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Public Administration, Executive Power, and Constitutional Confusion

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The purpose of this article is to argue that confusion over the meaning of the constitutional grant of "the executive power" to the President has created considerable confusion over the constitutional role of the public administration in American government. Richard Neustadt captured this ambiguity nicely when he noted that the two great themes that have characterized the American presidency have been "clerkship" on the one hand and "leadership" on the other.¹ There is no easy formula to bring clerks and leaders together to make them march in lock-step, and yet the President is clearly both. Today the tendency is to emphasize his role as leader because imperial pretensions and Nixonian excesses are still relatively fresh in our memories, but this is only a question of emphasis. No one denies that the President is a legally accountable officer who must do the bidding of the Congress. This is the clerkship side of the presidency.

Herbert Storing counsels against any effort to cut the Gordian knot and to try to determine once and for all just what it is the American President is supposed to be: clerk or leader. "The beginning of wisdom about the American presidency," Storing maintains, "is to see that it contains both principles and to reflect on their complex and subtle relation."² Following Storing's advice, this article reflects on the inherent ambiguity of the executive power that provides the constitutional foundation for the public administration. This reflection has three parts. The first examines the text of the Constitution and the meaning of executive power at the time of the founding. The second studies the confusion that the U.S. Supreme Court has created in its efforts to draw practical conclusions for presidential personnel management from the constitutional grant of "the executive power" to the President in relation to the removal power. The third examines some of the recent

problems of executive power that surfaced in the Watergate scandal and became salient in the important constitutional debate over special prosecutors, those most unwelcome intruders into the inner precincts of the Reagan Administration.

The Founding Period

"Executive" has two conflicting meanings that account in part for the confusion the word occasions in constitutional law and in other fields as well. Etymologically, it is derived from the Latin verb *exsequi*, meaning to follow through or to carry out. *Sequi* is the root verb meaning to follow, and the prefix *ex-* simply intensifies the meaning of following. Etymologically, then, the executive is a follower, and this clearly favors the clerk side of the clerk/leader conundrum. This meaning was prevalent in the eighteenth century, as the Oxford English Dictionary (OED) attests, and it survives to the present day. Corporate executives (at least in principle) carry out the will of the board of directors, and executors of estates follow the wishes of deceased testators. But ancient examples from the OED and contemporary usage as well justify a meaning of executive that is independent of higher authority. Kings have been said to execute their own wills, and God Himself is described as one who "executyth . . . good & indyfferent justyce . . . to his creatures."³ Today, Presidents are said to exercise "executive privilege" when they act in a manner utterly antithetical to that of a mere clerk of the Congress or of the courts. Such an executive is clearly a leader.

At the time of the founding of the Republic, the ambiguity that engulfed the executive was due as much to

This article examines the ambiguity in the meaning of executive power in both the text of the U.S. Constitution and in subsequent judicial interpretations. This ambiguity has had a profound impact on the constitutional position of the public administration. In the recent independent counsel case, the U.S. Supreme Court offered a restrictive interpretation of the President's constitutional powers to remove subordinate officers. This new interpretation could lead to increased congressional control over administrative agencies.

political expectations as to etymology and usage. The framers of the U.S. Constitution wanted a strong executive for two incompatible reasons. The sad administrative experience under the Articles of Confederation taught them the need for an independent executive whose legal existence would be liberated from the committees of the Continental Congress. This line of argument anticipated that of the Civil Service Reformers who would appear a century later. It was an argument grounded in concern for governmental efficiency. The executive was to be independent in order to enable him (or them--the single executive was quite controversial) to carry out the will of the Congress more efficiently. This theme, arising from the colonial experience, favored an independent executive, but not an executive that was equal to the legislature. This is the origin of the clerkship side of the presidency.

Some framers of the Constitution also wanted an independent executive to check the legislative excesses that they saw in many of the states. If they were about to establish a real government at the national level, there would be need for an authentic legislature with powers far greater than those of the hapless Continental Congress. Steps would have to be taken to keep this new national legislature from oppressing the people and disregarding their rights. To this end an independent executive was an indispensable means. He or they would vindicate the rights of the citizens and would maintain a watchful vigilance against the "excesses of democracy," that notorious failing of all popular governments. This political sentiment grounds the theme of President as leader.

Not surprisingly, these ambiguities in language and political expectations found their way into the text of the Constitution itself. The first sentence of Article II provides that "The executive power shall be vested in a President of the United States." This language contrasts markedly with the opening words of Article I: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Champions of a strong executive have always emphasized the absence of the qualifying words "herein granted" in Article II. This absence, they maintain, means that *the* executive power (presumably all of it) is vested in the President. Congress possesses all those legislative powers that are granted in the Constitution itself, but it does not possess all legislative power. That is, there are many areas of life in which Congress may not legislate. It may legislate only in those areas in which the Constitution permits it to do so. To be sure, Congress possesses all legislative powers in the sense that other institutions created by the Constitution have no explicit authorization to legislate. But the legislative powers of Congress are confined to the written document.

The practical import of these exegetical niceties is that they serve as a launching pad for a constitutional argument in support of *inherent* executive powers that are not confined by the text of the Constitution. This argument sees in the executive power clause a positive grant of power to the President to do whatever any political executive can do. Activist Presidents, like Jackson, Lincoln, and Theodore Roosevelt, made skillful use of this argument.

Theodore Roosevelt, for example, used this clause to support the robust theory of presidential power that led him to conclude that "it was not only his [the President's] right but his duty to do anything that the needs of the nation demanded unless such action was forbidden by the Constitution or by the laws."⁴ Such an interpretation of presidential power would put an end once-and-for-all to the tension between the President's roles as leader and clerk. The Rooseveltian President is not only leader of his people, but, like Gilbert and Sullivan's Pooh-Bah, he could also claim to be "first Lord of the Treasury, Lord Chief Justice, Commander-in-Chief, Lord High Admiral, Master of the Buckhounds, Groom of the Backstairs, Archbishop of Titipu, and Lord Mayor."

Critics of presidential power have responded in a variety of ways. One line of argument admits that the President does indeed possess all executive power without qualification, but it maintains that this does not justify the far-reaching conclusions of presidential apologists. What is executive power, they ask. It is simply the power to execute law. The President may only execute that which the Congress has legislated. It was perfectly logical for the framers to omit the "herein granted" qualification from the grant of the executive power to the President, because, having provided that the Congress has only those legislative powers "herein granted," there was no need to repeat the same language in the article establishing the executive. Executive power cannot outstrip legislative power, for there would be nothing for the executive to execute. He can only execute what the Congress can legislate. Hence the limitations on the scope of congressional power necessarily encumber the executive power of the President as well.

This argument is reinforced by explicit constitutional grants of power to the President to command the armed forces of the nation, to grant reprieves and pardons, to share in the power to make treaties and to appoint officers, to convene either or both houses of Congress, to receive ambassadors, and so forth. The fact that these powers are explicitly granted in the Constitution undercuts the argument that the executive power clause confers inherent executive powers on the President. If the executive power clause did this, what would be the purpose of spelling out all these other powers which are traditionally associated with the executive? These additional powers would all be redundant. They could all be found in the teeming womb of the executive power clause. Clearly, the argument goes, the framers intended that the "executive power" clause should give the President nothing more than the power to execute laws passed by Congress. Whatever other powers he might possess are explicitly stated in Article II. The President has no powers other than the sum of the powers resulting from these two sources.

Another argument against the presence of inherent executive power in Article II is drawn from the opening words of Article III: "The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." Critics of presidential power high-

light the contrast between Article II which vests only "the executive power" and Article III which vests "the judicial power of the United States" (emphasis added). It is the judiciary, not the executive, that enjoys inherent power. There is a judicial power of the United States, the argument runs, and this is the power to apply common law.⁵ The grant of this inherent power is signalled by the explicit mention of a judicial power of the United States. It is a power that inheres in the judicial system of any nation influenced by the English legal tradition. Article II significantly omits any mention of an executive power "of the United States." Had the framers of the Constitution wished to confer such inherent executive power on the President, they would have used the sort of language they adopted when they created the judiciary.

A final textual response to the expansive view of presidential power is based on sections 2, 3, and 4 of Article II. Here the argument differs from the considerations, just discussed. The previous arguments conceded that the executive power clause does indeed grant complete executive power to the President. Having made this concession, the thrust of the previous arguments was to limit the scope of executive power by confining the meaning of the word to executing the will of the Congress and thereby to deny any additional, inherent powers to the President. The argument here maintains that other sections of Article II cannot be reconciled with the claim that the executive power clause gives *all* executive power to the President--no matter how narrowly one defines executive power.

The most important constitutional clause in support of this position states that the President "shall take care that the laws be faithfully executed, and shall commission all the officers of the United States." This language makes it rather clear that the President himself is not to execute the laws, but is to see to it that others do so; and to assist him in doing just this, the Constitution empowers the President to commission officers. These constitutional provisions are followed immediately by the impeachment clauses which clearly describe the President as a legally accountable officer who "presides" (as a *President* should) over an executive establishment that carries out the laws mandated by Congress. This is the textual basis for the clerkship view of the presidency. It is reinforced by the explicit constitutional provision for "executive departments," each of which will be headed by a single "principal officer."

This constitutional language casts a shadow over the interpretation of the executive power clause that maintains that the framers meant to give the executive power (i.e., all of it) to the President alone. Surely a constitutional provision for a principal officer in each of several executive departments implies that these high officials hold some sort of executive power in their own right. But if they hold any executive power at all, the President cannot hold all of it.

These considerations will suffice to support the point that at the time of the founding of the Republic, there was considerable ambiguity and confusion over the precise nature of executive power. This ambiguity and confusion came from the word "executive" itself and, perhaps more

importantly, from the framers' conflicting expectations of a strong and independent executive. Not surprisingly, this ambiguity and confusion spilled over into the text of the Constitution itself and there found a permanent home for the irreconcilable themes of the President as leader on the one hand and clerk on the other. Public administration has established its constitutional dwelling place in this uneasy household whose bewildered inmates have brought forth anomalies, enigmas, and contradictions in their own image and likeness.

The President's Removal Power

Article II provides several ways in which federal officers may be appointed; but, except for the impeachment clause, it is silent on how they may be removed. This constitutional silence prompted an important debate during the first Congress. The debate occurred when the House of Representatives was establishing the Department of Foreign Affairs, the original name for the Department of State. There was no doubt that the Secretary of Foreign Affairs should be appointed by the President with the advice and consent of the Senate, but considerable doubt existed about how he should be removed from office. There were four distinct answers to this question, each of which involved an interpretation of the Constitution. One group maintained that the Constitution vests this power in the President alone. A second group said it was vested in the President and the Senate together--this had been the position of Publius in *Federalist* #77. A third said that Congress had the constitutional authority to vest this power in the President alone or in the President and the Senate together. A fourth group, much smaller than the other three, held that impeachment was the only constitutionally permissible method of removal.⁶

The argument was exceedingly complex and was highlighted by brilliant parliamentary maneuvers by the proponents of the position that the Constitution itself vests the removal of officers in the President alone. The debate consumed over five legislative days in which members of the House participated in three roll-call votes. The upshot of the debate was that the President emerged with the authority to remove the Secretary of Foreign Affairs without interference from the Senate. This outcome was called "the decision of 1789." It was a decision of monumental political significance. The President's power to remove the head of an executive department was at the heart of the most important constitutional crisis of Andrew Jackson's presidency and, even more significantly, at the heart of the effort to impeach President Andrew Johnson. To the present day it remains a crucial element in presidential control over the public administration.

Despite the overwhelming importance of the issue, the Supreme Court of the United States did not get around to addressing it until 1926 in *Myers v. United States*.⁷ Myers was a postmaster first class in Oregon who had been appointed by President Wilson in July 1917. He was appointed pursuant to an 1876 statute that provided that postmasters "shall be appointed and may be removed by

the President with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law". In February 1920, long before the expiration of his four-year term, Myers was removed from office by the postmaster general acting under direction from the President. Although the Senate had consented to Myers's appointment, it did not consent to his removal. Myers therefore maintained that his removal was not "according to law" and brought suit for the salary due him for the remainder of his term.

Myers's efforts were in vain. Chief Justice Taft, writing for a six-member majority, held that "the provision of the law of 1876, by which the unrestricted power of removal is denied to the President, is in violation of the Constitution, and invalid." Taft's opinion was a remarkable paean to the need for strong managerial powers in the hands of the President. It was the sort of opinion that could only have been written by an erstwhile President turned Chief Justice. In the course of his opinion, the Chief Justice relied heavily on "the decision of 1789" as an authoritative declaration of the true meaning of the Constitution by a Congress that included a good number of the framers of the Constitution. In appealing to the action of the first Congress, Chief Justice Taft gave too little attention to the fact that in 1789 Congress was debating the President's removal powers over a Secretary of Foreign Affairs, the closest of the President's advisers in an area that is distinctly presidential. The contrast with an Oregonian postmaster could hardly have been greater. In addition, the *Myers* case raised the question of whether the President could remove an officer with a fixed term of office before the expiration of the term, a matter that simply was not at issue in the decision of 1789. These important factual differences between the decision of 1789 and the *Myers* case prompted Justice Holmes to complain in dissent that Taft's arguments "seem to me spider's webs inadequate to control the dominant facts."

The most startling aspect of Taft's opinion was his confident assertion that the historical record unequivocally supported his sweeping view of presidential removal powers. "[T]here is not the slightest doubt," said the Chief Justice, "after an examination of the record, that the vote [the decision of 1789] was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone." The Chief Justice overstated his case; the record is simply not this clear. Justice Brandeis gave a much more precise account of the 1789 debate, when he argued in his dissenting opinion that it "did not involve a decision of the question whether Congress could confer upon the Senate the right, and impose the duty, to participate in removals." In 1876 Congress did address this question and decided that it could confer this right and duty upon the Senate. It was the constitutionality of the 1876 decision that was before the Court in *Myers*, and this question, Brandeis maintained, could not be settled by appeals to the decision of 1789.

With characteristic precision, Brandeis showed that the decision of 1789 involved "merely the decision that the

Senate does not, in the absence of a legislative grant thereof, have the right to share in the removal of an officer appointed with its consent; and that the president has, in the absence of restrictive legislation, the constitutional power of removal without such consent." Thus, for Brandeis, the decision of 1789 upholds the central role of Congress in the removal process. If Congress says nothing by law, the President alone may remove an officer whom he has appointed with the advice and consent of the Senate. For Brandeis, the decision of 1789 did not preclude Congress from providing by law that the Senate must concur in the removal of certain officers. The exercise of such power by Congress could be justified by the explicit constitutional authorization for Congress to make all laws "which shall be necessary and proper for carrying into execution the . . . powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof." The President is an officer of the United States who is empowered to take care that the laws are faithfully executed. A congressional requirement for senatorial approval of a presidential decision to remove an officer like a postmaster might well be considered a necessary and proper means of assuring that the President does take care that the laws are faithfully executed.

Brandeis's interpretation of the decision of 1789 is more accurate than that of Chief Justice Taft.⁸ Nevertheless, it is Taft's opinion that is the law of the land. As Edward Corwin has remarked, "what a judge cannot prove he can still *decide*."⁹ And Chief Justice Taft decided that, as a matter of constitutional law, the President has unfettered power to remove executive officers whom he or a previous President has appointed with the advice and consent of the Senate. This legal rule cried out for further clarification of just what is meant by an executive officer.

The clarification was not long in coming. Early in his first presidential term, President Franklin Roosevelt removed Federal Trade Commissioner Humphrey from office several years before his seven-year tenure had expired. The statute creating the commission and fixing its members' terms at seven years further provided that commissioners could be removed before the expiration of their terms only for cause. Humphrey had given no cause for removal. Clearly, Roosevelt's action was based on his belief that under the *Myers* decision the statutory restrictions on his removal powers were unconstitutional. Humphrey did not see it that way, and he sued for the salary due him for the remaining years in his term of office. In a unanimous decision the U.S. Supreme Court supported Humphrey's claim.¹⁰

In his opinion for the Court, Justice Sutherland distinguished *Myers* on the grounds that that case and the decision of 1789 involved officers whose functions were "purely executive," whereas federal trade commissioners exercise authority that is only quasi-legislative and quasi-judicial. Sutherland maintained that because of these functions, Humphrey was "an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President." He further maintained that when the Fed-

eral Trade Commission exercises an executive function, the power it exercises is not "executive power in the constitutional sense." Whatever action it takes, "it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers or as an agency of the legislative or judicial departments of the government."

This was an astounding line of reasoning. It is difficult to comprehend the distinction between "executive power in the constitutional sense" and some other form of executive power. No less puzzling is the meaning of Sutherland's statement that the Federal Trade Commission is "an agency of the legislative or judicial departments of the government" (emphasis added). Sutherland seems to put the commission on a constitutional shuttle between the courts and the Congress depending on whether it happens to be exercising quasi-legislative or quasi-judicial authority. The shuttle, however, must not stop at the executive branch of government--or at least at that branch that exercises "executive power in the constitutional sense." Sutherland's strange language led one commentator to wonder just where the trade commissioner belongs in the Court's constitutional cosmology: "[I]s he, forsooth, in the uncomfortable halfway situation of Mohamet's coffin, suspended twixt Heaven and Earth?"¹¹

The heart of the problem is that Sutherland accepted that portion of *Myers* that forbade Congress from limiting the President's constitutional power to remove executive officers appointed by the President with the advice and consent of the Senate. Having made this concession, Sutherland had a strong incentive to remove the "executive" label from any officer he believed might be rightfully protected by the Congress from an unfettered presidential power to remove. The *Humphrey* case gave the Court a chance to admit its error in *Myers* and simply to overrule that unhappy precedent. Unfortunately, the Court closed its eyes to the light at the end of the *Humphrey* tunnel. Instead, it ran in circles after an illusory executive power that is something other than "executive power in the constitutional sense." This will-of-the-wisp has as its sorry progeny the mindless chatter heard over the past half-century about the bureaucracy as a "headless fourth branch of government." Since there are only three constitutional branches of government, fourth branch rhetoric attacks the constitutional legitimacy of administrative institutions.

The problem is not confined to the so-called "independent regulatory commissions," like the Federal Trade Commission. The logic of Sutherland's opinion focuses on the function of an agency, not on its place in the *U.S. Government Organization Manual*. Under Sutherland's reasoning, it would seem that any officer who exercises quasi-legislative or quasi-judicial power could be described as one who "occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President." This would include those officers in the executive departments who exercise rule-making and adjudicatory powers.¹² Perhaps such officers should be exempt from presidential removal; this is especially true for those exercising quasi-judicial functions. It makes no sense, however, to say that

such officers do not exercise "executive power in the constitutional sense." If the *Humphrey* Court had overruled *Myers*, it could have avoided the need to use such bizarre language. Had *Myers* been overruled, Congress could have resumed its traditional powers to limit the President's power to remove some officers and to give the President a free hand in removing others. The Congress could do this on an *ad hoc* basis that would consider the particular function of each officer without any constitutional legerdemain about purely executive officers as opposed to those whose duties are quasi-this or quasi-that. The fundamental flaw in *Myers* is that Chief Justice Taft treated the executive branch of government as though it were a managerial enterprise instead of a political institution in which the Congress will always have a legitimate interest, an interest that was bound to grow along with the rise and development of the modern administrative state.

Independent Counsel/Special Prosecutor

Quite recently, the perennial confusion over executive power took a new twist in a Supreme Court decision that resolved the volatile issue of the constitutionality of the office of independent counsel created by the Ethics in Government Act of 1978.^[13] Popularly known as "special prosecutors," the independent counsels are appointed by three-judge panels to investigate alleged wrong-doings by high-ranking officials in the executive branch of government. The origin of the independent counsel can be traced to the messy constitutional problems that arose during the Watergate scandal. One of these problems centered on how Special Prosecutor Leon Jaworski, who was presumably an "inferior officer" in the executive branch of government, could defy the wishes of President Nixon, his executive superior, in his relentless (and successful) campaign to force the President to surrender the famous tapes that sealed his doom. The Supreme Court's unanimous ruling in *United States v. Nixon* failed to give an adequate response to this argument; an argument that was urged with the zeal worthy of a better cause by Nixon's brilliant attorney, James St. Clair.

A salient aspect of the problem was the absence of a clear statutory basis for the position and powers of the special prosecutor. The Congress addressed this problem in the Ethics in Government Act of 1978. Under this act, the Attorney General is required to conduct a preliminary investigation of plausible charges against high-ranking officials. After 90 days, he is to report the results of his investigation to a three-judge panel that is called the "special division," a division of the U.S. Court of Appeals for the District of Columbia. The three judges are appointed by the Chief Justice of the United States to serve for a term of two years. If the Attorney General finds "reasonable grounds to believe that further investigation or prosecution is warranted," he must ask the special division to appoint an independent counsel and to define the limits of the counsel's prosecutorial jurisdiction. The statute goes into considerable detail to describe the relationship between the independent counsel and the Department of

Justice; but, for purposes here, the most important points are that the independent counsel is appointed by a three-judge panel and can be removed only by impeachment or "by the personal action of the Attorney General and only for good cause, physical incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."

The policy objectives behind the independent counsel legislation were quite clear. Congress wanted to avoid any repetition of the "Saturday night massacre" of the Watergate era. It was important that the independent counsel should be truly independent. To ensure that this would be the case, Congress provided that the appointment should be made by a judicial panel and that removal could be effected only for cause.

Not surprisingly, these provisions were challenged on constitutional grounds. In the case that reached the Supreme Court, *Morrison v. Olson*, a former Assistant Attorney General, Theodore Olson, was under investigation by independent counsel Alexia Morrison on charges of having given false and misleading testimony to a congressional subcommittee in 1983 and of having wrongfully withheld certain documents from the House Judiciary Committee at that time. In the course of the investigation, Morrison caused a grand jury to issue subpoenas to Olson and two others who refused to comply on the grounds that the legislation creating Morrison's office was unconstitutional. This refusal led to the litigation that eventually reached the Supreme Court.

In a 7-1 decision, Chief Justice Rehnquist upheld the constitutionality of the unusual appointment and removal provisions for the independent prosecutor. The appointment argument was straightforward. The second section of Article II provides that appointments to federal offices are to be made by the President with the advice and consent of the Senate. The same section then adds the following qualification: "but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." The Chief Justice maintained that the independent counsel was an inferior officer and, therefore, that Congress could rightfully vest her appointment in a judicial panel. In a long and vigorous dissent, Justice Scalia argued that the independent counsel was not an inferior officer and, therefore, Congress could not vest her appointment in "the Courts of Law."

Underlying the technical issues concerning the meaning of the term "inferior Officer" was a deeper separation of powers question that became clearer as Rehnquist and Scalia presented their conflicting arguments on the constitutionality of the statutory provision that the independent counsel could be removed only for cause--i.e., she could not be removed at the pleasure of the President or of the Attorney General acting on behalf of the President. This issue beat a path back to the *Myers* and *Humphrey* cases. Scalia maintained that the "the prosecution of crimes is a quintessentially executive function." Prosecutors, he said, are "the virtual embodiment of the power to 'take care that the laws be faithfully executed'" and therefore should be

subject to the broad presidential removal powers announced in *Myers*.

Chief Justice Rehnquist disagreed and, in so doing, gave a new and very restrictive interpretation of *Myers*--an interpretation of considerable importance for public administration professionals. He maintained that "the only issue actually decided in *Myers* was that 'the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress.'" He then acknowledged that the *Humphrey* court had distinguished the case before it from *Myers* on the grounds that a federal trade commissioner exercised quasi-legislative and quasi-judicial authority, as opposed to the purely executive functions of a postmaster first class. According to the *Humphrey* court, this distinction justified the congressional action that imposed a "for good cause" limitation on the President's power to remove a trade commissioner.

Having rehearsed this history, the Chief Justice then made the following, startling comment:

but our present considered view is that the determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as "purely executive." The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II.

The Chief Justice went on to explain that in this and in future removal cases the Court will not focus exclusively or even primarily on the sorts of functions that an officer performs. To be sure, the Chief Justice acknowledged that an analysis of the functions performed would not be "irrelevant." "But the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light."

This is new constitutional doctrine. In dissent, Justice Scalia stated (correctly, I believe) that the *Humphrey* case "is swept into the dustbin of repudiated constitutional principle." Although Scalia recognized some of the problems in the *Humphrey* opinion, he found the loose standard announced by the Chief Justice far worse. He surmised that the new standard would be "an open invitation to Congress to experiment." The experiments would test just how far the Congress could go in protecting purely executive officers from dismissal at the pleasure of the President without impeding "the President's ability to perform his constitutional duty." He conjectured that under this standard, the Congress could provide that an "Assistant Secretary of State, with responsibility for one very narrow area of foreign policy," might be removed "only

pursuant to certain carefully designed restrictions." Or the Congress might offer similar protection to an Assistant Secretary of Defense for Procurement. Ominously, Scalia brooded:

The possibilities are endless, and the Court does not understand what the separation of powers, what "[a]mbition counteract[ing] ambition," *Federalist No. 51* . . . , is all about if it does not expect Congress to try them. As far as I can discern from the Court's opinion, it is now open season upon the President's removal power for all executive officers, with not even the superficially principled restriction of *Humphrey's Executor* as cover.

The public administration community will greet Scalia's predictions with greater equanimity than does the dissenting justice. One might well doubt that the Congress will follow through with the bold experiments Scalia fears. If the Congress were to do so, however, it might not be simply to celebrate the new "open season upon the President's removal power." Congress just might take such actions to encourage administrative professionalism in

high-ranking executive officers and to protect them from punitive political reprisals from Presidents who prefer ideological subservience to sound administration. Then it would be the duty of the executives themselves to see to it that the President's rightful place in the constitutional balance of powers is preserved. It would be their responsibility as practitioners of the art and science of public administration to be sure that their protected positions against mischievous presidential whim did not weaken the President's capacity to "take care that the laws be faithfully executed."

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Notes

1. Richard Neustadt, *Presidential Power: The Politics of Leadership from FDR to Carter* (New York: Wiley, 1960, 1980), Chapter 1.
2. Herbert J. Storing, "Introduction," to Charles C. Thach, *The Creation of the Presidency 1775-1789: A Study in Constitutional History* (Baltimore: Johns Hopkins University Press, 1923, 1969), pp. vii-viii.
3. *The Compact Edition of the Oxford English Dictionary*, Volume I, A-O (New York: Oxford University Press, 1971, 1976) E, pp. 393-395.
4. Theodore Roosevelt, *An Autobiography* (New York: Putnam, 1913), pp. 388-398.
5. George Anastaplo, "The United States Constitution of 1787: A Commentary," *Loyola University of Chicago Law Journal*, vol. 18 (Fall 1986), pp. 129-139.
6. I discuss the removal question in more detail in a forthcoming monograph, *The President and the Public Administration* (Washington: American Historical Association).
7. 272 U.S. 52 (1926)
8. For an extended argument in support of this assertion, see my monograph referenced in note 6. For a good counter argument, see Peter L. Schultz, "The Constitution, the Presidency, and the Rule of Law," in *University of Kentucky Law Journal*, vol. 76, no. 1 (1987-88), pp. 1-14; and "Separation of Powers and Presidential Prerogative: The Case of *Myers v. U.S.* Reconsidered," in Gary L. McDowell, ed., *Taking the Constitution Seriously* (Dubuque: Kerdall-Hunt, 1981), pp. 220-231.
9. Edward S. Corwin, *The President's Removal Power Under the Constitution* (New York: National Municipal League, 1927: repr., Ithaca, NY: Cornell University Press, 1981), p. 339.
10. *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935). Humphrey himself died after Roosevelt removed him; hence the title of the case.
11. Edward S. Corwin, *The President: Office and the Powers, 1787-1984*, 5th ed., (New York: New York University Press, 1984), p. 108.
12. This interpretation follows Corwin, *The President*, p. 108.
13. *Morrison v. Olson*, 108 S. Ct. 2597 (1988).
14. 418 U.S. 683 (1974).

Response to John Rohr

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What does John Rohr's thesis suggest about the future of public administration? Most importantly, the article indicates a need for law to become an integral part of the public administration curriculum again. In the vast majority of programs approved by the National Association of Schools of Public Affairs and Administration (NASPAA), law is not a requirement. There are several reasons why this situation should be remedied.

First, the relationship between law and administration is central to the operation of a democratic government, and it has great impact on public policy. As thousands of court cases are decided annually, so are thousands of public-policy and public-administration issues. If the bureaucrats of tomorrow are to have an understanding of how public policy is made and implemented, knowledge of law is essential.

Second, if improvements are to be made in efforts to maintain American constitutional democracy, understanding by public servants of the U.S. Constitution is necessary. Classwork that helps public administration students understand the constitutional confusion about the proper place and function of public administration and the implications of such confusion, for example, will better prepare future public servants for the challenges of administration.

Where ignorance of law may have been acceptable 50 years ago, it no longer is.

Third, American society has increasingly looked to public administrators for resolution of some of its most difficult problems. Many of these problems have been addressed through use of legal processes and application of legal principles. For example, legal principles have been used to assure proper functioning of markets, to assure safety of products and services, to regulate new technologies, to protect the environment, to regulate employment practices, and to protect "entitlements." It is important for public servants to have a thorough understanding of these legal issues.

Finally, much of the literature suggests that federal judges have become increasingly aggressive in their oversight of administrative action. Judges, in some instances, are no longer passive reviewers of actions that affect the public service but are active participants, shaping litigation and its outcomes. If the next generation of public servants is to function adequately in its interactions with the courts, knowledge of law is important. In sum, law as a course requirement in schools of public administration is more than a nicety; it is a necessity.