

C. The Department of Foreign Affairs

The greatest and best known struggle in the First Congress over the structure of government began on May 19, 1789, when Representative Boudinot moved to establish three executive departments to aid the President in carrying out his duties with respect to war, finance, and foreign affairs.²⁰⁴

Virtually no one disputed the necessity for some such legislation. Recognizing that the President could not perform the functions entrusted to him all by himself, Article II authorized him to obtain written advice from "the principal officer in each of the executive departments" and with Senate consent to appoint not only judges but also "ambassadors, other public ministers, and consuls" and "all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law." Not only did these provisions make clear the expectation that additional executive offices and departments would be created; they made equally plain that Congress had power to create them as necessary and proper to the execution of various powers granted to the President and Congress.²⁰⁵

Madison gave the members something concrete to chew on by moving to establish a Department of Foreign Affairs to be headed by a Secretary who was to be "appointed by the President, by and with the advice and consent of the Senate" and "removable by the President."²⁰⁶ Chew they did; over a month elapsed before the House passed a bill on the subject, and much of that time was spent in debating the constitutional conundrums posed by Madison's simple proposal.

Even the innocuous suggestion that the Secretary be appointed as Article II prescribed provoked dissent. To provide by law for the method of appointment, argued Smith of South Carolina, would convey the impression that Congress was "conferring power," when in fact the Constitution gave it no discretion; the statute should say nothing about appointment one way or the other.²⁰⁷ Lee responded that Congress did have a choice, for Article II, § 2 expressly authorized Congress "to vest the appointment of . . . inferior officers" elsewhere. The Secretary, he contended, was an inferior officer, because his only function was to aid the President in performing his duties.²⁰⁸ Under this interpre-

²⁰⁴See 1 Annals at 383–84. The Constitution is surprisingly sparse in respect to the President's foreign affairs authority, expressly giving him only power to receive foreign diplomats, to appoint our own, and to make treaties—and in the latter two cases requiring him to obtain the advice and consent of the Senate. See US Const, Art II, §§ 2–3. In requiring the Secretary of Foreign Affairs not only to carry on such dealings with our own and foreign ministers but also to conduct "such other matters respecting foreign affairs" as the President should direct, the First Congress appeared to share the modern conviction that a general authority over foreign affairs was either implicit in the unpromisingly drafted specific powers or the general provision vesting executive power in the President or inherent in the office itself. See 1 Stat 28, 29, § 1 (July 27, 1789); *United States v Curtiss-Wright Export Corp.*, 299 US 304 (1936); *The Second Century* at 217–18 n 63.

²⁰⁵See 1 Annals at 383 (Rep. Boudinot). Senator Maclay thought the President should nominate officers without prior legislation establishing their offices. See 9 Doc Hist at 104–05. In the House, however, "that the principles of organization for the executive offices should be settled by legislation was taken for granted." Casper, 30 Wm. & Mary L Rev at 233 (cited in note 141). For further discussion of this question see text at notes 100–12.

²⁰⁶1 Annals at 385.

²⁰⁷Id at 386.

²⁰⁸Id.

tation the President alone could have been empowered to appoint everybody except Justices of the Supreme Court, and it was quickly repudiated. "The inferior officers mentioned in the constitution," said Smith, "are clerks and other subordinate persons," not the heads of departments; and the reference to appointment by the President and Senate was struck from Madison's proposal.²⁰⁹

Smith's second objection was to the provision making the Secretary "removable by the President." For Article II, § 4 provided that civil officers of the United States should be removed from office when convicted of high crimes and misdemeanors by the Senate; and that, Smith argued, meant there was no other way to remove them.²¹⁰ Madison sensibly replied that the impeachment provision had been designed to provide "a supplemental security for the good behavior of the public officers," not to limit the President's authority to discharge them,²¹¹ and Smith's contrary interpretation received little support from other members.²¹²

Theodorick Bland of Virginia had a more challenging basis for complaint about the provision for presidential removal. If the President could remove an officer whom the Senate had approved, he might circumvent the Senate's authority by giving a recess appointment to an individual whom the Senators had already rejected.²¹³ Bland therefore opined that "the same power that appointed had, or ought to have, the power of removal"; the Senate's power of consent extended not only to naming officers but to dismissing them as well.²¹⁴

²⁰⁹Id at 386–87. As enacted the statute made no reference to the method of appointing the Secretary, but it did provide for a Chief Clerk to be appointed by the Secretary himself in accordance with the authority granted by Article II, 1 Stat 28, 29, § 2 (July 27, 1789). This incident may have some bearing on the Supreme Court's later decision that a special prosecutor essentially independent of executive, legislative, or judicial control could constitutionally be appointed by a panel of federal judges. *Morrison v Olson*, 487 US 654 (1988). Even if Lee's view had prevailed, it might still have been pertinent to ask to what other officer such a prosecutor could be described as "inferior." Maclay's interpretation went as far overboard in one direction as Lee's went in the other: He denied that the Chief Clerk was an "inferior officer," because in the absence of the Secretary he would run the Department. 9 Doc Hist at 118.

²¹⁰1 Annals at 387.

²¹¹Id. See also id at 393 (Rep. Sylvester); *The Federalist* No 65 (Hamilton) (arguing that impeachment was "a bridle in the hands of the legislative body upon the executive servants of the government"). The further suggestion of Benson and Boudinot (1 Annals at 387–88, 390–91) that Smith's argument would give all officers the tenure during "good behavior" that Article III reserved for judges was clever but flawed, for even Smith's reading would permit Congress to set fixed terms for other officers. See id at 391–92 (Reps. Jackson and Smith).

²¹²Benjamin Huntington of Connecticut broke his habitual silence to echo Smith's position, 1 Annals at 477. See also id at 540 (Rep. Page), 389 (Rep. Jackson) (adding that if either the House or the Senate had a constitutional role to play in removing officers it could not delegate the task to anyone else; for "every power recognised by the constitution must remain where it was placed by that instrument").

²¹³See US Const, Art II, § 2, authorizing the President "to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

²¹⁴1 Annals at 388–89. Livermore added the inevitable comparison to the treaty power: "I will not by any means suppose that gentlemen mean, when they argue in favor of removal by the President alone, to contemplate the extension of the power to the repeal of treaties." Id at 497. The extension that Livermore thought so absurd was endorsed by the court of appeals and the only Supreme Court Justice to reach the merits in *Goldwater v Carter*, 444 US 996, 1007 (1979) (Brennan, J, dissenting).

Hamilton had said as much in the *Federalist*,²¹⁵ but the words did not seem to support him; what Article II said was that the President should *appoint* officers with the advice and consent of the Senate. As Smith cogently observed, removal power was not implied in the authority to select the President, Vice-President, or members of Congress—not even, he noted interestingly, in the case of the Senate.²¹⁶ Moreover, the distinction the Constitution seemed to draw between appointment and removal of executive officers could easily be justified in terms of Hamilton's own explanation that the purpose of the provision was to "prevent[] the appointment of unfit characters," although he was right that a Senate check on removal would also "contribute to the stability of the administration."²¹⁷

In the House debate Madison was quick to disown the position Hamilton had taken. "[O]ne of the most prominent features of the constitution" was the President's responsibility for executive affairs. The Senate had been given a say in the appointing process because as a collective body it had better knowledge of possible candidates than any individual could have; but that limitation was consistent with presidential responsibility because, unlike a senatorial veto on removal, it permitted "no person" to be "forced upon him as an assistant by any other branch of the Government."²¹⁸

Several other members agreed with Bland,²¹⁹ but his motion that the proposal be amended to provide for removal "by and with the advice and consent of the Senate" was defeated.²²⁰ It was Gerry who raised the third and final argument against Madison's proposal: Even if neither the impeachment clause nor the appointments clause prevented the President from removing the Secretary, nothing in the Constitution authorized him to do so; and he had only those powers which the Constitution conferred.²²¹

There were two ways to repulse this attack, and both were employed. Laurance had already made the defense of confession and avoidance: Since the Constitution did not provide one way or the other, Congress was free—under the necessary and proper clause, as Thomas Hartley of Pennsylvania later added²²²—to give the President removal power or not, and it made sense to do so.²²³ George Clymer of Pennsylvania, in contrast, took the high road of direct denial: "[T]he power of removal was an executive power" and thus was vested in the President "by the express words" of Article II.²²⁴

It was at this point that in the Committee of the Whole "[t]he question was . . . taken, and carried by a considerable majority, in favor of declaring the power of removal

²¹⁵The *Federalist* No 77. Smith read this passage aloud with evident relish at a later point in the House discussion. See 1 *Annals* at 474.

²¹⁶1 *Annals* at 392. See the discussion of the role of Senators as representatives of the states at notes 64–75.

²¹⁷The *Federalist* Nos 76–77.

²¹⁸1 *Annals* at 394–95.

²¹⁹See, e.g., *id.* at 389 (Rep. Jackson), 391 (Rep. White), 395–96 (Rep. Gerry).

²²⁰*Id.* at 397–98.

²²¹*Id.* at 395. See also *id.* at 475 (Rep. Smith): "I call upon gentlemen to show me where it is said that the President shall remove from office."

²²²*Id.* at 500.

²²³*Id.* at 392–93.

²²⁴*Id.* at 397.

to be in the President."²²⁵ The reader will observe that this resolution left the difference of opinion between Clymer and Laurance unresolved. It did not say whether the President had removal power because the Constitution had given it to him or because Congress in its discretion had chosen to confer it. The House did not have to answer that question in order to agree that the President could discharge the Secretary, but it would be crucial if Congress ever decided to prohibit presidential removal.

The debate was resumed a few weeks later, when a bill was presented to carry out the principles agreed to in the Committee of the Whole.²²⁶ The House talked of nothing else for a week. In the process all the arguments that had been made before were repeated and enlarged upon. There were also a few new twists, however. In particular, the difference of opinion among the supporters of presidential removal was brought into the foreground, and the argument that the Constitution itself gave the President this authority was substantially reinforced.

When Madison endorsed Clymer's position that removal was an executive power vested in the President by Article II,²²⁷ Smith and White leapt to the attack. There was nothing intrinsically executive about removal, Smith argued; he knew of no state in which the Governor had any such power.²²⁸ Moreover, White contended, the Constitution did not give the President all powers that might abstractly be classified as executive: "[T]he executive powers so vested, are those enumerated in the constitution."²²⁹

The former argument was troubling, and the latter potentially fatal. For despite the conspicuous textual contrast between Article II and Article I, which expressly vested in Congress only those legislative powers "herein granted,"²³⁰ it seemed unlikely that the Framers had meant to give the President blanket authority to do everything that could theoretically be termed executive, especially since the critical words of Article I had been inserted without explanation by the Committee of Style;²³¹ at the very least there seemed to be an implicit restriction to executive matters that could fairly be deemed of federal concern.

Nevertheless, as Fisher Ames pointed out, the case did not depend on the argument that removal was in itself an unenumerated executive function:

The constitution places all executive power in the hands of the President, and could he personally execute all the laws, there would be no occasion for

²²⁵*Id.* at 399.

²²⁶*Id.* at 473.

²²⁷*Id.* at 481. Madison had initially argued that the matter lay in the discretion of Congress, and he acknowledged his change of mind. See *id.* at 389, 480.

²²⁸*Id.* at 490.

²²⁹*Id.* at 485.

²³⁰US Const, Art I, § 1. Article III is equally explicit, vesting the judicial power in specified courts and defining that power to embrace a finite list of disputes. John Adams recorded in his notes that Ellsworth relied on the absence of any such language in Article II in arguing to the Senate that the vesting clause gave the President removal power: "The executive power is granted; not the executive powers hereinafter enumerated and explained." 3 *Works of John Adams* at 409.

²³¹See 2 *Farrand* at 547, 565, 590; Charles C. Thach, Jr., *The Creation of the Presidency, 1775–1789*, in 40 *Johns Hopkins University Studies in Historical and Political Science* 138–39 (1922).

establishing auxiliaries; but the circumscribed powers of human nature in one man, demand the aid of others. . . . He must therefore have assistants. But in order that he may be responsible to his country, he must have a choice in selecting his assistants, a control over them, with power to remove them when he finds the qualifications which induced their appointment cease to exist.²³²

In other words, removal authority was implicit in the *enumerated* powers of the President, because he could exercise none of them without subordinates subject to his supervision and control. Madison succinctly restated the point a few minutes later: "[I]f the officer when once appointed is not to depend upon the president for his official existence, . . . I confess I do not see how the president can take care that the laws be faithfully executed."²³³

It was at this point that Egbert Benson of New York offered an amendment that was to divide the supporters of presidential removal power. A proposal to specify the manner of *appointment* had already been dropped after it was argued to imply a power of choice foreclosed by Article II;²³⁴ Benson made the same argument with respect to removal. That the Secretary was removable by the President was the command of the Constitution itself; to say the same thing in the statute was to suggest that the power was for Congress to give or withhold. The bill should therefore be amended to acknowledge the President's constitutional prerogative by providing that the Secretary's custodial duties should devolve upon his clerk "whenever the said officer shall be removed by the president."²³⁵

Sedgwick protested that it made no sense after having won the debate for the supporters of the removal power to quarrel over a purely academic question.²³⁶ Nevertheless the question was put, and Benson prevailed. The words "whenever the said officer shall be removed by the President" were inserted,²³⁷ and the words "to be removable by the President" were dropped.²³⁸ Thus at first glance it might appear that the House had agreed with Benson that the Constitution itself gave the President the power of removal.²³⁹

Unfortunately the matter was not so simple. For better or worse, the two halves of Benson's proposal were put to the House separately. The members first voted thirty to eighteen to add Benson's "whenever" language. All those who had spoken in favor of presidential removal voted aye, whether they thought that Article II settled the question

²³²1 Annals at 492. George Read made the same argument in the Senate. See 3 Works of John Adams at 411.

²³³1 Annals at 516. Ames later repeated the point: "In the constitution the President is required to see the laws faithfully executed. He cannot do that without he has a control over officers appointed to aid him in the performance of his duty." *Id.* at 561. To put the argument another way, to place the conduct of foreign affairs in the hands of an officer not subject to presidential control would offend Article II's command that the enumerated executive powers be vested in the President. See *Morrison v Olson*, 487 US 654 (1988) (Scalia, J., dissenting).

²³⁴See text at notes 51-53.

²³⁵1 Annals at 525-27.

²³⁶*Id.* at 602.

²³⁷*Id.* at 602-03.

²³⁸*Id.* at 608.

²³⁹Chief Justice Taft took this view of the House's action in *Myers v United States*, 272 US 52, 112-14 (1926). See also John Marshall, 5 *The Life of George Washington* 231-32 (AMS, 1805).

or left the matter to Congress. The House then voted thirty-one to nineteen to drop the phrase "to be removable by the President." The numbers were virtually identical, but it was a different majority. For on this question the proponents of Article II power prevailed only because they were joined by a substantial number of members who had opposed presidential removal altogether.²⁴⁰

The original coalition was patched up again when it came time for the House to pass the amended bill,²⁴¹ and after a similar discussion in the Senate²⁴² Benson's "whenever" formula became law.²⁴³ Thus it was the considered judgment of a majority in both Houses that the President could remove the Secretary of Foreign Affairs, but there was no consensus as to whether he got that authority from Congress or from the Constitution itself.²⁴⁴

~~D. Other Officers~~

Once the great controversy over presidential removal was resolved, Congress moved quickly to set up War and Treasury Departments, each headed by a Secretary whose tenure was described by the same "whenever" formula that had been so painstakingly worked out for the Secretary of Foreign Affairs.²⁴⁵ In other respects, however, the statute governing the Treasury differed significantly from those setting up the other two departments. To begin with, the Treasury was not expressly designated an "executive" depart-

²⁴⁰Fifteen of the thirty members who voted to add "whenever" voted not to delete "to be removable"; sixteen of the eighteen who voted not to add "whenever" voted to delete "to be removable." These were the members who were opposed to presidential removal entirely. Only sixteen of the forty-eight who voted on both questions voted for both, that is, for Benson's substitution. Justice Brandeis worked this all out in his dissent in *Myers*, 272 US at 286-87. See also Corwin, *Office and Powers* at 87 (cited in note 174). That was not enough to make Brandeis right on the merits; my own view is that Ames's argument was overpowering. See *The Second Century* at 194-95.

²⁴¹The final vote was twenty-nine to twenty-two. See 1 *Annals* at 614.

²⁴²See 9 *Doc Hist* at 114-15.

²⁴³1 Stat 28, 29, § 2, (July 27, 1789). Vice-President Adams had had to cast a tie-breaking vote in the Senate. See 9 *Doc Hist* at 115.

²⁴⁴"[T]he real significance of the debate," wrote Professor Casper, "lies in the multitude of views expressed about the significance and meaning of separation of powers." Casper, 30 *Wm & Mary L Rev* at 237 (cited in note 141).

²⁴⁵See 1 *Annals* at 412; 1 Stat 49 (Aug 7, 1789); 1 Stat 65 (Sept 2, 1789). The Treasury bill, however, also provided for a Comptroller whose duties included determining the validity of claims against the government. Because this task was more judicial than executive, Madison argued, the President should not control it; either the Comptroller should not be removable, or his decisions should be subject to Supreme Court review. 1 *Annals* at 635-37.

This proposal raised more difficulties than it resolved. It was by no means clear that the Comptroller's function was judicial; until the Treasury had rejected the claim, it was hard to find the adverse parties who characterized the ordinary judicial proceeding. Moreover, if the matter was judicial, Article III appeared to require that it be decided by a judge with tenure during good behavior and irreducible salary. Finally, unless the Comptroller could somehow be considered a judicial officer, it was not obvious how the Supreme Court could be empowered to review his decision; for under Article III, unless a state or a (foreign) diplomat was a party, the Supreme Court's jurisdiction was appellate, not original. Madison withdrew his motion after several colleagues spoke against it, as enacted the statute said nothing about the removal of inferior officers. See 1 *Annals* at 637-39; 1 Stat at 65, § 1.