1795. Chief Justice Marshall endorsed a similar understanding in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803) (“[W]hen 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. 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.”).

69. On the debate, see generally Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 361-69 (1927); and Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1023, 1029-31 (2006).

70. See Prakash, *supra* note 69, at 1031, 1035-36. On the possible inferences to be drawn from the text about the removal of executive officers, see LAWSON, *supra* note 6, at 241-42.

71. Prakash, *supra* note 69, at 1031-32.

72. See, e.g., *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197-98, 2206-07 (2020); *Myers v. United States*, 272 U.S. 52, 158-64, 193-202 (1926); see also Prakash, *supra* note 69, at 1067-75 (describing claims made by judges and scholars).

73. See Manning, *supra* note 29, at 1965 n.135 (“The First Congress was deeply divided on the question, and the implications of the debate, properly understood, were highly ambiguous and prone to overreading.”).

74. See Corwin, *supra* note 69, at 361; Prakash, *supra* note 69, at 1029-30.

And even as to that question, the debates reveal robust disagreement about the constitutionally prescribed procedure for removing executive officers.<sup>75</sup> In the end, a majority of the House of Representatives voted to make the Secretary of Foreign Affairs removable at the pleasure of the President, but an equally divided Senate approved that position only because of the tie-breaking vote of Vice President John Adams.<sup>76</sup> Subsequent practice consistent with this decision has, as a practical matter, established that the Constitution permits Congress to vest the President with the ability to remove his appointees and that he does not require the consent of the Senate to do so.<sup>77</sup> But outside those particular questions, the Decision of 1789 primarily demonstrates only that there was no more agreement about the existence of, or limits on, the President's removal power at the time of the Framing than there is today.<sup>78</sup>

In his majority opinion in *Seila Law LLC v. CFPB*, Chief Justice Roberts discounted Madison's statement in *Federalist No. 39* by claiming that, during the Decision of 1789, Madison abandoned his earlier position, pointing to Madison's statement that "inasmuch as the power of removal is of an Executive nature . . . it is beyond the reach of the Legislative body."<sup>79</sup> Giving more weight to post-ratification statements (from legislative history, no less) than to statements made in *The Federalist* during the ratification debate is dubious from an originalist perspective.<sup>80</sup> The Chief Justice's characterization of Madison's

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75. See Corwin, *supra* note 69, at 361, 365-69; Prakash, *supra* note 69, at 1034-42.

76. Prakash, *supra* note 69, at 1031-32.

77. Cf. William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 53-54 (2019) (recounting James Madison's prediction during the congressional debate over removal that their decision would have "permanent" consequences (quoting Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 527 (2003))).

78. See Manning, *supra* note 29, at 1965 n.135.

79. See *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2205 n.10 (2020) (alteration in original) (quoting 1 ANNALS OF CONG. 464 (1789) (Joseph Gales ed., 1834) [hereinafter ANNALS]).

80. See, e.g., Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RESV. L. REV. 243, 247-48 (2004) ("I generally do not give much credence to post-ratification material; particularly unreliable are controverted allegations of constitutional meaning made from memory or in the heat of battle. I resort to post-ratification material only when confirmatory of other evidence and generally uncontradicted. Instead, I tend to rely more on statements, representations, and known background facts (such as the state of the law) during the ratification process." (footnote omitted)); Calabresi & Prakash, *supra* note 17, at 552-53 (setting out a "hierarchy of originalist source materials" and placing "any widely read explanatory statements made about [the words of the Constitution]" second after only the "plain meaning of the words" themselves and placing last "any postenactment history or practice," as "[s]uch history is the least reliable source for recovering the original meaning of the law"); *id.* at 554 (characterizing "postenactment legislative history" as "the least reliable of all forms of 'legislative' history . . . because there can be no guarantee that a later lawmaker's understanding in fact bears on the intent animating an earlier enactment").

later statement is also incorrect. Madison was arguing that Congress cannot require the President to obtain the Senate's consent to removal, because the legislature cannot exercise the executive power, not that Congress cannot regulate the manner in which the executive power is exercised:

If the Constitution had not qualified the power of the President in appointing to office, by associating the Senate with him . . . in that business, would it not be clear that he would have the right, by virtue of his Executive power, to make such appointment? Should we be authorized, in defiance of that clause in the Constitution,—“the Executive power shall be vested in a President,” to unite the Senate with the President in the appointment to office? I conceive not. If it is admitted that we should not be authorized to do this, I think it may be disputed whether we have a right to associate them in removing persons from office, the one power being as much of an Executive nature as the other; and the first only is authorized by being excepted out of the general rule established by the Constitution, in these words, “the Executive power shall be vested in the President.” The Judicial power is vested in a Supreme Court; but will gentlemen say the judicial power can be placed elsewhere, unless the Constitution has made an exception? The Constitution justifies the Senate in exercising a judiciary power in determining on impeachments; but can the judicial power be further blended with the powers of that body? They cannot. I therefore say it is incontrovertible, if neither the Legislative nor Judicial powers are subjected to qualifications, other than those demanded in the Constitution, that the Executive powers are equally unabateable as either of the others; and inasmuch as the power of removal is of an Executive nature, and not affected by any Constitutional exception, it is beyond the reach of the Legislative body.<sup>81</sup>

In fact, during those same debates, Madison actually reiterated his earlier-expressed view, stating that the inference that “it is in the discretion of the Legislature to say upon what terms” the executive offices it created “shall be held, either during good behaviour or during pleasure,” would be “reconcilable in every part” with “the principles of the Constitution.”<sup>82</sup>

## B. Supreme Court Precedent

The Supreme Court did not wade into the removal foray until near the end of the nineteenth century. In *United States v. Perkins*, the Court held that “when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest.”<sup>83</sup> Adopting the opinion of the Court of Claims, the Supreme Court stated that “[t]he constitutional authority in Congress to . . .

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81. 1 ANNALS, *supra* note 79, at 463-64; *see also Seila Law*, 140 S. Ct. at 2230-31 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (critiquing the Chief Justice's interpretation of Madison's views).

82. 1 ANNALS, *supra* note 79, at 374-75.

83. 116 U.S. 483, 485 (1886) (quoting Court of Claims opinion, 20 Ct. Cl. 438, 444 (1885)).

vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.”<sup>84</sup> *Perkins* thus established that inferior officers appointed by an executive-branch officer other than the President can be shielded from removal.<sup>85</sup> The Court left open, however, the question of whether “Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the President by and with the advice and consent of the Senate under the authority of the Constitution.”<sup>86</sup>

In the 1926 case *Myers v. United States*,<sup>87</sup> the Court attempted to address that unanswered question. *Myers* concerned the dismissal of a postmaster first class, who was appointed by the President with the consent of the Senate.<sup>88</sup> The spurned postmaster challenged his dismissal on the ground that, by statute, he held his office for a four-year term and could be dismissed by the President only with the consent of the Senate.<sup>89</sup>

The Court held that this removal restriction was unconstitutional. Writing for the Court, Chief Justice Taft stated that “[t]he power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power.”<sup>90</sup> Chief Justice Taft acknowledged that *Perkins* had established that Congress could restrict the removal of an inferior officer appointed by a department head. But where an officer—principal or inferior—was appointed by the President by and with the consent of the Senate, the Chief Justice wrote, the Constitution prohibited Congress from regulating the President’s removal power.<sup>91</sup>

The Court in *Myers* clearly was attempting to lay down a broad principle, but the only issue in that case, narrowly construed, was whether Congress could make the removal of an officer contingent upon obtaining the approval of the Senate. Subsequent Supreme Court cases have narrowed the breadth of *Myers*’s holding considerably. A mere nine years later, in *Humphrey’s Executor v. United States*, the Court held that Congress could restrict the President’s ability

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84. *Id.* (quoting Court of Claims opinion, 20 Ct. Cl. at 444). According to the Court, “[t]he head of a Department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto.” *Id.* (quoting Court of Claims opinion, 20 Ct. Cl. at 444-45).

85. See *Morrison v. Olson*, 487 U.S. 654, 723-24 (1988) (Scalia, J., dissenting).

86. *Perkins*, 116 U.S. at 484 (quoting Court of Claims opinion, 20 Ct. Cl. at 444).

87. 272 U.S. 52 (1926).

88. *Id.* at 106.

89. *Id.* at 107.

90. *Id.* at 161.

91. *Id.* at 162.



to remove the heads of independent agencies that exercise “quasi-legislative” (rulemaking) and “quasi-judicial” (adjudicative) powers.<sup>92</sup>

Over fifty years later, in *Morrison v. Olson*,<sup>93</sup> the Court held that Congress may also grant for-cause removal protections to an independent counsel (or special prosecutor), an officer exercising the “purely executive” function of criminal law enforcement, so long as the restriction does not “interfere with the President’s exercise of the ‘executive power’” or “impede the President’s ability to perform his constitutional duty” to “take care that the laws be faithfully executed.”<sup>94</sup> Although the Court decided *Morrison* by a vote of 7-1,<sup>95</sup> Justice Scalia wrote a fiery and influential dissent arguing that Article II’s Vesting Clause requires that the President have “exclusive control” over “the exercise of purely executive power” (such as “the conduct of a criminal prosecution”), including the ability “to discharge those who do not perform executive functions according to his liking.”<sup>96</sup>

On the flip side, the Court held in *Bowsher v. Synar* that the Constitution does not permit Congress to play any role in removing executive officers, striking down a statute vesting executive powers in a “Comptroller General” removable only by a joint resolution of Congress.<sup>97</sup> In *Free Enterprise Fund v. PCAOB*, the Roberts Court struck down particularly restrictive statutory for-cause removal protections for the Directors of the PCAOB.<sup>98</sup> The Directors are appointed by the Commissioners of the Securities and Exchange Commission (SEC), who themselves can be removed by the President only for good cause.<sup>99</sup> The Court held that double layers of removal protection “subvert[] the

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92. 295 U.S. 602, 629 (1935). *Humphrey’s Executor* concerned President Roosevelt’s dismissal, in defiance of a congressional statute, of a Commissioner of the FTC. See Daniel A. Crane, Essay, *Debunking Humphrey’s Executor*, 83 GEO. WASH. L. REV. 1835, 1841-42 (2015).

93. 487 U.S. 654 (1988).

94. *Id.* at 689-92 (first quoting U.S. CONST. art. II, § 1, cl. 1; and then quoting *id.* art. II, § 3).

95. See *id.* at 658. The newly appointed Justice Kennedy did not participate in the decision.

96. See *id.* at 705, 726 (Scalia, J., dissenting). For examples of the dissent’s lingering influence, see Andrew Croner, Essay, *Morrison, Edmond, and the Power of Appointments*, 77 GEO. WASH. L. REV. 1002, 1010 (2009); Jay S. Bybee, Essay, *Printz, the Unitary Executive, and the Fire in the Trash Can: Has Justice Scalia Picked the Court’s Pocket?*, 77 NOTRE DAME L. REV. 269, 271 (2001); Nick Bravin, Note, *Is Morrison v. Olson Still Good Law? The Court’s New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103, 1106 (1998).

97. 478 U.S. 714, 726-28, 734 (1986).

98. 561 U.S. 477, 514 (2010). PCAOB Directors could be removed only “for willful violations of the Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance.” *Id.* at 503 (citing 15 U.S.C. § 7217(d)(3)). On *Free Enterprise Fund*, see the text accompanying note 2 below.

99. *Free Enter. Fund*, 561 U.S. at 487.

President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts.”<sup>100</sup> The Court held, however, that the removal restrictions were severable from the rest of the Sarbanes–Oxley Act, and thus its conclusion that the restrictions were invalid left the Directors in office but subject to removal by the SEC Commissioners at will.<sup>101</sup>

And in *Seila Law*, the Court struck down tenure protections for the Director of the CFPB. In so doing, it purported to establish a firm rule that Congress may not restrict the presidential removal power except in those limited instances, previously endorsed by the Court, involving “expert agencies led by a *group* of principal officers removable by the President only for good cause” and “certain *inferior* officers with narrowly defined duties.”<sup>102</sup> Time will tell how the *Seila Law* majority's rule will fare. Subsequent majorities in separation-of-powers cases tend to read inconvenient prior precedent narrowly where possible, focusing on the particular facts of the decision rather than on the opinion's sweeping pronouncements and efforts to lay down rules and principles.<sup>103</sup> The rule expressed in *Myers* that the President has an unrestricted removal power was effectively ignored in *Humphrey's Executor* and *Morrison*.<sup>104</sup> Chief Justice Roberts then narrowly interpreted *Morrison* in *Free Enterprise Fund* and *Seila Law*, treating the *Morrison* decision as based on the fact that the special counsel was considered an inferior officer,<sup>105</sup> which was not the grounds for that decision.<sup>106</sup> *Free Enterprise Fund* and *Seila Law* may someday receive the same treatment.<sup>107</sup>

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100. *Id.* at 498.

101. *Id.* at 508–09.

102. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020).

103. *See supra* note 16 and accompanying text.

104. *See Morrison v. Olson*, 487 U.S. 654, 725–26 (1988) (Scalia, J., dissenting) (accusing *Humphrey's Executor* of “gutting” *Myers* and the majority opinion in *Morrison* of being inconsistent with both earlier cases).

105. *See Seila Law*, 140 S. Ct. at 2199; *Free Enter. Fund*, 561 U.S. at 494–95.

106. *See Seila Law*, 140 S. Ct. at 2235–36, 2243 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

107. A few days after issuing its opinion in *Seila Law*, the Court granted certiorari to examine the Fifth Circuit's decision in *Collins v. Mnuchin*, 938 F.3d 553, 563, 595 (5th Cir. 2019) (en banc), which struck down the for-cause removal protection for the sole Director of the Federal Housing Finance Agency but held that protection severable as well. *See Mnuchin v. Collins*, No. 19–563, 2020 WL 3865249 (U.S. July 9, 2020) (mem.). Given that the Fifth Circuit's conclusion about the Federal Housing Finance Agency tracks the Court's conclusion about the CFPB, the grant of certiorari might be seen as an effort to solidify *Seila Law*'s principle regarding agencies run by a single individual by applying it to different factual circumstances. *Cf. Seila Law*, 140 S. Ct. at 2201–02 (distinguishing tenure protections for the single-headed Office of the Special Counsel, Social Security Administration, and Federal Housing Finance Agency but characterizing those restrictions as constitutionally controversial).

### C. The Unitary Executive Theory

The Supreme Court's apparent schizophrenia on the presidential removal power is mirrored in a broader debate among jurists and scholars over a theory of presidential power that has come to be known as the "unitary executive" theory of the presidency.<sup>108</sup> Proponents of the unitary executive theory contend that Article II vests the executive power in "one, and only one, person: the president of the United States."<sup>109</sup> The President, therefore, is the only person constitutionally authorized to wield the executive power. On this view, while Congress may create departments and officers within the executive branch to help the President carry out his duties, those officers can function only as the President's delegates. All decisions by executive-branch departments and agencies, whether military, regulatory, or prosecutorial in nature, must be made "in accordance with the president's wishes" and subject to his direction and control.<sup>110</sup>

Unitarians come in many flavors, but most assert that the Constitution requires the President to have the ability to remove all executive officers—principal or inferior—at will.<sup>111</sup> Thus, as Steven Calabresi and Christopher Yoo have argued, "congressional efforts to insulate executive-branch subordinates from presidential control by creating independent agencies and counsels are in essence unconstitutional."<sup>112</sup>

Unlike certain presidential powers that are explicitly mentioned in Article II—such as the pardon power, the power to receive ambassadors, and the President's designation as commander in chief of the armed forces—the Constitution does not say that the President shall have the power to dismiss subordinate officers.<sup>113</sup> By contrast, the Constitution does grant Congress the power "[t]o make all Laws which shall be necessary and proper for carrying

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108. See LAWSON, *supra* note 6, at 276-77. The term "unitary executive" appears to date from a 1974 article by Paul A. Freund, *The Supreme Court, 1973 Term—Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 15 (1974), but was popularized in Peter L. Strauss's seminal *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 605 (1984).

109. CALABRESI & YOO, *supra* note 1, at 3.

110. *Id.* at 3-4.

111. See *id.*; Calabresi & Prakash, *supra* note 17, at 597-98. Most, but not all. As Gary Lawson has noted, one can believe that the Constitution vests all of the executive power in the President without believing that the ability to remove subordinates is an inherent part of that power. See LAWSON, *supra* note 6, at 277.

112. CALABRESI & YOO, *supra* note 1, at 4.

113. Cf. Zachary J. Murray, *The Forgotten Unitary Executive Power: The Textualist, Originalist, and Functionalist Opinions Clause*, 39 PACE L. REV. 229, 253-54 (2018) (pointing to the Opinions Clause as an implicit indication that Congress may restrict the President's removal power because "[o]ne would assume that the power to remove an officer for any reason would include the power to require that officer report to the president").

into Execution [Congress's legislative] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."<sup>114</sup> One might argue that if the ability to remove appointed officers is "necessary" to carry into execution a law enacted by Congress, or to flesh out the structure and workings of the executive branch and its departments or officers, then it is for Congress to decide to whom, and to what extent, to allocate such a power. On that view, the only constraint on Congress's decision would be that it is "proper"—that is, does not improperly attempt to arrogate power to itself, "interfere with the President's exercise of the 'executive power,'" or "impede the President's ability to perform his constitutional duty" to "take care that the laws be faithfully executed."<sup>115</sup> This, indeed, is the tenor of Madison's statement in *The Federalist* that "[t]he tenure of the ministerial offices generally will be a subject of legal regulation, conformably to the reason of the case."<sup>116</sup>

For unitarians who profess a commitment to originalism, however, the cornerstone of the theory that the Constitution gives the President an illimitable removal power is the assertion that such a power was inherent in the "executive power" as that term would have been understood by the public in 1787. As Justice Scalia explained in an influential 1989 article:

One of the issues at hand [in *Myers v. United States*] (though not the only one) was what was understood to be the inherent content of the phrase "[t]he executive Power" in Article II, sec. 1, which provides that "[t]he executive Power shall be vested in a President of the United States of America." Specifically, was the phrase "the executive Power" a term of art that included the power to dismiss officers of the executive branch?<sup>117</sup>

In *Myers*, Chief Justice (and former President) Taft argued that the executive power was such a term of art, and that its inherent content did include the ability to dismiss subordinate executive-branch officers.<sup>118</sup> Because there is no evidence from the Constitutional Convention or the ratifying debates supporting the proposition that the term was so understood (and Hamilton's and Madison's statements in *The Federalist* cut the other way<sup>119</sup>), Chief Justice Taft turned to British history. He wrote, without providing any supporting

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114. U.S. CONST. art. I, § 8, cl. 18.

115. See *Morrison v. Olson*, 487 U.S. 654, 689-91 (1988) (first quoting U.S. CONST. art. II, § 1, cl. 1; and then quoting *id.* art. II, § 3). But see *Rosen*, *supra* note 52, at 5-6, 8-9 (treating removal as an unaddressed but nevertheless constitutional-level question committed to the interpretive agency of subsequent political communities).

116. THE FEDERALIST NO. 39 (James Madison), *supra* note 65, at 242.

117. Scalia, *supra* note 35, at 857 (alteration in original) (footnote omitted) (quoting U.S. CONST. art. II, § 1).

118. See *Myers v. United States*, 272 U.S. 52, 117-18 (1926).

119. See *supra* notes 65-68 and accompanying text.

citation,<sup>120</sup> that “[i]n the British system, the Crown, which was the executive, had the power of appointment and removal of executive officers, and it was natural, therefore, for those who framed our Constitution to regard the words ‘executive power’ as including both.”<sup>121</sup> Moreover, Chief Justice Taft argued that associating this power with the executive “is not incompatible with our republican form of Government.”<sup>122</sup>

Modern unitarians have similarly invoked British constitutional practice as providing historical support for their position.<sup>123</sup> Calabresi and Prakash, for example, have opined that history likely would support the proposition that “[t]he ‘executive power’ of English kings in the 18th century included an *unlimited* power to remove inferior executive officers.”<sup>124</sup> An amicus brief signed by professors Steven Calabresi, Julian Ku, Gary Lawson, John McGinnis, Geoffrey Miller, Michael Stokes Paulsen, Stephen B. Presser, Robert Pushaw, Michael Rappaport, and Christopher S. Yoo in the recent *Free Enterprise Fund* case confidently asserted that “17th and 18th century English law, which served as the backdrop for the Framers’ understanding [of] the scope of the executive power under the Constitution, recognized that the King of England unquestionably possessed the power to remove judicial and executive officers alike.”<sup>125</sup> And in defending presidential removal power in

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120. See Scalia, *supra* note 35, at 858. The opinion cited to *Ex parte Grossman*, 267 U.S. 87, 110 (1925), see *Myers*, 272 U.S. at 118, but *Grossman* concerned the pardon power and said nothing about the appointment or removal power. See Scalia, *supra* note 35, at 858.

121. *Myers*, 272 U.S. at 118 (citing *Grossman*, 267 U.S. at 110).

122. *Id.*

123. See, e.g., Steven G. Calabresi & Christopher S. Yoo, Essay, *Remove Morrison v. Olson*, 62 VAND. L. REV. EN BANC 103, 107 (2009) (arguing that “the seventeenth- and eighteenth-century English understanding of the King’s powers” supports the view that “[t]he Framers of the Constitution understood the grant of the ‘executive Power’ to the President as encompassing the power to remove all non-legislative and non-judicial personnel”); John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1947 (2009) (reviewing CALABRESI & YOO, *supra* note 1) (“Executives in the colonies and Great Britain held the power to appoint officers alone, and hence the power to remove. Because the Constitution specifically conditions the appointment power upon the Senate’s advice and consent, but remains silent on removal, we can infer that removal remains an executive power.” (citation omitted)).

124. Calabresi & Prakash, *supra* note 17, at 596 n.212 (emphasis added).

125. Brief of Law Professors as Amici Curiae in Support of Petitioners at 6, *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010) (No. 08-861), 2009 WL 2372919 (citing CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE (1552-1634)*, at 370-90, 477-504 (1957)). The law professors conceded that, “[i]n 1701, the Act of Settlement specified that judges would thereafter hold their offices during good behavior,” but they contended that “[t]he Act provided no such tenure for executive officials, and English Kings continued to remove executive officers.” *Id.*

court, the executive branch has made similar assertions.<sup>126</sup>

Scholars have criticized various aspects of the unitary executive theory on textual, historical, and functional grounds.<sup>127</sup> Their responses have included critiques of the unitarians' assertions that Congress cannot limit the President's removal authority.<sup>128</sup>

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126. See *Myers*, 272 U.S. at 91 (argument of Solicitor General Beck for the United States) (“At [the time of the Framing], in the science of government, according to the custom of the nation from which we drew our institutions in great part, and according to the custom of every country, so far as I know, the power to appoint and the power to remove had always been regarded as executive functions.”); Brief for the Petitioner at 19 n.11, *United States v. Lovett*, 328 U.S. 303 (1946) (Nos. 809, 810 & 811), 1946 WL 50579 (“Salaries of civil officials were defrayed from the Civil List. A lump sum was voted at the beginning of each reign which was entirely at the King’s disposal, and he could remove any person from office merely by striking him from the List.”).
127. See, e.g., Corwin, *supra* note 69, at 387-97 (critiquing the Supreme Court’s interpretation, in *Myers*, of the Decision of 1789 and the significance of British history); Flaherty, *supra* note 28, at 1729 (critiquing the historical and textual account provided by Calabresi and Prakash); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 278, 290-91 (1988) (arguing that, “from a historical perspective, criminal law enforcement cannot be considered a core or exclusive power of the executive branch” and discussing evidence of private criminal prosecutions in England); Lessig & Sunstein, *supra* note 38, at 2, 4 (opining that “the view that the framers constitutionalized anything like this vision of the executive is just plain myth,” but nevertheless concluding that “certain crucial aspects of the unitary executive view make most sense of the framers’ design”); Mortenson, *supra* note 26, at 1173 (cavassing originalist materials to conclude that the Vesting Clause only authorizes the President “to carry out projects defined by a prior exercise of the legislative power”); Robert V. Percival, Essay, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 966-69, 973-76 (2001) (presenting “textualist” and “originalist” arguments against an implied presidential power to dictate the decisions of executive regulatory agencies); Peter L. Strauss, Foreword, *Overseer, or “The Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 759 (2007) (“Our Constitution explicitly gives us a unitary head of state, but it leaves the framework of government almost completely to congressional design. If its text chooses between President as overseer of the resulting assemblage, and President as necessarily entitled ‘decider,’ the implicit message is that of oversight, not decision.”).
128. See, e.g., Kagan, *supra* note 20, at 2326 (explaining that although she is “highly sympathetic to the view that the President should have broad control over administrative activity, . . . the unitarians have failed to establish their claim for plenary control as a matter of constitutional mandate” because “[t]he original meaning of Article II is insufficiently precise and, in this area of staggering change, also insufficiently relevant to support the unitarian position”); Metzger, *supra* note 58, at 1880-81 (questioning the prominence of removal in debates over presidential control and contending that a variety of other mechanisms exist to supervise the conduct and decisionmaking of executive-branch officers); Eric A. Posner, *Balance-of-Powers Arguments, the Structural Constitution, and the Problem of Executive “Underenforcement,”* 164 U. PA. L. REV. 1677, 1705-07 (2016) (critiquing the contention that for-cause removal protections tilt the “balance-of-power” against the President).

But, until now, no one has questioned the conventional wisdom that the King of England possessed an inherent and illimitable removal power.<sup>129</sup> Indeed, even critics of the unitary executive theory appear to have accepted Chief Justice Taft's assertion without skepticism. Robert Reinstein, for example, has argued that implied presidential powers, such as removal, should be subject to regulation by Congress.<sup>130</sup> But he concedes that, "[a]t the time of the Constitutional Convention, the King's prerogatives included the power to remove any government official, except members of Parliament and judges," and that "all [executive] office-holders [in England] served at the pleasure of the King and were removable at his will."<sup>131</sup> Similarly, while John Manning has argued that the Constitution does not give the President unlimited removal power because it does not give him unlimited appointment power,<sup>132</sup> he has taken as a given that "[t]he executive power known to our English forebears assigned the crown limitless power to remove subordinates."<sup>133</sup>

That credulity is unfortunate. As Justice Scalia cautioned, Chief Justice Taft "bore the burden of establishing not only . . . that the phrase 'the executive Power' referred to the king's powers, *but also* that the king's powers in fact included the power to remove executive officials."<sup>134</sup> But Chief Justice "Taft's opinion contains nothing to support that point, except the unsubstantiated assertion that '[i]n the British system, the Crown . . . had the power of appointment and removal of executive officers.'"<sup>135</sup> And unitarians have supplied merely cursory generalizations gleaned from history books to supplement Chief Justice Taft's omission.<sup>136</sup> For Justice Scalia, "something more than an ipse dixit was called for,"<sup>137</sup> and yet, for almost a century, ipse dixit is all we have had. And that ipse dixit, it turns out, was mistaken.

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129. See *supra* note 38.

130. See Reinstein, *supra* note 31, at 263-65, 322 n.347.

131. *Id.* at 288, 294 (citing F. W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND: A COURSE OF LECTURES DELIVERED 428-30* (reprint 1909)).

132. Manning, *supra* note 29, at 2027.

133. Manning, *supra* note 37, at 45 n.268 (citing *Myers v. United States*, 272 U.S. 52, 118 (1926)); see also Manning, *supra* note 29, at 2027 (stating that the Crown had "unfettered power to remove" royal officers); cf. *id.* at 1964 n.134 (opining that "removal was surely considered an attribute of executive power").

134. Scalia, *supra* note 35, at 860.

135. *Id.* (alterations in original) (quoting *Myers*, 272 U.S. at 118).

136. See *infra* notes 175-76 and accompanying text.

137. Scalia, *supra* note 35, at 860.

## II. The Royal Prerogative and Removal

The originalist case for looking to the powers of the King of Great Britain to define the “executive power” vested in the President was best summarized (but not necessarily endorsed) by Justice Scalia:

[T]he traditional English understanding of executive power, or, to be more precise, royal prerogatives, was fairly well known to the founding generation, since they appear repeatedly in the text of the Constitution in formulations very similar to those found in Blackstone. It can further be argued that when those prerogatives were to be reallocated in whole or part to other branches of government, or were to be limited in some other way, the Constitution generally did so expressly. One could reasonably infer, therefore, that what was not expressly reassigned would—at least absent patent incompatibility with republican principles—remain with the executive.<sup>138</sup>

The notion that the royal prerogatives can help give content to the Framers’ understanding of the term “executive power” is sound.<sup>139</sup> Justice Scalia was correct that at least some in the late eighteenth century equated the King’s prerogatives with the executive power.<sup>140</sup> Blackstone, for instance, wrote that the “authorities and powers” vested in the King constitute “the executive part of government,” which “is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength and dispatch.”<sup>141</sup>

Moreover, when it came to the exercise of these prerogatives, the King possessed virtually unlimited discretion.<sup>142</sup> Though his powers and discretion could be and sometimes were limited by statute, such limitations were generally seen as alterations to the (unwritten) constitution:

He may reject what bills, may make what treaties, may coin what money, may create what peers, may pardon what offences he pleases: unless where the constitution hath expressly, or by evident consequence, laid down some

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138. *Id.* at 859-60.

139. *But see* Manning, *supra* note 62, at 1310-12, 1312 n.98 (discussing evidence that the Framers and ratifiers deliberately departed from the royal prerogative model of executive power, a yoke which they had recently shed blood to cast off).

140. On the relationship between the executive power and the royal prerogative in England, see 10 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 339 (1938) (“The principal motive force of the executive power in the British Constitution has always been the royal prerogative. This is as true today as it was in the eighteenth century.”).

141. 1 BLACKSTONE, *supra* note 40, at \*242; *see also* 4 BACON, *supra* note 50, at 149 (stating that the prerogative includes the “Rights and Privileges which by . . . Law the King hath, as Head and Chief of the Commonwealth, and as intrusted with the Execution of the Laws,” and describing the King as “intrusted with the executive Part” of the government (emphasis omitted)).

142. *See* 1 BLACKSTONE, *supra* note 40, at \*243.



exception or boundary; declaring, that thus far the prerogative shall go and no farther.<sup>143</sup>

The problem for originalists who champion an unlimited presidential removal power, then, is not that the executive power in Great Britain was not associated with the King's prerogative powers. And it is not necessarily that the Framers would not have understood the executive power under Article II to encompass any prerogative powers not allocated to Congress or manifestly incompatible with a republican government. It is that removal was not one of those powers.

This can be seen very clearly in Blackstone's *Commentaries on the Laws of England*. Blackstone divided the royal prerogatives into two categories: "direct" and "incidental."<sup>144</sup> The direct prerogatives were "such positive substantial parts of the royal character and authority, as are rooted in and spring from the king's political person, considered merely by itself, without reference to any other extrinsic circumstance."<sup>145</sup> The incidental prerogatives, by contrast, were "only exceptions, in favour of the crown, to those general rules that are established for the rest of the community: such as, that no costs shall be recovered against the king" or "that his debt shall be preferred before a debt to any of his subjects."<sup>146</sup>

Blackstone divided the direct prerogatives into three classifications: those that related to the King's royal character, those that related to the royal authority, and those that related to the royal income.<sup>147</sup> Chapter 7 of the first book of the *Commentaries* lists and describes the direct prerogatives related to the royal character and authority.<sup>148</sup> We are concerned here only with the latter category. The prerogatives related to the royal character ("dignity"), such as the King's "sovereignty, or pre-eminence," his immunity from suit, and the principle that the King, in his political capacity, "never dies,"<sup>149</sup> are "attributes of a great and transcendent nature," considered "inherent in" the King's "royal capacity" and ascribed to him in order that "the people are led to consider him in the light of a superior being."<sup>150</sup> Thus, they may inform the characteristics

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143. *Id.* On the view that limitations on the King's prerogatives were viewed as altering the Constitution, see note 316 below.

144. 1 BLACKSTONE, *supra* note 40, at \*232; see 10 HOLDSWORTH, *supra* note 140, at 342.

145. 1 BLACKSTONE, *supra* note 40, at \*232-33.

146. *Id.* at \*233.

147. *Id.* Holdsworth classifies the King's fiscal and proprietary rights with the King's incidental prerogatives. See 10 HOLDSWORTH, *supra* note 140, at 342.

148. See 1 BLACKSTONE, *supra* note 40, at \*233-70.

149. *Id.* at \*234-42.

150. See *id.* at \*234.

of a sovereign state (such as the United States as a whole), but they do not touch on powers that might have been transmitted to the President.<sup>151</sup>

The direct prerogatives related to the King’s “authorities and powers,” on the other hand, were those that Blackstone equated with “the executive part” of the British government.<sup>152</sup> Each prerogative emanated from a conceptual characterization of the King,<sup>153</sup> but these characterizations are not themselves powers. By the eighteenth century, many of those characterizations were no longer true in any legal or practical sense.<sup>154</sup> For example, while the King was considered the “fountain of justice” and thus lent his name to the proceedings of the courts of the realm,<sup>155</sup> he no longer had any actual prerogative to sit as a judge on his courts or to issue judgments or decrees.<sup>156</sup> Similarly, while Blackstone stated that the King “has alone the right of erecting courts of judicature,”<sup>157</sup> by the eighteenth century that power had become limited to erecting new common law courts or courts for English colonies, as circumscribed by law.<sup>158</sup>

Blackstone listed the following powers as constituting the King’s prerogative authority. First, because the King was characterized as “the delegate or representative of his people” with respect to foreign affairs, he had

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151. The Framers rejected the notion that the President was endowed with royal privileges, such as the conceit that the King could do no wrong. *See* Minutes of July 20, 1787 (Madison), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 63, 65-66 (Max Farrand ed., 1911); Convention of Pennsylvania, in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 391, 480 (Jonathan Elliot ed., Washington, D.C., 2d ed. 1836) (statement of Mr. Wilson). That conceit was not imputed to the President. *See* Clinton v. Jones, 520 U.S. 681, 697 n.24 (1997). The President, like judges and prosecutors, is entitled to absolute immunity from suits for damages “predicated on his official acts.” *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982); *see also* Clinton, 520 U.S. at 693 (discussing the immunity afforded to prosecutors and judges). But the President is not entirely immune from suit. He can be sued for injunctive relief and even for civil damages based on nonofficial conduct. *See* Clinton, 520 U.S. at 693-94, 697, 704-06.

152. *See* 1 BLACKSTONE, *supra* note 40, at \*242-43.

153. On the relationship between the conceptions of the King and the prerogatives flowing from each conception (as well as the boundaries of each prerogative), *see* 10 HOLDSWORTH, *supra* note 140, at 362-425.

154. For example, *see id.* at 340:

[T]hough the speculations of the Tudor and early Stuart lawyers had converted the very human mediæval King into a corporation sole, immortal, omni-present, and infallible, the result of the constitutional controversies of the seventeenth century had been to prove that the prerogative of this immortal and infallible King was not the sovereign power in the state, and that, though the King was personally above the law, his prerogative was subject to it.

155. 1 BLACKSTONE, *supra* note 40, at \*257.

156. *Id.* at \*257-58.

157. *Id.* at \*257.

158. *See* 10 HOLDSWORTH, *supra* note 140, at 414.

the sole power to send and receive ambassadors, the power “to make treaties, leagues, and alliances with foreign states and princes,” “the sole prerogative of making war and peace,” the power to “direct[] the ministers of the crown to issue letters of marque and reprisal,” and the power to grant “safe-conducts” to admit and expel aliens.<sup>159</sup>

Second, in his character as “a constituent part of the supreme legislative power” (the other constituent part being Parliament<sup>160</sup>), the King possessed an absolute veto on legislation.<sup>161</sup>

Third, in his character “as the generalissimo, or the first in military command, within the kingdom,”<sup>162</sup> the King possessed “the sole power of raising and regulating fleets and armies,” the sole command of the militia and all land and sea forces, and “the sole prerogative . . . of erecting, . . . manning and governing” forts and “other places of strength,” as well as the prerogatives of “appointing ports and havens” and erecting “beacons, light-houses, and sea-marks,” the power of “prohibiting the exportation of arms or ammunition,” and the right to “confin[e] his subjects to stay within the realm, or of recalling them when beyond the seas.”<sup>163</sup>

Fourth, because he was considered “the fountain of justice and general conservator of the peace of the kingdom,” the King possessed “alone the right of erecting courts of judicature” and the prerogative of “issuing proclamations” to “enforce the execution” of existing laws.<sup>164</sup>

Fifth, in his conceptual role as the nation’s prosecutor, the King had the prerogative of “pardoning offences.”<sup>165</sup>

Sixth, as “the fountain of honour, of office, and of privilege,” the King had “the sole power of conferring dignities and honours,” the prerogative “of erecting and disposing of offices,” “the prerogative of conferring privileges upon private persons,” such as “granting place or precedence to any of his

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159. 1 BLACKSTONE, *supra* note 40, at \*245-46, \*249-53.

160. *See infra* note 340 and accompanying text (discussing the concept of the “King in Parliament”).

161. 1 BLACKSTONE, *supra* note 40, at \*253.

162. *Id.* at \*254.

163. *Id.* at \*254-56; *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 254-56, *supp.* at vi-vii (Oxford, Clarendon Press 1765) (emphasis omitted).

164. 1 BLACKSTONE, *supra* note 40, at \*257, \*260-61. As discussed above, other than with respect to new common law courts and colonial courts, the power of “erecting courts of judicature” was more theoretical than actual. *See* 10 HOLDSWORTH, *supra* note 140, at 360, 414-17.

165. 1 BLACKSTONE, *supra* note 40, at \*258-60 (emphasis omitted).

subjects,” “converting aliens, or persons born out of the king’s dominions, into denizens,” and “erecting corporations.”<sup>166</sup>

Seventh, “as the arbiter of commerce,” the King possessed the prerogatives of establishing public markets and fairs, of fixing and regulating standard weights and measures, and of coining money and regulating its value.<sup>167</sup>

Finally, “as the head and supreme governor of the national church,” the King was vested with the prerogatives of “conven[ing], prorogu[ing], restrain[ing], regulat[ing], and dissolv[ing] all ecclesiastical synods or convocations,” nominating bishops, and serving as “the dernier resort” for appeals “in all ecclesiastical causes.”<sup>168</sup>

These are the prerogatives that comprised the executive power in England.<sup>169</sup> The powers to remove executive officials or to specify the tenure of any grants of offices are not listed. Nor is a removal power listed in the following chapter of Blackstone’s *Commentaries*, which describes the King’s traditional prerogative sources of revenue.<sup>170</sup>

Some unitarians recently have argued that the King’s prerogative to “dispose of” offices included the powers both of appointment and removal.<sup>171</sup> Apart from the prerogative being applicable only to the limited offices created by the King himself rather than by statute,<sup>172</sup> this unnatural reading of the

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166. *Id.* at \*261-63. Note that Blackstone does not say that the King possessed exclusive power to erect or dispose of offices. On the meaning of the term “dispose of,” see notes 171-74 and accompanying text below. As will be seen in the next Part of the Article, Parliament could and did create offices as well. See *infra* Part III.B.2.

167. 1 BLACKSTONE, *supra* note 40, at \*263-68.

168. *Id.* at \*269-70 (emphasis omitted).

169. For a glimpse at how the U.S. Constitution divides up these prerogatives among Congress and the President, see Reinstein, *supra* note 31, at 271-307; and Scalia, *supra* note 35, at 858-60.

170. See 1 BLACKSTONE, *supra* note 40, at \*271-326. To be sure, the King utilized his prerogative of creating offices, in tandem with the statutory revenue granted to him by Parliament (“the civil list”), to appoint officers to a variety of positions (mostly related to revenue collection) and sinecures held at the royal pleasure. See 10 HOLDSWORTH, *supra* note 140, at 500-01. And in the eighteenth century, the Hanoverian Kings, George I (r. 1714-1727), George II (r. 1727-1760), and especially George III (r. 1760-1820), leveraged this patronage system into a tool for influencing Parliament and maintaining control over their ministries. See *id.* at 418-20. But these political happenstances are not the equivalent of a royal prerogative and, indeed, were largely swept away through reform legislation enacted between 1780 and 1834. See Archibald S. Foord, *The Waning of “The Influence of the Crown,”* 62 ENG. HIST. REV. 484, 498-500 (1947). On the regnal years of the Kings and Queens of England, see note 175 below.

171. See Brief for Separation of Powers Scholars as Amici Curiae in Support of Petitioner at 11, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) (No. 19-7), 2019 WL 6910302.

172. See 1 BLACKSTONE, *supra* note 40, at \*262 (explaining that while the King may create new offices, “he cannot create new offices with new fees annexed to them, nor annex new fees to old offices; for this would be a tax upon the subject, which cannot be

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term “dispose” is insupportable. Other contemporaneous authorities on the prerogative do not refer to a removal power and instead talk about granting offices, solidifying the reading of “disposing” as synonymous with granting or bestowing.<sup>173</sup> Moreover, these authorities make clear that the King’s appointment power extended only to those offices that he created, not those created by Parliament, and that the offices he could create were limited in nature.<sup>174</sup>

Given that the English authorities do not include removal as one of the King’s prerogatives, unitarians attempting to find support for Chief Justice Taft’s assertion have looked mostly to statements in constitutional and political histories about how the British government operated as a practical matter, particularly during the reign of George III (r. 1760-1820).<sup>175</sup> The statements in these histories, however, are imprecise generalizations or episodic descriptions of particular events.<sup>176</sup> They can be helpful in

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imposed but by act of parliament”); *see also infra* Part III.B.2 (discussing offices created by statute).

173. *See* 4 BACON, *supra* note 50, at 174 (“But tho’ all such Officers derive their Authority from the Crown, and from whence the King is termed the universal Officer and Disposer of Justice, yet it hath been held, that he hath not the Office in him to execute it himself, but is only to *grant or nominate . . .*” (emphasis added)); MATTHEW HALE, THE PREROGATIVES OF THE KING 262 (D.E.C. Yale ed., Selden Soc’y 1976) (ms. c. 1640-1660) (“But in any case where the office is not a burden or prejudice to the people, the king may erect an office and *make it a freehold* whereupon an assise may be maintained.” (emphasis added)); *id.* (“Yet by the same charter the king may erect and *grant* the office.” (emphasis added)).
174. *See* 4 BACON, *supra* note 50, at 174 (explaining that the King cannot “grant any new Powers or Privileges to any such Officers, but they must execute their Offices according to the Rules established and prescribed them by the Law”); HALE, *supra* note 173, at 262 (noting that the King’s power to create offices is limited to those not funded by any new fees or taxes; that is, “where the office is not a burden or prejudice to the people”).
175. *See, e.g.,* Brief of Law Professors as Amici Curiae in Support of Petitioners, *supra* note 125, at 6-7; Calabresi & Yoo, *supra* note 123, at 107-08. For historical context, the first mention of an English monarch in the text is followed by a parenthetical listing the years during which they reigned, drawn from Ben Johnson, *Kings and Queens of England & Britain*, HISTORIC UK, <https://perma.cc/3PJ7-M77J> (archived Oct. 9, 2020).
176. For example, the portions of the biography of Sir Edward Coke, *The Lion and the Throne*, relied upon by both Calabresi and Yoo and the law professors’ brief cited in the preceding footnote, *supra* note 175, merely recount Coke’s dismissal from King’s Bench in 1616 and the removal and imprisonment of various officials who refused to cooperate with the forced loan program of Charles I (r. 1625-1649). *See* BOWEN, *supra* note 125, at 370-90, 477-504. In its brief in *United States v. Lovett*, the United States cited D. LINDSAY KEIR, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN, 1485-1937, at 299, 303-04 (2d ed. 1943), for a discussion of general royal removal practice under the statutorily created “civil list” in the eighteenth century (on which, see note 169 above), and to 1 THOMAS ERSKINE MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND SINCE THE ACCESSION OF GEORGE THE THIRD 1-80 (Francis Holland ed., rev. ed. 1912), for the proposition that “George III made removals without consulting either Parliament or  
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understanding the overall political milieu of Great Britain in the eighteenth century, but they do not (and were not attempting to) do the required work of showing that the King actually had the power to remove all executive officers (a sort of de facto prerogative), or that Parliament could not or did not limit the King's removal authority. The next Part of this Article takes on that work, in the process demonstrating that the reality is far removed from the conclusions legal scholars have previously drawn.

### III. Removal of Executive Officers in England

So what was the reality of the royal removal power? This Part answers that question. In particular, both the common law and Parliament's power over tenure limited the King's ability to remove executive officers.

#### A. Common Law Limitations on the King's Ability to Remove Executive Officers

As this Part demonstrates, while the King could remove many executive officers, his ability to do so was often strictly limited by law. The first source of limitations on the royal removal power came from the common law.

##### 1. Royal grants of tenure

Throughout English history, most legal restraints on the Crown's ability to remove executive officers were imposed by the Crown itself. This may appear odd from a modern perspective,<sup>177</sup> but in the political and socioeconomic world of England from the medieval era to the nineteenth century, tenure-protected government offices, with their attendant fees and other perquisites, were a valuable source of patronage for the King.<sup>178</sup>

From as far back as the Norman Conquest of 1066, the Crown cultivated influence and rewarded supporters by granting offices in the central government with tenure protections, such as in fee simple (which would descend to the grantee's heirs), for life, for a term of years, or *quamdiu se bene gesserint* (Latin for "as long as he shall behave himself well," commonly known

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his own ministers." See Brief for the Petitioner, *supra* note 126, at 19 n.11. Neither source suggests that the cited practices stemmed from a royal prerogative, were inherent powers, or were in any way illimitable.

177. Steven Calabresi and Christopher Yoo have written an entire book attempting to establish that Presidents of the United States have consistently asserted the power to remove all executive-branch officers. See CALABRESI & YOO, *supra* note 1, at 4; see also *id.* at 22 (anticipating the criticism that "it is entirely predictable that all forty-three presidents would favor a broad understanding of presidential power").

178. See 1 HOLDSWORTH, *supra* note 140, at 249-50 (3d ed. 1922); 10 *id.* at 504, 509 (1938).

as “during good behavior”).<sup>179</sup> A grant of an office from the King was treated as a property right, and thus even the King could not legally remove an officer with tenure absent a breach of the conditions of the grant.<sup>180</sup>

The extent to which the King tied his own (and his successors’) hands by parceling out tenured offices is staggering. Royal beneficence affected every branch of the government, from the King’s council and royal household,<sup>181</sup> to the administration of the military,<sup>182</sup> to the revenue collectors and myriad other officers dispersed throughout the realm.<sup>183</sup> A tour through some of the

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179. See E.F. Churchill, *The Crown and Its Servants*, 42 LAW Q. REV. 212, 212-19 (1926); see also, e.g., 13 Edw. c. 42 (1285) (stating that some of the King’s “Marshals of Fee, Chamberlains, Porters in the Circuit of Justices and Serjeants bearing Vierge before Justices at Westminster” held their offices in fee (emphasis omitted)); 9 Hen. 3 c. 14 (1225) (distinguishing between “Forester[s] in fee” and foresters not in fee).

180. See AYLMER, *supra* note 43, at 106-08; 1 HOLDSWORTH, *supra* note 140, at 247-48 (3d ed. 1922); J.C. Sainty, *The Tenure of Offices in the Exchequer*, 80 ENG. HIST. REV. 449, 464-65 (1965). A party could be removed from office by means of a judicial proceeding for a writ of *quo warranto* or for a writ of *scire facias* to cancel the King’s letter patent. 1 HOLDSWORTH, *supra* note 140, at 229-30, 452 (3d ed. 1922). With respect to offices granted *quamdiu se bene gesserint* (on good behavior), proof of breach required a showing, supported by evidence, of actual misbehavior. See Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 93 (2006).

181. For example, many of the Clerks of the Privy Council were appointed for life, and the four Clerks of the Privy Seal enjoyed life tenure until 1814. See J.C. Sainty, *Clerks of the Privy Seal c. 1537-1851*, INST. HIST. RSCH. (Mar. 1999), <https://perma.cc/9RKJ-NBUW?type=image>; J.C. Sainty, *Clerks of the Privy Council*, INST. HIST. RSCH. (Apr. 2004), <https://perma.cc/6QEA-D5Z6?type=image>.

182. Officers of the Navy Board were appointed for life from their creation in the mid-1500s until 1639, and the office of Navy Treasurer was granted for life until 1668. See J.C. Sainty, *Navy Clerk of the Acts c. 1546-1660*, INST. HIST. RSCH. (Jan. 2003), <https://perma.cc/6ZN9-E27W?type=image> (Navy Board Officers); J.C. Sainty, *Navy Treasurer c. 1546-1836*, INST. HIST. RSCH. (Jan. 2003), <https://perma.cc/S3QX-PEJN?type=image>. Similarly, army ordnance officers were appointed for life until between 1663 and 1690. See J.C. Sainty, *Ordnance Masters 1544-1855*, INST. HIST. RSCH. (May 2002), <https://perma.cc/PZD7-VHUW?type=image> (noting that ordnance masters had life tenure until 1663); J.C. Sainty, *Ordnance Clerk 1544-1855*, INST. HIST. RSCH. (May 2002), <https://perma.cc/8L4S-2C2K?type=image> (noting that ordnance clerks had life tenure until 1690).

183. See, e.g., J.C. Sainty, *Receivers of Land Revenues 1554-1832*, INST. HIST. RSCH. (Feb. 2004), <https://perma.cc/K6X3-4BK2?type=image>; *Wards Officers*, INST. HIST. RSCH., <https://perma.cc/EX77-A7TS?type=image> (archived Sept. 5, 2017); J.C. Sainty, *Justices in Eyre 1509-1840*, INST. HIST. RSCH. (Nov. 2002), <https://perma.cc/486L-ZZ3C?type=image>; J.C. Sainty, *Masters of the Mint 1572-1869*, INST. HIST. RSCH. (May 2002), <https://perma.cc/8XH6-BNRZ?type=image>; J.C. Sainty, *Wardens of the Mint 1572-1869*, INST. HIST. RSCH. (May 2002), <https://perma.cc/VDX2-YAFP?type=image>; see also 1 W. & M. c. 21, § 9 (1688) (noting that the Clerk of the Peace for the Duchy and County Palatine of Lancaster “holds his . . . Office for Lives” by grant of the King); 37 Hen. 8 c. 1, § 1 (1545) (noting that many Clerks of the Peace obtained from the King letters patent for life); Laws in Wales Act 1542, 34 & 35 Hen. 8 c. 26, § 65 (discussing offices of Stewardships of the King’s Lordships granted for Term of Life); 19 Hen. 7 c. 10, § 7  
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most notable offices reveals an executive apparatus far removed in many respects from the assumptions of unity often projected onto it by modern scholars.

To begin with, many of the officers of the Exchequer and the Chancery, the first “two great departments of state,”<sup>184</sup> held their offices for life or during good behavior for centuries. Between 1331 and 1801, for example, the Clerk of the Crown in Chancery was almost always granted his office for life.<sup>185</sup> The Exchequer, which was developed to supervise the collection and accounting of the King’s revenues,<sup>186</sup> was particularly rife with tenured officials. The Constable, Marshal, and Chamberlain of the Exchequer held their offices in fee simple.<sup>187</sup> The Barons of the Court of Exchequer, who handled the Exchequer’s judicial business, generally held their offices during good behavior after 1450.<sup>188</sup> Even the Chancellor of the Exchequer (concurrently the Under Treasurer) held his offices for life until 1676.<sup>189</sup> While gradual reforms carried out in the seventeenth century rendered many offices in the central government more accountable to the King, Exchequer officials often retained their independence.<sup>190</sup>

Royal law enforcement officers often possessed tenure as well. James I (r. 1603-1625) appointed Francis Bacon to be King’s Counsel during good

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(1503) (discussing that the offices of Constable and Porter of the Castle of Conysborough and the office of Warnership of the Warren of Methwolde were held under life tenure).

184. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 12 (4th ed. 2007). The Exchequer served as the royal treasury, in which the King settled his accounts with royal officials and with his debtors and creditors. Over time its functions were divided into an administrative side and a judicial side. See 1 HOLDSWORTH, *supra* note 140, at 42-44, 231-34 (3d ed. 1922). The Chancery was the department presided over by the Lord Chancellor, one of the King’s most important ministers. The Chancery served a variety of administrative functions and also was the kingdom’s court of equity. See *id.* at 37-38, 395-412.

185. See J.C. Sainty, *Clerk of the Crown in Chancery—Introduction*, INST. HIST. RSCH. (Apr. 2001), <https://perma.cc/797C-DE9Q?type=image> (listing appointments to the Clerk of the Crown in Chancery).

186. On the development of the Exchequer, see BAKER, *supra* note 184, at 17-18.

187. See 51 Hen. 3, stat. 5, § 7 (1266).

188. BAKER, *supra* note 184, at 18, 167. Their tenure was formally secured by the Act of Settlement of 1701, see *id.* at 168, which provided that judges should hold their offices during good behavior, but that the King could remove them upon joint address by the two Houses of Parliament, see Act of Settlement 1700, 12 & 13 Will. 3 c. 2, § 3.

189. OFFICE-HOLDERS IN MODERN BRITAIN: VOLUME 1—TREASURY OFFICIALS, 1660-1870, at 26-28 (J.C. Sainty ed., 1972), reprinted in *Chancellor of the Exchequer 1660-1870*, BRIT. HIST. ONLINE, <https://perma.cc/J9SY-TRWX> (archived Oct. 10, 2020).

190. Sainty, *supra* note 180, at 467-68.



behavior (and with an annuity for life) in 1604.<sup>191</sup> The Attorney General (originally known as the King's Attorney) usually held his office for life or during good behavior from 1410 until the reign of Henry VIII (r. 1509-1547), and the Solicitor General often enjoyed similar tenure protections until the Restoration of Charles II (r. 1660-1685), which followed the death of Lord Protector Oliver Cromwell in 1658 and the end of the Protectorate in 1660.<sup>192</sup>

The existence of independent sheriffs is also notable.<sup>193</sup> In the medieval period, the sheriff effectively ruled his shire, acting on the King's behalf in the collection of revenue, the direction of military and police forces, the keeping of jails and courts, the execution of judicial process, and the supervision of parliamentary elections.<sup>194</sup> The role of the sheriff gradually diminished over the centuries, and many of his functions were transferred to other officials, but even so, the sheriff still served as one of his county's chief law enforcement officers until the end of the 1800s.<sup>195</sup> While it was the exception rather than the rule in England, the sheriffships in some jurisdictions were granted in fee, rendering the holder irremovable.<sup>196</sup> And hereditary sheriffs were the norm in much of Scotland until the Scottish heritable jurisdictions were abolished in 1748.<sup>197</sup>

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191. See ALEXANDER PULLING, *THE ORDER OF THE COIF* 185, 187-88 (London, William Clowes & Sons 1884).

192. See W.S. Holdsworth, *The Early History of the Attorney and Solicitor General*, in *CELEBRATION LEGAL ESSAYS* 394, 397-400 (Albert Kocourek ed., 1919); 2 WINSTON S. CHURCHILL, *A HISTORY OF THE ENGLISH-SPEAKING PEOPLES: THE NEW WORLD* 316-28 (1956).

193. On the sheriff, see 1 HOLDSWORTH, *supra* note 140, at 6-8, 65-68 (3d ed. 1922).

194. See *id.* at 66; see 6 Hen. 6 c. 4 (1427) (requiring that sheriffs supervise elections to Parliament). During the Anglo-Saxon period, the Sheriff ("shire-reeve") served as the arm of the central government at the shire level. See BAKER, *supra* note 184, at 9.

195. 1 HOLDSWORTH, *supra* note 140, at 67-68 (3d ed. 1922); 1 BLACKSTONE, *supra* note 40, at \*332-33.

196. See 1 HOLDSWORTH, *supra* note 140, at 66 (3d ed. 1922); see also 23 Hen. 6 c. 7 (1444) (noting that "divers of the King's liege People be inheritable to the Office of Sheriffs at this Day" or hold the sheriffship in freehold); 1 Hen. 5 c. 4 (1413) ("[T]hey which be Bailiffs of Sheriffs by one Year, shall be in no such Office by three Years next following, except Bailiffs of Sheriffs which be inheritable in their Sheriffwicks."); 28 Edw. c. 8 (1300) ("The King hath granted unto his People, that they shall have Election of their Sheriff, in every Shire, where the Shrivaltie is not of Fee, if they list."); THE COMPLETE SHERIFF 50 (London, E. & R. Nutt & R. Gosling 3d ed. 1727) (discussing sheriffs who have "Freehold in [their] Office"); cf. 14 Edw. 3, stat. 1, c. 7 (1340) (observing that "some Sheriffs have their Bailiwicks for Term of Years of the King's Grant"). Holdsworth notes that the sheriffship in Westmoreland County remained hereditary until 1850. 1 HOLDSWORTH, *supra* note 140, at 66 (3d ed. 1922); cf. 19 Hen. 7 c. 10, § 1 (1503) (noting that the keeping of some jails was held by "Estate of Inheritance, or by Succession").

197. See James Ferguson, *The Sheriff in Scotland*, 22 JURID. REV. 105, 113-15 (1910-1911).

Moreover, in most counties, the coroner was elected by the people for life and was removable only for cause.<sup>198</sup> The coroner investigated unexpected deaths and served as a sort of grand-jury prosecutor and judge, trying inquests of murder in order to commit an accused to prison and certifying the results of the inquest to the King's courts for trial.<sup>199</sup>

In addition to this profusion of executive officials holding office under royal grants of tenure, England also contained many regions (such as counties palatine and other large liberties), cities, and towns that operated independently of royal executive control.<sup>200</sup> While these areas were subject to parliamentary legislation and thus cannot be thought of as independent of English sovereignty,<sup>201</sup> they had been often granted charters or franchises allowing them to select their own law enforcement officers without royal interference and not subject to removal by the King or his ministers.<sup>202</sup> Some could even make their own justices of the peace or have their members or officers occupy that post *ex officio*.<sup>203</sup>

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198. See 1 BLACKSTONE, *supra* note 40, at \*336.

199. See *id.* at \*337. Like many English officers, particularly ancient ones, the coroner's duties partook of a mixture of judicial and executive functions. See 1 BACON, *supra* note 50, at 491-98 (London, E. & R. Nutt & R. Gosling 1736).

200. Counties palatine, or palatinates, were "independent principalities of the continental type within which the king's writ did not run." 1 HOLDSWORTH, *supra* note 140, at 109 (3d ed. 1922). The term "liberty" refers to other autonomous local towns and other jurisdictions independent of royal control. See Keith Stringer, *States, Liberties and Communities in Medieval Britain and Ireland (c. 1100-1400)*, in LIBERTIES AND IDENTITIES IN THE MEDIEVAL BRITISH ISLES 5, 5-7 (Michael Prestwich ed., 2008).

201. See 1 HOLDSWORTH, *supra* note 140, at 109 (3d ed. 1922). For an example, see 9 Ann. c. 20, § 8 (1710) (providing that no person elected as mayor, bailiff, or other officer of a borough with annual elections can serve again in the following year). Unlike the United States, England had no federal system. See Lord Justice Woolf, *The Role of the English Judiciary in Developing Public Law*, 27 WM. & MARY L. REV. 669, 669 (1986). While local governments possessed considerable autonomy, see 10 HOLDSWORTH, *supra* note 140, at 133-36, all local authority was ultimately subject to the control of Parliament and the central courts. See *id.* at 236-56 (describing the relations of the local government to the central government). The exceptions to royal (but not parliamentary) control embodied in these liberties thus are less analogous to states possessing their own sovereignty and more analogous to all of the branch offices of federal agencies and the United States Attorney's offices in a particular state operating without any oversight from the President or the Department of Justice in Washington, D.C.

202. See 1 HOLDSWORTH, *supra* note 140, at 109-20 (3d ed. 1922) (discussing counties palatine); 10 *id.* at 131-32, 137 (1938). English cities, towns, and ports received statutory security for their liberties in the Magna Charta, see 9 Hen. 3 c. 9 (1225), and London's franchises were rendered irrevocable by statute at the end of the seventeenth century, see 3 BLACKSTONE, *supra* note 40, at \*263-64 (citing 2 W. & M., sess. 2, c. 8 (1690)).

203. See 10 HOLDSWORTH, *supra* note 140, at 137-38, 140-42; 1 *id.* at 109 (3d ed. 1922); see also Justices Qualification Act 1744, 18 Geo. 2 c. 20, § 12 (noting that cities, towns, Cinque  
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In the eighteenth century, justices of the peace were the principal civil officials in the county.<sup>204</sup> Usually, they were local magnates, such as peers or landed gentry, who served in the position without pay out of a sense of duty to their community and the Crown.<sup>205</sup> Although they exercised a local judicial jurisdiction, presiding over the Quarter-Sessions,<sup>206</sup> they were also law enforcement officers, charged with keeping the peace<sup>207</sup> and executing national laws.<sup>208</sup> As to this latter function, Parliament vested the justices of the peace with significant administrative and regulatory authority. Statutes instructed them to execute laws related to infrastructure, the environment, public health and safety, and prisons, as well as to assess taxes, administer the poor laws, set wages and prices, and license wine retailers and alehouses.<sup>209</sup>

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Ports, and liberties have “Justices of the Peace within their respective Limits and Precincts, by Charter, Commission, or otherwise”.

204. Justices of the peace were created in the fourteenth century during the reign of Edward III (r. 1327-1377), when Parliament assigned “keepers of the peace” for every county in an effort to establish firmer royal control. See 1 W. NELSON, *THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE*, at xx (London, H. Lintot 12th ed. 1745); 1 HOLDSWORTH, *supra* note 140, at 285-87 (3d ed. 1922). They ordinarily served at the King’s pleasure. 1 BLACKSTONE, *supra* note 40, at \*341.
205. See 10 HOLDSWORTH, *supra* note 140, at 127.
206. See *id.* at 128.
207. See, e.g., 15 Rich. 2 c. 2 (1391) (authorizing justices of the peace to call the *posse comitatus* (“Power of the County”) to confront those who have made forcible entry onto another’s land and to suppress insurrections, riots, and disturbances of the peace).
208. See 4 Hen. 7 c. 12, § 2 (1488) (requiring “plain and true Execution” of the law). Richard Tompson describes them as “[a] combination of police inspector, magistrate and county councillor.” Richard S. Tompson, *The Justices of the Peace and the United Kingdom in the Age of Reform*, 7 J. LEGAL HIST. 273, 273 (1986).
209. See 10 HOLDSWORTH, *supra* note 140, at 156; see also, e.g., 26 Geo. 2 c. 34, § 1 (1753) (empowering justices of the peace to license persons to buy and sell cattle in order to prevent the spread of distemper); 26 Geo. 2 c. 31, § 1 (1753) (licensing alehouses); 14 Geo. 2 c. 35, § 14 (1740) (setting rates and duties for measuring, stamping, and sealing cloth); County Rates Act 1738, 12 Geo. 2 c. 29, § 1 (making assessments for repairing bridges and building or repairing jails); 9 Geo. 2 c. 23, § 14 (1735) (licensing liquor retailers); 8 Ann. c. 18, §§ 1, 3 (1709) (setting prices and making regulations for marking bread); 16 & 17 Car. 2 c. 2, §§ 1-2 (1664) (setting and enforcing rates for the sale of coal); 2 Jac. c. 31, § 2 (1604) (taxing inhabitants for the relief of persons infected with the plague); 13 Eliz. c. 9, § 2 (1570) (exercising the power of the commissioners of sewers whose commissions have expired); 1 Mar., sess. 3, c. 5 (1554) (assessing landowners, farmers, and inhabitants to finance repairs to a road); 6 Hen. 6 c. 3 (1427) (setting “the Wages of Artificers and Workmen by Proclamation”); 13 Rich. 2, stat. 1, c. 8 (1389) (setting the rates of laborers’ wages and the profits that could be made by victuallers). Historians have noted that the administrative and regulatory purposes served by statutes from the Tudor period to the end of the eighteenth century were extensive. See J. W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 24 n.2 (1955) (“Elizabethan statutes . . . were largely concerned with administrative regulations about trade, poor relief, enclosures, control of recusants, and so on . . .”); Paul Craig, *The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the*  
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Semi-independent franchises often were given significant regulatory authority of their own accord. A 1738 statute, for example, empowered “the Court of Lord Mayor and Aldermen of the City of London” to set the price of coal imported into London,<sup>210</sup> and London was also delegated the power of appointing its own commissioners of sewers.<sup>211</sup> Sewer commissions, created by statute during the reign of Henry VI (r. 1422-1461),<sup>212</sup> possessed extensive regulatory jurisdiction over sewers, wetlands, and rivers, “akin to that of a modern environmental agency.”<sup>213</sup> Among other things, sewer commissioners promulgated rules, assessed taxes, conducted surveys, implemented infrastructure projects, appointed inferior officers, and imposed fines.<sup>214</sup>

## 2. Inferior officers

The King’s ability to remove executive officers was limited in another respect: At common law, the powers of appointment and removal, as well as the ability to set the tenure of a public office, were subject to a byzantine set of rules, customs, and exceptions binding even the King.<sup>215</sup> And because the ability to use appointments to public offices as a reward or to dispense offices in exchange for compensation made the appointment power a valuable commodity, royal officers jealously guarded the appointments within their “gift.”<sup>216</sup> Many inferior executive officers were appointed by their principals rather than directly by the Crown. This was as true of the central royal government, where the King often jockeyed with his own appointees for the power to make appointments of inferior officials,<sup>217</sup> as it was of the officers spread throughout the shires: Court officers were appointed by the court’s

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*Historical Record Straight* 10 (Oxford Legal Stud. Rsch. Paper No. 44/2016, 2016), <https://perma.cc/XG5Z-3N68>.

210. 11 Geo. 2 c. 15 (1737); *see also* 6 & 7 Car. 2 c. 2, §§ 1-2 (1664) (authorizing the Lord Mayor and Aldermen to appoint officers to enter and seize illegal coal).

211. 7 Ann. c. 9, § 1 (1708); *see also id.* c. 9, § 2 (noting that a previous statute provided for the appointment of “Collectors of the Rates and Duties”); 16 Car. c. 19, § 3 (1640) (transferring the powers of the office of clerk of the market to the mayor or head officer of each city or town).

212. *See* 6 Hen. 6 c. 5 (1427).

213. Craig, *supra* note 209, at 22.

214. *See* SIDNEY WEBB & BEATRICE WEBB, ENGLISH LOCAL GOVERNMENT: STATUTORY AUTHORITIES FOR SPECIAL PURPOSES 20-27 (1922); Craig, *supra* note 209, at 21-23. Sewer commissioners received a commission for a term of years, but their commissions could be revoked by the King. *See infra* note 329.

215. *See* 3 BACON, *supra* note 50, at 719-45 (London, E. & R. Nutt & R. Gosling 1740).

216. *See* 10 HOLDSWORTH, *supra* note 140, at 361, 509; Tompson, *supra* note 208, at 275; Sainty, *supra* note 180, at 454, 461.

217. *See* 10 HOLDSWORTH, *supra* note 140, at 361; Sainty, *supra* note 180, at 455-56.

judges,<sup>218</sup> bailiffs and under-sheriffs were appointed by the sheriff,<sup>219</sup> and the justices of the peace appointed a wide array of local officers.<sup>220</sup> Many of these officers were themselves granted tenure and thus could not be removed by their superior officers absent a breach of the conditions of the grant.<sup>221</sup>

### 3. Royal control

The extent of official independence should not be overstated, particularly with respect to the most powerful offices. Given their military and civil importance,<sup>222</sup> for example, there were relatively few hereditary sheriffs in England.<sup>223</sup> Most sheriffs were appointed by the King, who could remove them at will.<sup>224</sup> Meanwhile, the use of justices of the peace and a *custos rotulorum* (the

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218. See, e.g., 12 Geo. c. 32, § 3 (1725) (providing for the Court of Chancery to appoint an Accountant General of the Court of Chancery); 34 & 35 Hen. 8 c. 26, § 45 (1542) (providing for the Justices of Great Sessions in Wales to appoint the marshal and crier of their courts); see also 2 Hen. 6 c. 10 (1423) (stating that “all the Officers made by the King’s Letters Patents Royal within the said Courts, which have Power and Authority, by virtue of their Offices of old Times accustomed, to appoint Clerks and Ministers within the same Courts, shall be charged and sworn to appoint such Clerks and Ministers”).

219. See 1 BLACKSTONE, *supra* note 40, at \*333-34; 1 HOLDSWORTH, *supra* note 140, at 68 (3d ed. 1922).

220. See, e.g., County Rates Act 1738, 12 Geo. 2 c. 29, § 6 (providing for county treasurers to be appointed by justices of the peace); 9 Geo. 2 c. 18, § 3 (1735) (empowering justices “to appoint a Scavenger or Scavengers for cleansing the Streets, and to order the Repairing such Streets therein, as they shall judge necessary; and for defraying the Charges thereof, to order an Assessment or Assessments”); 3 & 4 Edw. 6 c. 2, § 9 (1549) (granting justices of the peace, head officers of cities and towns, and the wardens of the clothworkers the power to appoint overseers of cloth for a term of one year); Laws in Wales Act 1542, 34 & 35 Hen. 8 c. 26, § 70 (requiring justices of the peace in Wales to appoint chief constables). The *custos rotulorum* (“keeper of the rolls”), selected from among the justices, generally appointed the county clerk of the peace. 4 BLACKSTONE, *supra* note 40, at \*269.

221. See, e.g., *Harcourt v. Fox* (1693) 89 Eng. Rep. 720, 725; 1 Show. K.B. 506, 517-18 (Eyles J) (holding that a *custos rotulorum* could not remove a clerk of the peace appointed by his predecessor); Sainty, *supra* note 180, at 455 (discussing tenure provisions for inferior officers in the Exchequer).

222. See 1 HOLDSWORTH, *supra* note 140, at 6-8, 65-66 (3d ed. 1922).

223. *Id.* at 66. A brief experiment in the fourteenth century with local elections was swiftly abandoned. Compare 28 Edw. c. 8 (1300) (“The King hath granted unto his People, that they shall have Election of their Sheriff, in every Shire, where the Shivalty is not of Fee, if they list.”), with 9 Edw. 2, stat. 2 (1315) (“[T]he Sheriffs from henceforth shall be assigned by the Chancellor, Treasurer, Barons of the Exchequer, and by the Justices; . . . and in the Absence of the Chancellor, by the Treasurer, Barons, and Justices.”).

224. See 1 BLACKSTONE, *supra* note 40, at \*329-31. Whether a sheriff of the eighteenth century would even be disappointed if he were removed from his unpaid, compulsory one-year term is another question entirely. See 3 Geo. c. 16 (1716) (“Whereas it is not reasonable that the Sheriffs of this Kingdom, who are obliged to take upon them that  
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“keeper of the rolls”) to head up local county government, and lord lieutenants to command the county military, further ensured royal control.<sup>225</sup> The King also appointed and could remove his generals, admirals, and commissioned military and naval officers.<sup>226</sup> And the King’s Great Officers of State—such as the Chancellor, the Treasurer, the Lord President, the Keeper of the Great Seal, and the Lord Privy Seal—as well as the members of the Privy Council, were always appointed at the royal pleasure.<sup>227</sup>

Moreover, during the seventeenth century, the Crown sought to consolidate royal control over officers of the central government departments by gradually eliminating tenure protections for many offices. Thus, many of the Navy Board offices were transitioned to at-pleasure in 1639, and similar changes in other departments were implemented after the Restoration.<sup>228</sup> And in the eighteenth century, as Parliament took over as the “predominant partner” in the Constitution,<sup>229</sup> the Crown found the ability to remove officers helpful in its efforts to maintain the support of the House of Commons.<sup>230</sup> Offices were parceled out to Members of Parliament, their friends and relations, and other supporters.<sup>231</sup> When such an appointment was made at pleasure, the obvious implication was that the King could dismiss an officer if they or their parliamentary patron did not prove sufficiently malleable.<sup>232</sup>

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troublesome and expensive Office for the Service of their Country, should pay those large Fees that are demanded of them, and of Right belong to the Officers and Clerks of the Chancery, Exchequer and Pipe, for passing their Patents and Accounts and obtaining their *Quietuſs*....”).

225. See 4 BLACKSTONE, *supra* note 40, at \*269 (describing the *custos rotulorum* as “the principal civil officer in the county” and the lord lieutenant as “the chief in military command”); see also 10 HOLDSWORTH, *supra* note 140, at 130-31, 238-41 (discussing the relationship between the local civil and military officers and the Crown in the eighteenth century).
226. 10 HOLDSWORTH, *supra* note 140, at 418 (noting that all officials, including military officers, served at the royal pleasure).
227. 1 BLACKSTONE, *supra* note 40, at \*222-23 (explaining that “[t]he king’s will is the sole constituent of a privy counsellor”); 10 HOLDSWORTH, *supra* note 140, at 453.
228. See J.C. Sainty, *Navy Surveyor c. 1546-1667*, INST. HIST. RSCH. (Jan. 2003), <https://perma.cc/2TB9-HJUM?type=image>; J.C. Sainty, *Navy Comptroller c. 1546-1639*, INST. HIST. RSCH. (Jan. 2003), <https://perma.cc/95V9-HQYW?type=image>; Sainty, *Navy Clerk of the Acts c. 1546-1660*, *supra* note 182; Sainty, *supra* note 180, at 463-66.
229. 10 HOLDSWORTH, *supra* note 140, at 5.
230. See *id.* at 504; Foord, *supra* note 170, at 484; D. L. Keir, *Economical Reform, 1779-1787*, 50 LAW Q. REV. 368, 368-80 (1934).
231. See NORMAN CHESTER, *THE ENGLISH ADMINISTRATIVE SYSTEM, 1780-1870*, at 34 (1981).
232. See Foord, *supra* note 170, at 484 (describing the system of Crown influence); Sainty, *supra* note 180, at 465 (explaining that “the widespread use of pleasure tenures was an essential element in the manipulation of government placemen in the house of commons which would have been impossible if the officers concerned were on life tenures”).

Nonetheless, it remained the case that, even in the eighteenth century, many of the officers who executed the laws, both at the central and at the regional level, could not be removed by the King or his ministers, or could be removed only for cause.<sup>233</sup> Moreover, after the Star Chamber and other royal tools of central administrative control were abolished in the seventeenth century, most government at the county and local levels became functionally independent of the Crown.<sup>234</sup> The central government could “advise” county and local officials such as justices of the peace, sheriffs, and constables, but it could not “compel” them, except through formal judicial process sought in the King’s courts, and even then only when the Crown could show that the officers were “subject to a legal duty, and . . . had not fulfilled that duty.”<sup>235</sup>

The judges of the central courts, who after 1701 always held their offices during good behavior,<sup>236</sup> were sometimes assigned executive functions as well, such as serving as justices of the peace<sup>237</sup> and setting the price of wine during certain parts of the year.<sup>238</sup> In fact, in 1707, Parliament designated the Chief Justice of King’s Bench to serve on the governing council of state in the time between the death of one King and the accession of the next.<sup>239</sup>

Thus, the execution and administration of vast swaths of the laws in England, including most national statutes regulating trade, commerce, infrastructure, benefits, and the environment, were in the hands of officers who, even where they were appointed by the King or his ministers and

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233. *See supra* Parts III.A.1-2.

234. *See* 10 HOLDSWORTH, *supra* note 140, at 133-34, 155-56.

235. *Id.* at 156. Parliament sometimes made contrary requirements by statute, at least for officers in the central government. *See* 9 Ann. c. 10, § 27 (1710) (providing that officers of the post office must follow orders, rules, and directions from the Queen); 6 Ann. c. 26, § 11 (1707) (providing that all officers of the revenue in Scotland “shall be under and subject to” the direction of the Court of Exchequer where not contrary to commands, orders, or directions from the Queen, the Lord High Treasurer, or the Lords Commissioners of the Treasury in Great Britain).

236. BAKER, *supra* note 184, at 168.

237. 1 BLACKSTONE, *supra* note 40, at \*338 (noting that the Justices of King’s Bench were made conservators of the peace by virtue of their offices).

238. 12 Car. 2 c. 25, § 13 (1660) (naming “the two Chief Justices” as among those officials authorized to set wine prices).

239. 6 Ann. c. 7, § 11 (1707). The Court of King’s Bench was England’s “supreme court of common law.” 3 BLACKSTONE, *supra* note 40, at \*41. It exercised a robust original jurisdiction in criminal and civil cases, heard appeals on writ of error from other courts of common law, and exercised a supervisory jurisdiction over the country’s inferior courts. *See* Daniel D. Birk, *The Common-Law Exceptions Clause: Congressional Control of Supreme Court Appellate Jurisdiction in Light of British Precedent*, 63 VILL. L. REV. 189, 206, 223 (2018).

technically could be removed by them,<sup>240</sup> were effectively free of royal control.<sup>241</sup> And that is to say nothing of the boroughs, counties palatine, and other liberties possessing an independent power to appoint and remove justices of the peace and other executive officers, or of the many hereditary and tenured officers who could not be removed by anybody at all. It will be helpful to keep this backdrop in mind as we next survey Parliament's power to regulate the tenure of executive-branch officers.

## B. Parliament's Power over Tenure

The second source of limitations on the royal removal power came from statutes enacted by Parliament.

### 1. Legislative regulation of offices and officers

Statutes regulating and limiting the conduct of the King's officers comprised a significant proportion of English statutes enacted during the Middle Ages.<sup>242</sup> From the Magna Charta onwards, two of the main purposes of English statutory law were to limit the exercise of arbitrary power and to curb the King's officers in response to varied grievances. Thus, while some statutes were used by the Crown to preclude barons and other local magnates from exercising certain powers or to provide instructions to royal officials,<sup>243</sup> others consisted of promises by the King not to engage in certain conduct or not to infringe upon certain liberties.<sup>244</sup>

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240. In the eighteenth century, the justices of the peace generally held their positions *de facto*, if not *de jure*, for life. Though the Chancellor had the power to remove the justices if he wished, as a practical matter he did not do so unless a justice was convicted of misconduct. See 10 HOLDSWORTH, *supra* note 140, at 134.

241. See *id.* at 133-34, 155-56.

242. See, e.g., 13 Edw. c. 13 (1285) (prohibiting sheriffs from imprisoning accused felons without an indictment issued by a jury); 3 Edw. c. 24-28 (1275) (prohibiting various types of official misconduct by escheators, sheriffs, bailiffs, clerks, and other of "the King's Officer[s]"); 52 Hen. 3 c. 8 (1267) (prescribing punishment for sheriffs committing "*redisseisin*" without authorization); *id.* c. 18 (removing from escheators the power to issue fines for default of common summons); 51 Hen. 3, stat. 4 (1266) (regulating the taking of distresses by sheriffs and bailiffs for the King's debts); 9 Hen. 3 c. 14 (1225) (limiting the ability of the King's foresters to charge tolls); *id.* c. 17 (prohibiting sheriffs, constables, escheators, coroners, and bailiffs from holding pleas of the Crown); *id.* c. 19-21 (regulating seizures by sheriffs, constables, and bailiffs).

243. See, e.g., 13 Edw. c. 8 (1285) (providing for review of the conduct of sheriffs); 51 Hen. 3, stat. 5, § 8 (1266) (prohibiting the appointment of clerks and other officers in the Exchequer without "License of the Treasurer").

244. See, e.g., 1 Edw. 3, stat. 2, c. 9 (1327) (confirming the liberties of "Cities, Boroughs, and franchised Towns"); *id.* c. 10 (noting a promise by the King to refrain from "request[ing]" grants of corodies from clergy); Magna Charta, 9 Hen. 3 c. 1 (1225) (promising to observe liberties of the Church and of "all the free-men of our realm"); see also *id.* c. 2-4, 6-10, 12-14.



In addition to regulating the conduct of the King's officers, Parliament also asserted a power to define, structure, and limit the nature of offices in the royal service. Throughout the fourteenth and fifteenth centuries, for example, Parliament imposed statutory qualifications on sheriffs, justices of the peace, clerks of recognizances, officers of the royal household, and customs and excise officials, among others.<sup>245</sup> Many of these qualifications were designed to ensure that the officials executing the laws possessed sufficient land or other property to satisfy any judgments or fines against them for unlawful conduct,<sup>246</sup> but others were based on suspicions about loyalty, such as the statutes enacted in 1402, during the Welsh Rebellion of 1400 to 1415, that disabled Welshmen or any Englishman marrying a Welsh woman from holding office.<sup>247</sup>

Parliament continued to regulate qualifications for office into later eras, including by imposing minimum property requirements and enacting restrictions to combat corruption, incompetence, and misconduct.<sup>248</sup> In the Act

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245. See, e.g., 2 Hen. 5, stat. 1, c. 4, § 2 (1414) (providing residency requirements for justices of the peace); 11 Hen. 4 c. 2 (1409) (“[N]o Man which holdeth a common Hostry in any City or Borough of England, shall be a Custumer, Comptroller, Finder, nor Searcher of the said Lord the King . . .” (footnote omitted)); 4 Hen. 4 c. 5 (1402) (providing residency requirements for sheriffs); 14 Edw. 3, stat. 1, c. 11 (1340) (providing minimum property requirements for clerks of recognizances in cities and boroughs); cf. 12 Rich. 2 c. 2 (1388) (“Item it is accorded, That the Chancellor, Treasurer, Keeper of the Privy Seal, Steward of the King’s House, the King’s Chamberlain, Clerk of the Rolls, the Justices of the one Bench and of the other, Barons of the Exchequer, and all other that shall be called to ordain, name, or make Justices of Peace, Sheriffs, Escheators, Customers, Comptrollers, or any other Officer or Minister of the King, shall be firmly sworn, . . . that they make all such Officers and Ministers of the best and most lawful Men, and sufficient to their Estimation and Knowledge.”).

246. See, e.g., 14 Edw. 3, stat. 1, c. 8 (1340) (providing that “no Coroner be chosen unless he have Land in Fee sufficient in the same County, whereof he may answer to all Manner of People”).

247. See 4 Hen. 4 c. 32, 34 (1402). King Edward I of England (r. 1272-1307) brought the principality of Wales under the dominion of the Crown in 1282, but Wales remained officially independent of England at the time. See CHRISTOPHER A. SNYDER, *THE BRITONS* 244 (2003); THOMAS GLYN WATKIN, *THE LEGAL HISTORY OF WALES* 106-24 (2d ed. 2012). The Welsh Rebellion led by Owain Glyn Dŵr in the early fifteenth century was the last of a series of uprisings against English rule, and between 1535 and 1543, Parliament passed laws annexing Wales into England. See WATKIN, *supra*, at 116, 124. On the Welsh Rebellion, see Jon Latimer, *The Last Welsh Prince of Wales*, *MIL. HIST.*, Dec. 2002, at 42, 42-48.

248. See, e.g., Civil List and Secret Service Money Act 1782, 22 Geo. 3 c. 82, § 6 (providing that the Surveyor or Comptroller of his Majesty’s Works must be a bona fide architect or builder by profession); Justices Qualification Act 1731, 5 Geo. 2 c. 18, § 1 (declaring that “constituting Persons of mean Estates to be Justices of the Peace may be highly prejudicial to the publick Welfare”); *id.* c. 18, § 2 (providing that no practicing attorney can be a justice of the peace); Court of Session Act 1723, 10 Geo. c. 19, § 1 (discussing statutory qualifications aimed at ensuring that “Persons of known Probity and Understanding in the Laws” become justices of the Court of Session in Scotland); 6 Ann. c. 26, § 2 (1707) (prescribing professional qualifications for Barons of the newly  
*footnote continued on next page*

of Settlement, Parliament sought to restrain royals imported from the Continent from installing foreigners to government positions by making anyone born outside the realm incapable of holding “any Office or Place of Trust, either Civil or Military,” even if they had been naturalized.<sup>249</sup> And Parliament frequently—some might say obsessively—imposed oath requirements on holders of public offices, from oaths affirming allegiance to new monarchs, to general oaths of office, to the notorious Test Acts of the seventeenth and eighteenth centuries, which were aimed at preventing Roman Catholics and Non-Conformists from holding positions of power.<sup>250</sup> Persons who refused to take these oaths were disabled from holding civil office.<sup>251</sup>

On the flip side, Parliament frequently made removal or disqualification from holding office a penalty for the violation of statutes regulating official conduct.<sup>252</sup> Removal and disqualification statutes targeted officers at all levels of the government, including the great officers of state and other high-level officials of the central government, as well as the King’s chief local law enforcement officers.<sup>253</sup> In addition, Parliament passed statutes directly

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created Scottish Court of Exchequer); 1 Mar., sess. 2, c. 8, § 2 (1553) (providing that no person can simultaneously hold the offices of sheriff and justice of the peace in the same county); 6 Hen. 8 c. 10, § 2 (1514) (requiring commissioners of sewers to possess lands valued above a certain amount or be a “Justice of the Quorum learned”); 1 Hen. 8 c. 8, § 1 (1509) (requiring escheators to possess lands valued above a certain amount).

249. Act of Settlement 1700, 12 & 13 Will. 3 c. 2, § 3.

250. For just a small taste of the obsessiveness, see, for example, 2 Geo. 3 c. 20, § 42 (1761); Cattle Theft (Scotland) Act 1747, 21 Geo. 2 c. 34, §§ 15-16; 1 Geo., stat. 2, c. 13, § 1 (1714); 9 Ann. c. 10, § 25 (1710); 8 Ann. c. 15, § 2 (1709); 6 Ann. c. 14, § 1 (1707); 6 Ann. c. 7, § 18 (1707); 1 W. & M. c. 8, § 10 (1688); 7 Jac. c. 6, §§ 2, 4, 6-11, 17-18, 24 (1609); 27 Eliz. c. 12, § 1 (1584); 1 Eliz. c. 1, § 19 (1558); 14 Edw. 3, stat. 1, c. 5 (1340). On the Test Acts, see 4 BLACKSTONE, *supra* note 40, at \*57-58; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421-22 (1990).

251. See, e.g., 1 Geo., stat. 2, c. 13, § 7 (1714); 6 Ann. c. 14, § 5 (1707); 1 W. & M. c. 25, § 3 (1688); 1 W. & M. c. 8, §§ 6, 10 (1688); 12 Car. 2 c. 24, § 47 (1660); 7 Jac. c. 6, § 27 (1609); *cf.* 13 & 14 Car. 2 c. 3, §§ 18-19 (1662); 1 Eliz. c. 1, §§ 20-21 (1558).

252. For a few examples (out of many), see 28 Geo. 2 c. 1, § 7 (1755); 19 Geo. 2 c. 39, § 8 (1745); House of Commons Disqualification Act 1741, 15 Geo. 2 c. 22, § 2 (providing that any officer disabled from sitting or voting in Parliament who is returned as a member “shall from thenceforth be incapable of taking, holding, or enjoying any Office of Honour or Profit under his Majesty, his Heirs or Successors”); Habeas Corpus Act 1679, 31 Car. 2 c. 2, §§ 5, 12 (providing that any person violating the commands of a writ of habeas corpus or sending a prisoner out of the dominion shall be disabled from holding office); 33 Hen. 8 c. 39, § 71 (1541); 13 Hen. 4 c. 5 (1411) (providing that no customer, comptroller, gauger of wine, or searcher shall “be absent from his said Office by three Weeks at the most, upon Pain to lose his said Office”); and 1 Rich. 2 c. 12 (1377) (prohibiting the warden of the fleet from illegally releasing a prisoner “upon Pain to lose his Office, and the Keeping of the said Prison”).

253. See, e.g., 9 Ann. c. 10, § 36 (1710) (applying to the Postmaster General, Accountant General, and Receiver General); *id.* c. 10, § 44 (Postmaster General); 1 W. & M. c. 21, § 8

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invalidating letters patent granted by the Crown if those patents violated statutory restrictions.<sup>254</sup>

## 2. Creating offices and appointing officers

Contrary to some assumptions,<sup>255</sup> Blackstone's characterization of the King as the "fountain of . . . office"<sup>256</sup> should not be taken to imply that the King had exclusive or plenary power over the creation of offices or the appointment of officers. Although many offices in England were of ancient vintage, existing since "[t]ime immemorial,"<sup>257</sup> and some were created by virtue of the King's control of the Civil List (itself a statutory invention<sup>258</sup>), many other offices were created by statute.

As early as 1266, for example, the Statute of the Exchequer provided that "the King shall assign three able Persons that shall go throughout the Realm, to survey and find" wards and escheats.<sup>259</sup> In 1282, the Statute of Rutland

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(1688) (*custos rotulorum*); 16 Car. c. 10, §§ 3, 5-6 (1640) (punishing attempts by the King's high ministers to exercise the jurisdiction of Star Chamber by disabling them from holding office); 2 & 3 Edw. 6 c. 6, § 2 (1548) (applying to the Lord Admiral and any other minister or officer of the Admiralty); 4 Hen. 7 c. 12, § 2 (1488) (justices of the peace); 23 Hen. 6 c. 7 (1444) (sheriffs).

254. See, e.g., Court of Session Act 1723, 10 Geo. c. 19, § 2 (prohibiting the King from nominating "Extraordinary Lords" to the Scottish Court of Session and providing that any such nomination "is hereby declared to be null and void"); 7 Edw. 6 c. 4, § 2 (1553) (stating that if tax collectors fail to provide security, "their said Letters Patents and other Writings [are] to be utterly void and of no[] Effect"). For earlier examples, see 19 Hen. 7 c. 10, § 1 (1503); 12 Edw. 4 c. 8 (1472); and 1 Hen. 4 c. 6 (1399).

255. See, e.g., E. Garrett West, Note, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 178 (2018).

256. 1 BLACKSTONE, *supra* note 40, at \*261.

257. See 4 BACON, *supra* note 50, at 174.

258. See, e.g., 1 Geo. 3 c. 1, §§ 1, 6 (1760). Many of the officers who filled up the Civil List were first authorized by statute. See, e.g., 12 Car. 2 c. 24, § 48 (1660) ("[A]nd so many subordinate Commissioners and Sub-Commissioners, and other Officers and Ministers for the Execution of the Premises, shall be from Time to Time nominated and appointed by his Majesty, his Heirs and Successors . . . as from Time to Time his Majesty, his Heirs and Successors, shall think fit."); *id.* c. 25, § 2 (noting that "it shall and may be lawful to and for his Majesty, his Heirs and Successors, from time to time [to appoint] two or more Persons, . . . to licence and give Authority to such Person or Persons as they shall think fit, to sell and utter by Retail all and every, or any Kind of Wine or Wines"); *id.* c. 25, § 3 (noting that "such Persons as shall be commissioned and appointed by his Majesty, his Heirs or Successors, as aforesaid, shall be and be called his Majesty's Agents for granting Licences for the Selling and Uttering of Wine by Retail"); *id.* c. 25, § 5 (noting that "it shall and may be lawful to and for his Majesty, his Heirs and Successors, to constitute and appoint such and so many other Officers and Ministers as a Receiver, Register, Clerk, Comptroller, Messenger, or the like, for the better Carrying on of this Service, as he and they shall think fit").

259. 51 Hen. 3, stat. 5, § 4 (1266).

authorized the deputation of “[t]wo faithful Knights” to supervise the receipts of the collection of royal debts and duties and provided that “certain Persons assigned thereunto on [the King’s] Behalf, shall be sent into every Shire” as Inquisitors to investigate the status of debts owed to the Crown.<sup>260</sup> And in 1285, Parliament prohibited illegal salmon fishing and, to enforce the prohibition, required that “in Places where[] fresh Waters be, there shall be assigned Overseers of this Statute, which being sworn, shall oftentimes see and inquire of the Offenders” and impose punishment.<sup>261</sup>

As the centuries progressed, Parliament frequently created offices, including surveyors to enforce a uniform system of weights and measures,<sup>262</sup> officers of the King’s courts and departments of state,<sup>263</sup> sewer commissioners,<sup>264</sup> customs and excise officers,<sup>265</sup> and other regulatory

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260. 10 Edw. c. 4, 8 (1282).

261. 13 Edw. c. 47 (1285) (footnote omitted); *see also, e.g., id.* c. 30, § 2 (creating clerks for the justices of the “Benches”); 11 Edw. § 1 (1283) (providing for the appointment of a clerk for hearing complaints regarding debts owed).

262. *See* 14 Edw. 3, stat. 1, c. 12, § 1 (1340) (providing that “thereupon shall be assigned two good and sufficient Persons in every County, and more, according as the County in Greatness requireth,” to serve as surveyors of weights and measures to ensure adherence to a uniform standard for sales by the bushel, gallon, and weights of brass).

263. *See, e.g.,* 6 Ann. c. 26, § 3 (1707) (creating the offices of the Queen’s Remembrancer, the Lord Treasurer’s Remembrancer, and the Clerk of the Pipe for the Scottish Court of Exchequer); 33 Hen. 8 c. 39 (1541) (“The Court of the general Surveyors of the King’s Lands shall be a Court of Record, and shall have a Privy Seal, of which Court shall be Officers, the King’s general Surveyors, a Treasurer, viz. the Treasurer of the King’s Chamber for the Time being, an Attorney, the Master of the Woods, Auditors, Receivers, a Clerk of the Court, an Usher, a Messenger . . .”); 32 Hen. 8 c. 45 (1540) (“There shall be erected a Court of Record, commonly called the Court of the First-fruits and Tenths, . . . the Officers whereof shall be the Chancellor, the Treasurer, the King’s Attorney, two Auditors, two Clerks, a Messenger, and an Usher . . .”); 5 Rich. 2, stat. 1, c. 13 (1381) (providing that “two Clerks shall be assigned to make Parcels of Accompts in the . . . Exchequer”); 37 Edw. 3 c. 4 (1363) (providing that “one Clerk of the Remembrance be titled to sit against the Clerk of the Pipe, to see the Discharges made in the Pipe, and to imbraviate the same in the Remembrance”).

264. *See* 23 Hen. 8 c. 5, § 1 (1531); *see also id.* c. 5, § 3 (granting commissioners the power “to depute and assign, diligent, faithful, and true Keepers, Bailiffs, Surveyors, Collectors, Expenditors, and other Ministers, and Officers”).

265. *See, e.g.,* 32 Geo. 2 c. 35, § 2 (1758) (empowering commissioners of velum to “employ such Officers under them . . . as they shall think proper”); 9 Geo. 2 c. 23, § 4 (1735) (appointing commissioners of excise to “be his Majesty’s Commissioners for granting such Licences for retaling such Spirituous Liquors” and granting the power “to constitute and appoint under them such Officers as shall be necessary in that Behalf”); 6 Ann. c. 26, § 18 (1707) (providing for the appointment of customs officers); 12 Car. 2 c. 24, § 33 (1660) (stating that the excise “Commissioners who shall be appointed by his Majesty for putting this Act in execution, and their Sub-Commissioners in their respective Circuits and Divisions, shall hereby have Power to constitute under their Hands and Seals, such and so many Gagers as they shall find needful”).

officers.<sup>266</sup> Parliament created the justices of the peace in England in the fourteenth century,<sup>267</sup> and it extended the office to the King's dominion of Wales in the sixteenth century<sup>268</sup> and to Scotland at the beginning of the eighteenth.<sup>269</sup> In 1710, Parliament also created the post office and its attendant officers, including the Postmaster General.<sup>270</sup>

Notably, although Parliament often provided that the King should appoint officers to fill newly created offices,<sup>271</sup> it apparently considered itself unconstrained in vesting the appointment power in other hands.<sup>272</sup> Up through the eighteenth century, Parliament also specified modes of appointment,<sup>273</sup> provided rules for succession in case of a vacancy,<sup>274</sup> limited the number of officers who could be appointed to fill an office,<sup>275</sup> prohibited

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266. *See, e.g.*, 6 & 7 Will. 3 c. 10, § 1 (1695) (providing for the appointment by the King of commissioners for the marking of boats used to transport coal).

267. *See* 18 Edw. 3, stat. 2, c. 2 (1344) (providing that “Two or Three of the best of Reputation in the Counties shall be assigned Keepers of the Peace by the King’s Commission”); 1 Edw. 3, stat. 2, c. 16 (1327) (“For the better keeping and Maintenance of the Peace, the King will, That in every County good Men and lawful, which be no Maintainers of Evil, or Barretors in the Country, shall be assigned to keep the Peace.”).

268. *See* 34 & 35 Hen. 8 c. 26, § 53 (1542).

269. 6 Ann. c. 6, § 2 (1707).

270. *See* 9 Ann. c. 10, § 2 (1710).

271. *See, e.g.*, Pension Duties Act 1758, 32 Geo. 2 c. 33, § 1; 9 Ann. c. 10, § 2 (1710); 12 Car. 2 c. 24, § 46 (1660); 34 & 35 Hen. 8 c. 26, §§ 8-9, 44 (1542).

272. *See, e.g.*, Pension Duties Act 1757, 31 Geo. 2 c. 22, § 22 (providing that the High Treasurer or Commissioners of the Treasury shall appoint a General Receiver for Scotland); 9 Ann. c. 10, § 4 (1710) (providing that the Postmaster General “shall be at Liberty to keep one chief Letter Office in the City of Edinburgh, and one other chief Letter Office in the City of Dublin, and one chief Letter Office in New York aforesaid [and other places in the colonies] and appoint sufficient Deputies under him, for the better managing, ordering, collecting, and improving the Revenue hereby granted”); *id.* c. 10, § 11 (providing that the Postmaster General may appoint road surveyors); 16 Car. c. 16, § 6 (1640) (providing that the Lord Chancellor or Lord Keeper is to appoint commissioners nominated by the “Peers, Knights and Burgesses” of Parliament). For earlier examples, *see* 34 & 35 Hen. 8 c. 26, §§ 54, 66 (1542); 33 Hen. 8 c. 12, § 3 (1541); 27 Hen. 8 c. 5, § 1 (1535); 23 Hen. 8 c. 5, § 1 (1531); 1 Hen. 8 c. 9 (1509); and 14 Edw. 3, stat. 1, c. 8, 10 (1340).

273. *See, e.g.*, 1 W. & M. c. 27, § 3 (1688) (specifying a method for nominating and appointing sheriffs in Wales); 12 Car. 2 c. 24, § 45 (1660) (providing that the chief commissioners and governors of excise are to be appointed by the King); 8 Eliz. c. 16, § 2 (1565) (specifying mode of appointing sheriffs in England); 23 Hen. 8 c. 6, § 4 (1531) (providing for the King to appoint the Clerk of the Recognizances); 2 Hen. 5, stat. 2, c. 1 (1414) (providing that “the Justices of the Peace . . . shall be made of the most sufficient Persons dwelling in the same Counties, by the Advice of the Chancellor and of the King’s Council”).

274. *See, e.g.*, Colonial Leave of Absence Act 1782, 22 Geo. 3 c. 75, § 3; Estreats Act 1716, 3 Geo. c. 15, § 8.

the King from appointing certain officers,<sup>276</sup> and even occasionally appointed officers by statute.<sup>277</sup>

Statutes also transferred the appointment power from the King to other officers. In 1545, Parliament, concerned about corruption and the quality of appointments issuing from the Chancery, transferred the nomination of the *custos rotulorum*—the head justice of the peace in each shire—from the Chancellor to the King and specified that the King could nominate a replacement at will.<sup>278</sup> That same statute transferred the power to appoint inferior clerks of the peace from the Crown, which had been appointing such clerks with life tenure, to the *custos rotulorum* himself, specifying that each clerk was to hold office only during the term of his principal.<sup>279</sup> After experience showed that it was too troublesome and time-consuming for the King to appoint the *custos*, resulting in numerous vacancies, Parliament transferred the appointment power back to the Chancellor.<sup>280</sup>

### 3. Parliamentary regulation of tenure

Most critically for purposes of this Article, Parliament also exercised significant control over the tenure of officers appointed to execute the laws, including officers appointed by the King. Statutory restrictions on the King's ability to dictate the tenure of an office date from the medieval period.<sup>281</sup> The Crown's tendency to make offices—including important ones—hereditary, or to grant them for life or for other terms, formed a bone of contention between Parliament and the Crown. Throughout English history, one of the chief grievances of the nobles and the commoners alike concerned the misconduct, corruption, and arbitrary power wielded by the King's ministers and other

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275. See, e.g., 6 Ann. c. 7, § 27 (1707); *id.* c. 26, § 24; 8 Eliz. c. 16, § 2 (1565); 34 & 35 Hen. 8 c. 26, § 55 (1542); 14 Rich. 2 c. 11 (1390); 14 Edw. 3, stat. 1, c. 8-9 (1340); *cf.* 5 W. & M. c. 4 (1693) (repealing a statute limiting the number of justices of the peace in Wales to eight per county and providing that “it shall and may be lawful to and for” the King and Queen to appoint “any such Number of Persons . . . as they shall think fitting and convenient”).

276. See, e.g., Court of Session Act 1723, 10 Geo. c. 19, § 2 (prohibiting the King from nominating a Lord Extraordinary to the Scottish Court of Session); 14 Edw. 3, stat. 1, c. 9 (1340) (providing that “no Bailiff Errant be but in the Counties where Bailiffs Errants have been in Times past, in the Time of the King's Grandfather that now is”).

277. See, e.g., 20 Geo. 3 c. 54, § 1 (1780); 27 Hen. 8 c. 24, § 22 (1535); 14 Edw. 3, stat. 1, c. 5 (1340); *cf.* 16 Car. c. 16, § 6 (1640) (commanding the Lord Chancellor or Lord Keeper to appoint commissioners nominated by the “Peers, Knights, and Burgessses” of Parliament to ascertain and establish the boundaries of the royal forests).

278. 37 Hen. 8 c. 1, §§ 1-2 (1545).

279. *Id.* c. 1, §§ 1, 3.

280. 3 & 4 Edw. 6 c. 1, §§ 2-3 (1549).

281. See Churchill, *supra* note 179, at 214 n.7, 215-16.

officers.<sup>282</sup> Parliament perceived tenure protections as facilitating these problems, because the offending officers would not be fired or otherwise held accountable.<sup>283</sup>

Thus, instead of attempting to shield officers from removal (the tactic of modern congressional legislation concerned with undue political influence from the President), Parliament generally sought to render officials *more* politically accountable by making them removable at pleasure or otherwise limiting their tenure in office.<sup>284</sup> One of the biggest targets of the legislature's ire was the King's chief law enforcement officer: the sheriff. Beginning in 1340, legislation provided that, from thereafter, no sheriff was permitted to serve in his position for longer than one year, "and then another convenient shall be ordained in his Place."<sup>285</sup>

Unfortunately for Parliament, the King often thwarted these statutes by ignoring them in his grants of office, by pardoning officers serving for longer periods than allowed, or by using his "dispensing" power to abrogate the statutory requirements.<sup>286</sup> Thus, although a statute enacted in 1390 provided that "no Customer, Comptroller, Searcher, Weigher, or Finder, have any such Office for Term of Life," but instead be removable at pleasure,<sup>287</sup> the statute apparently was so frequently ignored that Parliament found it necessary to

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282. *See id.* at 214-19.

283. In one statute, for example, Parliament complained that "several Sheriffs" holding their offices with formal or informal tenure protections "were greatly encouraged, and did take upon them to do many and divers Oppressions to the King's liege People, unduly, and evil, and falsly to serve the King and his People." *See* 23 Hen. 6 c. 7 (1444).

284. *See* Churchill, *supra* note 179, at 214-20; *see also, e.g.*, 1 Hen. 5 c. 4 (1413) (commanding that "they which be Bailiffs of Sheriffs by one Year, shall be in no such Office by three Years next following, except Bailiffs of Sheriffs which be inheritable in their Sheriffwicks"); 14 Rich. 2 c. 10 (1390) ("[N]o Customer, Comptroller, Searcher, Weigher, or Finder, have any such Office for Term of Life, but only as long as shall please the King, notwithstanding any Patent or Grant made to any to the contrary." (footnote omitted)); 14 Edw. 3, stat. 1, c. 8 (1340) (providing that "no Escheator tarry in his Office above a Year").

285. 14 Edw. 3, stat. 1, c. 7 (1340).

286. GOUGH, *supra* note 209, at 46-47. Convincing the King and his officers to enforce or respect statutes was a recurring problem in the medieval era. *See id.* at 16; Faith Thompson, *Parliamentary Confirmations of the Great Charter*, 38 AM. HIST. REV. 659, 665-69 (1933); *cf.* 28 Hen. 6 c. 3 (1449) ("The King's Pardon to those that were Sheriffs or Clerks the last Year before, for occupying their Places above one Year, contrary to the Statute of 23 Hen. 6 c. 8."). In fact, it appears that good behavior tenure developed not as a means of protecting the independence of judges, but as the King's workaround to avoid parliamentary prohibitions on granting an office for life. *See* Churchill, *supra* note 179, at 219.

287. 14 Rich. 2 c. 10 (1390) (footnote omitted).

reaffirm it when a new King ascended to the throne,<sup>288</sup> and again a half century later.<sup>289</sup> Similarly, Parliament enacted term limits for sheriffs three times between 1354 and 1444.<sup>290</sup>

Parliament continued to enact laws regulating the tenure of offices up through the eighteenth century. For example, when it created a system of sheriffships in Wales in the mid-sixteenth century, Parliament provided that sheriffs should serve at the King's pleasure for no longer than one year.<sup>291</sup> During the reign of Queen Anne (r. 1702-1714), the statute creating the Scottish Court of Exchequer permitted the Queen to appoint the court's masters and chief officers "for such Term, Estate, and Interest" as she saw fit, but it provided that those officers could be removed by the Barons of the Court "for Neglect of Duty, or for Crimes and Misdemeanors in their respective Offices and Places, or other just Causes."<sup>292</sup> And in 1715, when Parliament transferred the heritable sheriffships confiscated in the wake of one of the Jacobite uprisings, it specified that the King's appointees could hold office "during Pleasure only."<sup>293</sup>

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288. See 1 Hen. 4 c. 13 (1399) (referencing 17 Rich. 2 c. 5 (1393), which limited the tenure of customers, controllers, searchers, weighers, and finders, and providing that 17 Rich. 2 c. 5 (1393) should "be firmly holden and kept"); Churchill, *supra* note 179, at 220; see also *id.* at 219-21 (describing the Crown's habit of ignoring such limitations and Parliament's efforts to secure observation through reenactment and renewal).

289. See 31 Hen. 6 c. 5, § 1 (1452).

290. See 23 Hen. 6 c. 7 (1444); 1 Rich. 2 c. 11 (1377); 28 Edw. 3 c. 7 (1354).

291. See 34 & 35 Hen. 8 c. 26, § 61 (1542); see also 18 Eliz. c. 8, § 4 (1575) (providing that Justices of Great Sessions in Wales are to serve at the Queen's pleasure); 13 Eliz. c. 9, § 1 (1570) (providing that the Queen can remove sewer commissioners by writ of *supersedeas* at any time during their term). Other statutes also regulated tenure during the Tudor period. See, e.g., 27 Hen. 8 c. 24, § 2 (1535) (providing that all "Justices of Eyre, Justices of Assise, Justices of Peace, or Justices of Gaol-delivery . . . shall be made by Letters Patents under the King's Great Seal, in the Name and by Authority of the King's Highness and his Heirs . . . at their Pleasure and Wills"); 1 Hen. 8 c. 8, § 4 (1509) (prohibiting any person from holding the office of escheator for longer than one year).

292. 6 Ann. c. 26, §§ 3-4 (1707); see also, e.g., 25 Geo. 2 c. 29, § 6 (1751) (providing for courts to issue a writ commanding the removal of a coroner convicted of extortion, neglect of duty, or misdemeanor in office).

293. 1 Geo., stat. 2, c. 50, § 32 (1715); KEIR, *supra* note 176, at 289-90 (discussing the "Jacobite risings of 1715 and 1745"). Various statutes enacted tenure restrictions during the eighteenth century. See, e.g., 23 Geo. 3 c. 50, § 17 (1783) ("Provided always, and be it enacted, That nothing herein contained shall extend, or be construed to extend, to take away, diminish, or alter, the Power of the Paymaster General of his Majesty's Forces to appoint, remove, or change, at his Pleasure, all or any of the Officers and Clerks employed in his said Office . . ."); 2 Geo. 3 c. 20, § 90 (1761) ("That his Majesty's Lieutenant for any County, Riding or Place, may and shall appoint a Clerk for the General Meetings within such County, Riding or Place, and may displace such Clerk if he shall think fit, and appoint another in his Room; and the Deputy Lieutenants within their respective Subdivisions, or the major Part of them present, may and shall appoint a Clerk for their Subdivision, and may displace such Clerk, if they or the major Part of them present shall think fit, and appoint another in his Room."); County Rates Act

*footnote continued on next page*



To a large degree, then, the Crown's efforts to increase royal control over executive officials in the seventeenth and eighteenth centuries—previously discussed in Part III.A—was in harmony with Parliament's longstanding desire to keep executive officers accountable. The result was that an increasing number of officials were removable at pleasure, either through royal or through statutory specification.

But when it had reason to do so, Parliament had no compunctions about enacting tenure regulations that prevented the King and his ministers from removing particular officers. In 1754, for example, in an effort to reform the ancient Marshalsea prison (where Charles Dickens's father later would be imprisoned for debt<sup>294</sup>), Parliament provided that the marshal of the prison would hold his office "during so long Time as such Marshal shall behave himself well in his said Office, and shall be resident in the said Prison, or within the Rules thereof, and no longer."<sup>295</sup> The marshal's inferior officers were also given statutory tenure.<sup>296</sup>

The sheriffs-depute in Scotland provide another example. When Parliament abolished hereditary sheriffships in Scotland in 1746, it provided that all sheriffs in Scotland would be appointed by the King to a term no greater than one year.<sup>297</sup> The office of sheriff was, however, largely ceremonial. Most of the real authority was exercised by the sheriff's deputy,

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1738, 12 Geo. 2 c. 29, § 11 ("[I]t shall and may be lawful to and for the said Justices of the Peace at their respective General or Quarter-Sessions . . . to continue from time to time such Treasurer or Treasurers in his or their Office or Offices, so long as they shall see convenient, and to remove him or them at their Pleasure . . ."); 12 Geo. c. 32, § 3 (1725) (providing for the High Court of Chancery to appoint an Accountant General to "hold such Office during the Pleasure of the said Court").

294. See CLAIRE TOMALIN, CHARLES DICKENS: A LIFE 22-23 (2011).

295. 27 Geo. 2 c. 17, § 5 (1754). One might ask whether the phrase "and no longer" serves merely as a bar on the King granting a longer tenure than good behavior, not as a prohibition on granting the office during the royal pleasure. In 1597, however, the King's Bench ruled that the phrase was a mere tautology and interpreted the words "for life, and no longer" as a life estate in the office's grantee. See *Robinson v. Robinson* (1756) 97 Eng. Rep. 177, 179; 1 Burr. 38, 41 (citing *Baldwin v. Smith (Archer's Case)* (1597) 76 Eng. Rep. 146; 1 Co. Rep. 66b); cf. Colonial Leave of Absence Act 1782, 22 Geo. 3 c. 75, §§ 1, 4 (providing that "no Office to be exercised in any Colony or Plantation . . . shall be granted or grantable by Patent for any longer Term than during such Time as the Grantee thereof, or Person appointed thereto, shall discharge the Duty thereof in Person, and behave well therein," but stating that "nothing herein contained shall operate to the Prejudice of any subsisting Grant of such Office or Offices, or to prevent any Office being granted determinable at Pleasure").

296. See 27 Geo. 2 c. 17, § 7 (1754) ("[A]ll inferior Officers who shall be appointed in pursuance of this Act, shall hold their several Offices during so long Time as they shall respectively behave themselves well therein, and no longer . . .").

297. Heritable Jurisdictions (Scotland) Act 1746, 20 Geo. 2 c. 43, §§ 4-5.

the sheriff-depute.<sup>298</sup> The statute provided that the sheriff-depute also would be appointed by the King, and for the first seven years, his office would be held at the King's pleasure.<sup>299</sup> After seven years of continuance in service, however, the sheriff-depute would be granted his office "*ad Vitam aut Culpam*," a Latin term meaning "for life or until fault."<sup>300</sup>

Parliament established tenure and for-cause removal protections for officers selected at the county and local levels as well. A 1737 statute regulating the making of cloth created an office of searcher, to be appointed by the justices of the peace to a one-year term, but it provided that the searcher could be replaced during his term if he died or was "rendered incapable of executing" his office.<sup>301</sup> Similar examples of tenured offices abound, including coroners,<sup>302</sup> mayors and aldermen,<sup>303</sup> city constables,<sup>304</sup> and the officials chosen to regulate the weaving of worsted wool and the forging of wrought plate.<sup>305</sup>

Parliament had a wide variety of reasons for protecting officers from removal. Sometimes, as in the case of the Marshalsea, it may have just been a sop to tradition (the marshal's office had previously been hereditary<sup>306</sup>). At other times, it was to induce qualified candidates to serve. For instance, in 1688, Parliament provided that the clerk of the peace, a county officer appointed by the *custos rotulorum*, should hold his office "for so long Time only as [he] shall

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298. See Ferguson, *supra* note 197, at 115.

299. Heritable Jurisdictions (Scotland) Act 1746, 20 Geo. 2 c. 43, § 29.

300. *Id.* Nine years later, Parliament increased the probationary period to fifteen years, see Sheriffs (Scotland) Act 1755, 28 Geo. 2 c. 7, which some might think an ungenerous reward to those sheriffs-depute who had recently completed their seven-year stint.

301. 11 Geo. 2 c. 28, §§ 3-4 (1737); see also 3 & 4 Edw. 6 c. 2, § 9 (1549) (granting justices of the peace, head officers of cities and towns, and the wardens of the clothworkers the power to appoint overseers of cloth for a term of one year).

302. 1 BLACKSTONE, *supra* note 40, at \*336 (citing 25 Geo. 2 c. 29 (1751)) (explaining that the "coroner is chosen for life" but may be removed by "the king's writ *de coronatore exonerando*, for a cause therein assigned, as that he is engaged in other business, is incapacitated by years or sickness, hath not a sufficient estate in the county, or lives in an inconvenient part of it" or by statute for "extortion, neglect, or misbehaviour"); see also 28 Edw. 3 c. 6 (1354) (providing that county coroners be elected by the county commons).

303. 8 Hen. 6 c. 25 (1429) (addressing the two-year term of the Mayor of Calais); 17 Rich. 2 c. 11 (1393) (addressing the indefinite tenure of Aldermen of London, except when removed for reasonable cause).

304. 29 Geo. 2 c. 25, §§ 1, 6 (1756) (providing for city officials in Westminster to appoint constables to one-year terms, dischargeable for "Inability, or for other just Cause").

305. 12 & 13 Will. 3 c. 4, § 2 (1700) (addressing the year-long terms of wardens for the incorporated forgers of wrought plate); 23 Hen. 6 c. 3 (1444) (addressing the year-long terms of wardens of worsted weavers).

306. See 27 Geo. 2 c. 17, §§ 1-2 (1754).

well demean himself.”<sup>307</sup> The statute further provided that the clerk could be removed by the justices of the peace upon a finding of misbehavior.<sup>308</sup> In an action brought by a displaced clerk of the peace, the King’s Bench held that the statute granted the clerk an estate for life, determinable only for misbehavior.<sup>309</sup> The court held that this was so even where the King removed the appointing *custos* and installed another in his place.<sup>310</sup>

Chief Justice Holt’s opinion in that case is instructive. He explained that, previously, the clerk of the peace held his office only so long as the *custos rotulorum* did.<sup>311</sup> As Chief Justice Holt’s colleague Justice Gregory stated in his seriatim concurring opinion, since the *custos* was appointed at the King’s pleasure, the clerk effectively served at the royal pleasure as well.<sup>312</sup> Parliament determined, however, that it would be better “to make such provision, that the sessions and justices of the peace should always be furnished with an able clerk of the peace.”<sup>313</sup> Thus, “they settle[d] the estate so as to put him out of fear of losing it for any thing but his own misbehaviour in it.”<sup>314</sup> Parliament’s design, Chief Justice Holt explained, “was, that men should have places not to hold precariously or determinable upon will and pleasure, but have a certain durable estate, that they might act in them without fear of losing them.”<sup>315</sup>

Other times, Parliament desired to make officers independent of the King. After the union of England and Scotland in 1707, for instance, the statute creating a new Court of Exchequer for Scotland granted the Barons of that court tenure during good behavior, placing them on the same status as their English cousins, who had possessed tenure under the King’s royal patents since 1450.<sup>316</sup>

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307. 1 W. & M. c. 21, § 5 (1688).

308. *See id.* c. 21, § 6.

309. *See* *Harcourt v. Fox* (1693) 89 Eng. Rep. 720, 734; 1 Show. K.B. 506, 535-36 (Holt CJ).

310. *See id.* at 730, 1 Show. K.B. at 527.

311. *Id.* at 734, 1 Show. K.B. at 535-36.

312. *Id.* at 728, 1 Show. K.B. at 523 (Gregory J).

313. *Id.* at 734, 1 Show. K.B. at 534 (Holt CJ).

314. *Id.*

315. *Id.* at 734, 1 Show. K.B. at 535.

316. 6 Ann. c. 26, § 2 (1707); *cf.* BAKER, *supra* note 184, at 167 (explaining that the King had granted judges of the English Court of Exchequer tenure during good behavior since 1450). While the Barons of the Exchequer were judicial officers, judges were at that time still considered an arm of the executive branch, just as the judicial power had not come to be fully distinguished conceptually from the executive power, of which it was considered a branch. *See* 1 BACON, *supra* note 50, at 555 (London, E. & R. Nutt & R. Gosling 1736) (describing the administration of justice in the King’s courts as an exercise of the “whole Executive Power of the Law” and noting that “[a]ll Judges must derive their Authority from the Crown”). This Article does not discuss in depth, the

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Parliament also established independent commissions to execute various functions, and it often appointed these officers by statute to fixed terms, apparently to ensure impartiality.<sup>317</sup> A profusion of such commissions sprang up just after the American Revolution (but before the Constitution was drafted or ratified).

During this period, under the same George III to whom modern unitarians look for a supposedly illimitable removal power,<sup>318</sup> Parliament set up commissions to examine the accounts “of all Duties, Taxes, and Monies, granted, raised, and appropriated, for the public Service” for a term of one year;<sup>319</sup> to inquire into and pay compensation to loyalists who lost property during the American Revolution for a period of one year;<sup>320</sup> to investigate abuses related to public offices, fees, and emoluments lasting until the end of the next session of Parliament;<sup>321</sup> to inquire into and pay compensation for a term of two years to English subjects who lost their property when Florida was ceded to the King of Spain;<sup>322</sup> and to audit and sell Crown lands for a term of three years.<sup>323</sup>

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most famous English statutory removal protection, the Act of Settlement 1700, 12 & 13 Will. 3 c. 2, § 3, which provided that the commissions of all judges “be made *Quandiu se bene gesserint*, and their Salaries ascertained and established,” subject to removal only upon the address of both Houses of Parliament. Parliament had been fighting for tenure protections for superior court judges since the reign of Charles I (r. 1625-1649) because of (well-justified) concerns about impartiality and a desire to render judges independent of the King. See BAKER, *supra* note 184, at 167-68. This Article does not discuss that example in depth, however, because Parliament altered the unwritten English constitution with respect to the King’s control over the judges of “his” superior courts at Westminster, who were great officers and whom he had appointed since “Time immemorial.” 4 BACON, *supra* note 50, at 174. For the reasons explained in Part IV below, I have focused on offices created by statute (such as the Barons of the Scottish Exchequer) and tenure regulations in other ordinary legislation.

317. See 26 Geo. 3 c. 75, § 1 (1786) (stating that the purpose of the statute was to ensure “a diligent and impartial Enquiry”); *id.* c. 75, § 13 (providing for the statute to “continue in force for two Years”). The earliest example of an independent commission that this research found was in a statute from 1340. See 14 Edw. 3, stat. 1, c. 5 (1340) (granting “a Commission and a Power” to the Archbishop of Canterbury, the earls of Arundel and Huntingdon, the Lord of Wake, and the Lord Ralfe Basset “to begin to do Remedy upon this Ordinance . . . to endure till the next Parliament”).

318. See *supra* note 175 and accompanying text.

319. 20 Geo. 3 c. 54, §§ 1, 10 (1780).

320. 26 Geo. 3 c. 68, §§ 1, 14 (1786).

321. 25 Geo. 3 c. 19, §§ 1, 7 (1785).

322. 26 Geo. 3 c. 75, §§ 1, 13 (1786).

323. *Id.* c. 87, §§ 1, 26.

These commissioners were granted extensive powers, including such powers as appointing inferior officers;<sup>324</sup> conducting examinations;<sup>325</sup> commanding the deliverance of books and records, enforceable by royal law enforcement officers;<sup>326</sup> making binding decisions regarding the sale of land or the payment of benefits;<sup>327</sup> and issuing orders and directions to the Treasury, the Exchequer, the Admiralty, the Paymaster General, the War Department, and the commanders in chief of the armed forces, among others.<sup>328</sup> While provision was made in some statutes for the King to appoint replacement commissioners upon a vacancy “by Death or Resignation,” the initial commissioners were named by Parliament, and the King was not given the power to remove them.<sup>329</sup>

Perhaps most notably, in 1785, Parliament created a commission for auditing public accounts, consisting of five members.<sup>330</sup> The statute was part of a sustained effort to reform the patronage system and to reduce the Crown’s influence on the House of Commons.<sup>331</sup> Even though three of the commissioners were appointed by the King (Parliament assigned the comptrollers of the army accounts to the other two offices *ex officio*), the statute provided that the commissioners were to hold their offices during good behavior.<sup>332</sup> This forerunner of the modern independent agency thus was

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324. *See id.* c. 87, § 3; *id.* c. 75, § 4; *id.* c. 68, §§ 4, 8; 25 Geo. 3 c. 19, § 1 (1785); 20 Geo. 3 c. 54, § 4 (1780).

325. *See* 26 Geo. 3 c. 87, § 5 (1786); *id.* c. 75, § 3; *id.* c. 68, § 4; 25 Geo. 3 c. 19, §§ 2-3 (1785); 20 Geo. 3 c. 54, §§ 3-4 (1780).

326. *See* 26 Geo. 3 c. 87, § 4 (1786); *id.* c. 75, § 4; *id.* c. 68, § 4; 25 Geo. 3 c. 19, § 3 (1785); 20 Geo. 3 c. 54, § 4 (1780).

327. *See* 26 Geo. 3 c. 87, § 9 (1786).

328. *See id.* c. 87, §§ 14, 20-21; *id.* c. 68, § 11; 25 Geo. 3 c. 19, § 1 (1785); 20 Geo. 3 c. 54, § 3 (1780).

329. *See* 26 Geo. 3 c. 75, §§ 1, 12 (1786); *id.* c. 68, §§ 1, 13; 25 Geo. 3 c. 19, §§ 1, 6 (1785); *see also* 26 Geo. 3 c. 87, §§ 1, 23 (1786); 20 Geo. 3 c. 54, § 1 (1780). By contrast, the 1531 statute authorizing appointment of commissioners of sewers granted the commissioners three-year terms but provided that, “nevertheless, . . . the King’s Highness shall always at his Pleasure, by his Writ of *Supersedeas* out of his said Court of Chancery, at any Time discharge as well every such Commission, as every Commissioner that shall be made or named by Authority of this Act . . . after which Discharge the said Commissioner shall have no Power or Authority to proceed in the Execution of their Commission, nor in any Thing, by Authority of this Act.” 23 Hen. 8 c. 5, § 16 (1531).

330. 25 Geo. 3 c. 52, § 4 (1785); *see also* 10 HOLDSWORTH, *supra* note 140, at 120 (discussing the audit commissioners).

331. On the reform movement, *see* 10 HOLDSWORTH, *supra* note 140, at 522-25; and Foord, *supra* note 170, at 491-92.

332. 25 Geo. 3, c. 52, § 4 (1785); *see also* J.C. Sainty, *Audit Commissioners 1785-1867*, INST. HIST. RSCH. (Feb. 2003), <https://perma.cc/MH2B-ZG38?type=image> (“The tenure of the commissioners was during good behaviour.”).

headed by commissioners with tenure protections that even the King could not traverse without a judicial declaration of misbehavior.<sup>333</sup>

#### **IV. Implications for the Presidential Removal Debate**

The evidence surveyed in this Article has important implications for the debate over the President's power to remove executive-branch officers in the United States. The King of Great Britain at the time of the Framing was the very model of a unitary executive. Blackstone wrote that the King was "the supreme executive power" of the state,<sup>334</sup> "not only the chief, but properly the sole, magistrate of the nation," and vested with the whole of "the executive part of government . . . for the sake of unanimity, strength, and dispatch."<sup>335</sup> Through the exercise of his prerogatives, the King wielded enormous direct power over the military, foreign affairs, and various other domains of the government. And through the discretion granted him by statute and tradition over civil spending, he exerted a significant influence on how his subordinates performed their official duties.

But while the British executive may have been unitary, it was not a monolith. The King's authority was often limited and could be regulated by Parliament. He lacked the power to issue directives or commands to the majority of the executive officers who exercised law enforcement, regulatory, and administrative powers in his name, and he did not have the ability, even indirectly, to remove many of them. Most importantly, though Parliament generally preferred to make royal officers accountable to—and thus removable by—the King or his ministers, that preference was not absolute. Parliament could, and did, grant tenure protections to executive officers without it being seen as an interference with the King's executive power.

Thus, to the extent that the British monarch provided the Framers with a model of the powers properly classed as "executive," the historical record simply and powerfully contradicts the contention—advanced by Calabresi and Prakash, Chief Justice Taft, and others—that the removal power is an inherent component of the executive power vested in the President. Rather, it appears

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333. See *supra* note 180 and accompanying text.

334. 1 BLACKSTONE, *supra* note 40, at \*327.

335. *Id.* at \*242-43. Echoing modern unitarians, Blackstone, *id.*, explained:

Were [the executive part of government] placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in government: and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford. The king of England is therefore not only the chief, but properly the sole, magistrate of the nation; all others acting by commission from, and in due subordination to him. . . .

that the ability to remove executive officers was, as James Madison put it in *Federalist No. 39*, “a subject of legal regulation.”<sup>336</sup>

Nor does it appear that the English considered an unlimited removal power necessary to the King’s ability to execute the laws. Other than his great officers of state, the King himself had always vested significant executive authority in officers who held their offices in fee simple, for life, or during good behavior, without thereby compromising the King’s executive authority. To the extent Parliament deemed it necessary to the proper execution of a given office or function to make a royal official subject to removal at pleasure, it provided for such removal by statute. Similarly, to the extent it might be thought that presidential power to remove at pleasure is necessary or helpful to the execution of a given office or function, that power has been vested in Congress by the Necessary and Proper Clause, to determine (as Madison put it) “conformably to the reason of the case.”<sup>337</sup>

Noting in passing that Parliament sometimes enacted legislation specifying the tenure of an executive office, Prakash has attempted to distinguish such statutes by claiming that, “[i]n England, the Parliament was sovereign and could pass whatever legislation it wished.”<sup>338</sup> Hence, Prakash

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336. See THE FEDERALIST NO. 39 (James Madison), *supra* note 65, at 242. Prakash has called Madison’s statement “ambiguous,” though he concedes that it “could be read as supporting the idea that Congress would have some authority to set tenures for offices.” Prakash, *supra* note 24, at 1795. The statement does not strike me as ambiguous. It quite clearly expresses the view that the tenure of executive (that is, ministerial) officers is a subject for regulation by Congress on a case-by-case basis. Somewhat more obscurely, Madison says that the regulations would conform to “the example of the State constitutions.” See THE FEDERALIST NO. 39 (James Madison), *supra* note 65, at 242. Presumably, this means either that the state constitutions also treated the tenure of executive officers as a “subject of legal regulation” or that Congress would, in making regulations, follow the example of tenure provisions in various state constitutions. Regardless, it does not render the main point of the sentence ambiguous. Indeed, Madison expressed a similar view during the debates over the Decision of 1789 in response to an assertion that because the Constitution mentioned only impeachment as a means for removing officers, the President could not remove executive-branch officers at all. See 1 ANNALS, *supra* note 79, at 374-75 (emphasis added):

[Madison stated that he] did not conceive it was a proper construction of the Constitution to say that there was no other mode of removing from office than that by impeachment; he believed this, as applied to the Judges, might be the case; but he could never imagine it extended in the manner which gentlemen contended for. He believed they would not assert, that any part of the Constitution declared that the only way to remove should be by impeachment; the contrary might be inferred, because Congress may establish offices by law; therefore, *most certainly, it is in the discretion of the Legislature to say upon what terms the office shall be held, either during good behaviour or during pleasure.* Under this construction, *the principles of the Constitution would be reconcilable in every part; but under that of the gentleman from South Carolina [William Smith], it would be incongruous and faulty.*

337. See THE FEDERALIST NO. 39 (James Madison), *supra* note 65, at 242.

338. Prakash, *supra* note 24, at 1842.

argues, “the Parliament could, with the Crown’s acquiescence, alter the Crown’s ancient powers at will, including its ability to set tenure.”<sup>339</sup>

To be sure, Parliament (more precisely, the King in Parliament) was considered the sovereign power in the state, and courts would not declare legislation invalid by reference to some higher or more fundamental law.<sup>340</sup> A duly enacted statute thus could regulate, alter, or even abolish the Crown’s prerogatives.<sup>341</sup> But that does not mean that legislation affecting the tenure or removal of executive officers is inapposite.

To begin with, as discussed in Part II, a power to remove or specify the tenure of subordinate government officials was not one of the King’s prerogatives (or “ancient powers”) in the first place. Thus, a parliamentary statute regulating removals or fixing tenure would generally be considered ordinary legislation rather than the sort of extraordinary legislation that sometimes affected or diminished the royal prerogatives, otherwise altered the English constitution, or was a “legal though unprecedented use of [Parliament’s] powers.”<sup>342</sup>

Second, when Parliament enacted legislation even touching the King’s prerogatives, it said so explicitly, stating for instance that the statute was merely intended to clarify existing law or to remove doubts as to actions the King had already taken.<sup>343</sup> Other than with respect to military officers, the great officers of state, and the Privy Council<sup>344</sup> (and perhaps the superior court

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339. *Id.*

340. See 1 A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 37-39 (6th ed. 1902).

341. *Id.* at 61-62.

342. See *id.* at 45.

343. See, e.g., 13 & 14 Car. 2 c. 3, § 1 (1662) (prefacing a statute with the declaration, “[f]orasmuch as within all his Majesty’s Realms and Dominions, the sole and supreme Power, Government, Command and Disposition of the Militia, and of all Forces by Sea and Land, and of all Forts and Places of Strength is, and by the Laws of England ever was, the undoubted Right of his Majesty, and his Royal Predecessors, Kings and Queens of England; (2) and that both or either of the Houses of Parliament cannot nor ought to pretend to the same”); 31 Hen. 8 c. 10, § 1 (1539) (“[T]he King’s most Royal Majesty, although it appertaineth unto his Prerogative Royal to give such Honour; Reputation and Placing to his Councillors, and other his Subjects, as shall be seeming to his most excellent Wisdom, is nevertheless pleased and contented, for an Order to be had and taken in this his most high Court of Parliament, that it shall be enacted by Authority of the same, in Manner and Form as hereafter followeth.”).

344. See, e.g., 2 Geo. 3 c. 20, § 14 (1761) (“[H]is Majesty, his Heirs and Successors, shall, from Time to Time, as he and they shall think fit, signify his and their Pleasure to his and their Lieutenants of any County, Riding or Place, to displace all or any such Deputy Lieutenants and Officers; and thereupon his Majesty’s respective Lieutenants shall appoint others within the same County, Riding or Place, under the like Qualifications, to serve in their Stead.”); Admiralty Act 1690, 2 W. & M., sess. 2, c. 2, §§ 1-2 (clarifying that the Crown was justified in appointing commissioners to exercise the powers of  
*footnote continued on next page*



judges<sup>345</sup>), statutes regulating appointment and removal authority in the ordinary course did not include such language.

Indeed, as discussed in Part III, acts of Parliament regulating the structure of the executive branch permeate the statute books. There is nothing to suggest that legislation specifying tenure was considered any different than legislation specifying qualifications for holding office, conditions of forfeiture or removal, successions in case of a vacancy, holders of the appointment or removal power, or the procedures for nomination and appointment. Rather, they were all subjects to be prescribed and regulated as an ordinary incident of Parliament's legislative power.

Finally, the argument that an unrestricted removal authority is inherent within the term "executive power" is based on the notion that an informed member of the ratifying public would have looked to Anglo-American traditions to give content to the term. As Justice Scalia explained, from an originalist perspective, the burden is on the proponent of the removal power to locate evidence showing that the King possessed such an inherent power.<sup>346</sup>

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the office of Lord High Admiral); 1 W. & M. c. 21, § 1 (1688) (stating the same as to combining the position of Lord Chancellor and Lord Keeper); 13 & 14 Car. 2 c. 3, § 2 (1662) (providing for the appointment of militia officers but stating, "always understood, That his Majesty, his Heirs and Successors have Power and Authority to direct and order otherwise, and accordingly at his and their Pleasure may appoint and commissionate or displace such Officers; any Thing in this Act to the contrary notwithstanding"); 31 Hen. 8 c. 10, §§ 1, 4 (1539) (setting the order of precedence for great officers when the King is attending Parliament).

345. The full name of the statute commonly known as the Act of Settlement, which granted permanent tenure to the judges of the King's superior court of Westminster, was "An Act for the further Limitation of the Crown, and better securing the Rights and Liberties of the Subject." See Act of Settlement 1701, 12 & 13 Will. 3 c. 2. This title suggests a conscious limiting of the King's ancient prerogative of setting the tenure of the judges of "his" royal courts of Common Pleas, King's Bench, and Exchequer. See James C. Corson, *Judges and Statutory Tenure in England in the Seventeenth Century*, 42 JURID. REV. 136, 147-49 (1930) (arguing that the Act of Settlement's tenure provision memorialized an alteration of the constitutional position of the King). The judges of these courts were traditionally considered high officials, and although the Barons of the Exchequer held their commissions during good behavior, the judges of Common Pleas and King's Bench generally served at the King's pleasure. See W. R. Lederman, *The Independence of the Judiciary*, 34 CANADIAN BAR REV. 769, 779-82 (1956). A statute granting tenure to the Lord Chancellor likely would have been seen as involving a similar limitation on the royal prerogative. See *id.* at 782; cf. Court of Session Act 1723, 10 Geo. c. 19, § 1 (stating that "the Nomination and Appointment of the Lords of the Court of Session in Scotland is an inherent Prerogative of the Crown" before regulating the Crown's appointments).

346. See Scalia, *supra* note 35, at 860 ("I should note, moreover, that those three sentences bore the burden of establishing not only (what we have just discussed) that the phrase 'the executive Power' referred to the king's powers, *but also* that the king's powers in fact included the power to remove executive officials.").

If the evidence shows that, from the Middle Ages onward, Parliament regularly exercised its legislative power to specify the tenure of government offices and to assign persons other than the King the power to remove royal officials; if the King's executive power was consistently exercised pursuant to such restrictions; and if multitudes of executive officers in England held their offices subject to tenure protections, then it is difficult to understand why such evidence would support any interpretation other than that an unrestricted removal power was *not* inherent in the executive power as that term was understood in the Anglo-American common law tradition.

As discussed above, there were exceptions. The King had an absolute prerogative with respect to the military and foreign relations, and in those realms, his discretion over appointments and removals was largely unconstrained.<sup>347</sup> The same was true of the Privy Council and of the great offices of state.<sup>348</sup> The King's chief ministers were, effectively, extensions of the King himself. They exercised the royal prerogative on behalf of the King, or advised him in his discretionary decisions.<sup>349</sup> From an originalist perspective that equates the executive power with the residual royal prerogative, then, perhaps Congress would be unable to restrict the President's ability to remove military officers and other officers exercising powers related to foreign intelligence and national security, ambassadors and other officers in the State Department, many cabinet-level officers, and the President's own advisers.<sup>350</sup>

This interpretation dovetails nicely with the hypothesis advanced by William Van Alstyne that Article II might require unlimited presidential power to remove "those office-holders who work in intimate association with him at the cabinet level, discharging highly discretionary responsibilities at the

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347. See 1 BLACKSTONE, *supra* note 40, at \*245-46, \*249-55.

348. See Churchill, *supra* note 179, at 225 (noting that Parliament rarely tried to regulate appointments of the great officers of the Crown); cf. 4 BACON, *supra* note 50, at 174 (noting that the "King hath created [the great Officers of State since] Time immemorial").

349. See 10 HOLDSWORTH, *supra* note 140, at 339-40, 453 (explaining that "in the eighteenth century the powers of the executive were almost entirely derived from the royal prerogative, and only to a comparatively small extent from statutes which gave additional powers to the King or his ministers").

350. Cf. Strauss, *supra* note 127, at 759-60 ("In limited contexts—foreign relations, military affairs, coordination of arguably conflicting mandates—the argument for inherent presidential decisional authority is stronger. But in the ordinary world of domestic administration, where Congress has delegated responsibilities to a particular governmental actor it has created, that delegation is a part of the law whose faithful execution the President is to assure. Oversight, and not decision, is his responsibility." (footnote omitted)).

President's immediate direction and virtually as his alter ego."<sup>351</sup> It also maintains ample room for the inquiry mandated by *Morrison v. Olson* into whether vesting a particular officer with tenure unduly interferes with the President's ability to exercise the executive power and to take care that the laws are faithfully executed.<sup>352</sup>

But one should be careful not to extend these exceptions too far. The great officers of state were an exclusive group. That term did not apply to all officers of the central government, and it certainly did not apply to the vast corps of prosecutors, law enforcement officers, and statutorily created regulators and administrative officials who conducted most government business.<sup>353</sup> Thus, even if one could infer from the historical evidence that the President should have an unlimited power to remove high-level cabinet officers, that would not extend to officers charged with regulatory or administrative tasks, such as a postmaster first class,<sup>354</sup> an FTC Commissioner,<sup>355</sup> a Comptroller General,<sup>356</sup> the Directors of the PCAOB,<sup>357</sup> the Director of the CFPB,<sup>358</sup> the head of the Federal Housing Finance

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351. See William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS., Spring 1976, at 102, 114 (characterizing such an argument as "compelling"); cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) (contemplating situations in which "the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion").

352. See 487 U.S. 654, 689-90 (1988).

353. See *supra* note 348 and accompanying text.

354. Cf. *Myers v. United States*, 272 U.S. 52, 106-07, 176 (1926) (holding that the President's decision to remove a postmaster first class from office does not require the consent of the Senate).

355. See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935) (upholding statutory removal protections granted to FTC Commissioners).

356. Cf. *Bowsher v. Synar*, 478 U.S. 714, 727-28 (1986) (invalidating a statute permitting the Comptroller General to be removed by joint resolution of Congress but not by the President). This is not to say that the statutory provisions at issue in *Bowsher* or *Myers* should have passed constitutional muster. The issue in each of those cases was whether Congress could reserve for itself (or part of itself) a role in the removal of executive-branch officers. See *id.*; *Myers*, 272 U.S. at 176. That seems to me to pose a clear separation-of-powers problem. The Constitution does not grant Congress such a role.

357. Cf. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 509, 514 (2010) (striking down statutory provision granting for-cause removal protections to Directors of the PCAOB).

358. Cf. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020) (holding that "the CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers").

Agency,<sup>359</sup> or the Social Security Administrator.<sup>360</sup> Nor would it extend to prosecutors and other law enforcement officers, such as the independent counsel at issue in *Morrison*<sup>361</sup> or the head of the Office of the Special Counsel.<sup>362</sup>

Statutory tenure protections in England were the exception rather than the rule. But then—as now—there were good reasons for that to be the case.<sup>363</sup> And there were also various political forces at work in the eighteenth century, the confluence of which ensured that most officers served at the pleasure of a superior. The independent auditors of the 1780s, however, presaged political developments in Great Britain that would increasingly tilt the balance of the civil service in favor of independence over political accountability.<sup>364</sup>

In the nineteenth century, the Civil List system extolled by Blackstone gave way to a permanent civil service, in which almost all government officers other than high-level ministers held their offices during good behavior.<sup>365</sup> And in the twentieth century, the needs of an industrialized society and the development of the modern administrative state resulted in Parliament—like Congress—vesting regulatory power in a number of independent agencies.<sup>366</sup> The British experience thus provides an important caution to contemporary lawyers not to mistake the political needs of an earlier era for a constitutional maxim.

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359. See *id.* at 2201-02 (distinguishing tenure protection for the single-headed Federal Housing Finance Agency but characterizing the restriction as constitutionally controversial); see also *supra* note 107.

360. See *Seila Law*, 140 S. Ct. at 2201-02 (distinguishing tenure protection for the single-headed Social Security Administration but characterizing the restriction as constitutionally controversial); see also *Free Enter. Fund*, 561 U.S. at 541 (Breyer, J., dissenting) (discussing the Social Security Administration); *supra* note 107.

361. See 487 U.S. 654, 690-92 (1988).

362. See *Seila Law*, 140 S. Ct. at 2201-02 (distinguishing tenure protection for the single-headed Office of the Special Counsel but characterizing the restriction as constitutionally controversial); see also 5 U.S.C. § 1212 (describing investigatory and civil enforcement powers of the Office of Special Counsel).

363. Making law enforcement officials generally accountable to—and removable at will by—the President serves important individual-liberty interests because the President is seen as an elected representative of the people and a check on insulated administrative bureaucracy. See Justin Walker, *FBI Independence as a Threat to Civil Liberties: An Analogy to Civilian Control of the Military*, 86 GEO. WASH. L. REV. 1011, 1072-73 (2018).

364. See *supra* notes 330-32 and accompanying text.

365. J.A.R. MARRIOTT, ENGLISH POLITICAL INSTITUTIONS: AN INTRODUCTORY STUDY 103-04 (1910).

366. See generally Const. Reform Ctr., *Regulatory Agencies in the United Kingdom*, 44 PARLIAMENTARY AFFS. 505 (1991) (describing the growth of regulatory agencies in the United Kingdom during the twentieth century).

## Conclusion

Unitarians have defended their assertions of an illimitable presidential power to control executive-branch officials on grounds other than historical ones. They have argued that there are good policy reasons to champion a presidential removal power.<sup>367</sup> They have reasoned from political theory that the President should be able to remove and direct subordinate officials acting as his deputies in the execution of the laws.<sup>368</sup> And they even have attempted to read such powers into the interstices of constitutional text or other constitutional provisions, notwithstanding Article II's explicit silence on the matter.<sup>369</sup>

But the history surveyed in this Article contradicts the constitutional basis for such arguments. In light of the evidence surveyed here, continuing to adhere to the unitary executive theory requires the belief that the Constitution, without explicitly saying so, and without any indication that such a step was contemplated by the Framers or discussed during ratification, implemented a radical new definition of executive power and imposed a restriction on legislative authority contrary to—and completely unknown in—the English tradition.

Adhering to such a position may be impossible for committed originalists. For those attempting to discern the original meaning of the Executive Power Clause, Chief Justice Taft's assertion regarding the English understanding of executive power provided a historical link between the nebulous text of

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367. See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 81-86 (1995). *But see* Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1763-69 (2009) (presenting arguments in favor of for-cause removal protections); Posner, *supra* note 128, at 1707 (listing policy reasons for and against for-cause removal protections and speculating that empirical testing might show that "some agencies should be independent and others should not be").

368. See, e.g., Calabresi & Prakash, *supra* note 17, at 598 ("Appointments to executive departments determine who will help the President implement his powers and responsibilities. It would make little sense to force the President to deal with officers who fundamentally disagree with his administrative or political philosophy.").

369. See, e.g., *id.* at 597 (arguing that the history, text, and structure of Article II, taken together, implicitly require that the President be able to remove executive-branch officers); cf. CALABRESI & YOO, *supra* note 1, at 22-29 (arguing that presidential practice over the course of the nation's history creates a precedent supporting an unlimited presidential removal power). *But see* Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 91-92 (2017) (reading precedent to establish that the Take Care Clause authorizes removals only for "[u]nfaithful execution," as "characterized by neglect or impropriety," rather than for mere disagreement with policy decisions); Strauss, *supra* note 127, at 759 ("Congress's arrangements of government are a part of the law that the President is to assure will 'be faithfully executed,' and the Constitution's text anticipates that those arrangements will place 'duties' elsewhere in the executive branch, which Congress is given wide scope to define.").

Article II and the assertion of an unwritten, implied power superior to Congress's default ability to prescribe laws necessary and proper for structuring the government. Without that link, all that is left is the nebulous text.

The history surveyed here also highlights the difficulty of reconstructing the "original understanding" or "original public meaning" of the Constitution's dense language and complex allocation of powers among newly crafted governmental institutions without comprehensively investigating the legal doctrines and political milieu familiar to the Framers.<sup>370</sup> The imprecisions and generalities of historians are often good enough to capture the flavor of an era, but they usually are not (and were not intended to be) sufficient guides to a lawyer seeking to answer specific questions about complex institutions or complicated doctrine.<sup>371</sup>

Case in point: It appears that many judges and scholars committed to the use of history to interpret the Constitution have, for almost a century, been laboring under a significant misapprehension regarding one of the core historical precedents for the President's position within the executive branch. While English history supports the inference that Congress may not saddle the President with unwanted advisers or transfer the President's prerogatives over the military, national security, and foreign relations to permanent delegates, the English experience otherwise supports the view that Congress should have some discretion to shield administrators, regulators, and law enforcement officials from removal without cause and other forms of presidential interference, in appropriate instances.

This Article began with Calabresi and Prakash's contention that what is at stake in the debate over the unitary executive is whether Congress has the "'power' to carve up the executive department of the federal government into minifiedoms independent of presidential control."<sup>372</sup> If that question is to be answered by looking to the executive power as it was exercised in England—as many unitarians have asserted it should be—then the answer is "Yes."

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370. For critiques of the originalist enterprise in the context of debates over the executive branch, see Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1226-30 (2012); and Flaherty, *supra* note 28, at 1728-29.

371. See William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 813-15 (2019).

372. Calabresi & Prakash, *supra* note 17, at 544.