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## The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence

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## THE THREE PERMISSIONS: PRESIDENTIAL REMOVAL AND THE STATUTORY LIMITS OF AGENCY INDEPENDENCE

*Jane Manners & Lev Menand\**

*Seven words stand between the President and the heads of over a dozen “independent agencies”: inefficiency, neglect of duty, and malfeasance in office (INM). The President can remove the heads of these agencies for INM and only INM. But neither Congress nor the courts have defined INM and hence the extent of agency independence. Stepping into this void, some proponents of presidential power argue that INM allows the President to dismiss officials who do not follow presidential directives. Others contend that INM is unconstitutional because it prevents Presidents from fulfilling their duty to take care that the laws are faithfully executed. This Article recovers the lost history of INM, explaining its origins and meaning, inverting our current understanding of its purpose, and rejecting both challenges to agency independence. It shows that INM provisions are not removal “protections” that prevent at-pleasure removal; they are removal permissions that authorize removal where it is otherwise prohibited by an officer’s term of years, a tenure long understood to bar executive removal for any reason. INM provisions are narrow exceptions to term tenures: Neglect of duty and malfeasance in office cash out an official’s failure to faithfully execute official duties, while inefficiency relates to government waste and ineptitude. INM provisions do not permit the President to remove agency heads for failing to follow presidential directives. But they do not clash with the Take Care Clause either, because even on an expansive reading of the clause, INM provisions authorize Presidents to remove unfaithful or incompetent officials.*

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## INTRODUCTION

Independent agencies are government bodies whose leaders do not serve at the pleasure of the President or other government officials.<sup>1</sup> Although independent agencies are common creatures in our political ecosystem,<sup>2</sup> their legality and independence are hotly contested. Prominent jurists argue that some or all conflict with Article II of the Constitution, which vests “executive [p]ower” in the President and requires the President to “take [c]are” that the laws are “faithfully executed.”<sup>3</sup> Other proponents of presidential power contend that there is no constitutional problem with independent agencies because independent agencies are actually subject to a good deal of presidential control. On this view, the President already has the power under existing law to remove the heads of independent agencies for failing to follow directives or achieve White House policy goals.<sup>4</sup>

Much of this debate centers on the statutory provisions that define the President’s removal authority. These provisions typically permit the

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1. Most definitions of “independent agency” encompass only government bodies headed by officials who are not removable by the President at will. See, e.g., Jacob E. Gersen, *Designing Agencies*, in *Research Handbook on Public Choice and Public Law* 333, 347 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010); Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 *Admin. L. Rev.* 1111, 1138 (2000); Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245, 2376 (2001); Geoffrey P. Miller, *Introduction: The Debate over Independent Agencies in Light of Empirical Evidence*, 1988 *Duke L.J.* 215, 216–17. This Article applies a slightly different definition that includes officials, like the Comptroller General, whose “dependence” or “independence” mostly involves another branch of government. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 737 (1986) (Stevens, J., concurring) (“The fact that Congress retained for itself the power to remove the Comptroller General is important evidence supporting the conclusion that he is a member of the Legislative Branch . . .”). It also explicitly excludes government bodies whose leaders are not removable by the President at will but *are* removable by officials who serve at the pleasure of the President. See, e.g., 31 U.S.C. § 303 (2018) (the Bureau of Engraving and Printing). This definition is narrower than those that treat agency independence as a function of several different factors of which tenure in office is only one. See, e.g., *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 547 (2010) (Breyer, J., dissenting) (adopting a broader definition); Robert E. Cushman, *The Independent Regulatory Commissions* 3 (1941) (same); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 *Cornell L. Rev.* 769, 772 (2013) (same).

2. See *Free Enter.*, 561 U.S. app. A at 549 (Breyer, J., dissenting) (identifying forty-eight federal independent agencies); *infra* Appendix B; see also Datla & Revesz, *supra* note 1, at 786.

3. U.S. Const. art. II, §§ 1, 3.

4. See *infra* section I.B.1. In an important new article, Professors Cass R. Sunstein and Adrian Vermeule stake out a modified version of this position, focusing on an official’s neglect of their statutory duties under the Administrative Procedure Act. Cass R. Sunstein & Adrian Vermeule, *Presidential Review: The President’s Statutory Authority over Independent Agencies*, 109 *Geo. L.J.* (forthcoming 2021), [https://papers.ssrn.com/abstract\\_id=3520879](https://papers.ssrn.com/abstract_id=3520879) (on file with the *Columbia Law Review*).

President to remove independent agency heads for cause. Acts creating the Federal Reserve System,<sup>5</sup> the Postal Service,<sup>6</sup> and the Federal Housing Finance Agency (FHFA)<sup>7</sup> use precisely these words (“for cause”). But most laws specify three causes: inefficiency, neglect of duty, and malfeasance in office (INM).<sup>8</sup> Federal agencies with INM provisions in their enabling acts include the Federal Trade Commission (FTC),<sup>9</sup> the National Transportation Safety Board (NTSB),<sup>10</sup> the Office of Special Counsel (OSC),<sup>11</sup> the Federal Energy Regulatory Commission (FERC),<sup>12</sup> and the Consumer Financial Protection Bureau (CFPB).<sup>13</sup> In recent decades, courts have even read INM provisions into statutes, like the Securities Exchange Act,<sup>14</sup> that do not include them.<sup>15</sup>

Yet despite the critical role these terms play in shaping the relationship between independent agencies and the President, there is no consensus about what they actually mean. Neither Congress nor the Supreme Court has ever defined INM provisions, and in recent years, appeals court judges have been unable to agree on their scope and, hence, on the extent of agency independence.<sup>16</sup> Can the President remove

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5. 12 U.S.C. § 242 (2018).

6. 39 U.S.C. § 202 (2018).

7. 12 U.S.C. § 4512(b)(2).

8. See *infra* section I.A, Appendix B.

9. 15 U.S.C. § 41 (2018).

10. 49 U.S.C. § 1111(c) (2018).

11. 5 U.S.C. § 1211(b) (2018).

12. 42 U.S.C. § 7171(b)(1) (2018).

13. 12 U.S.C. § 5491(c)(3) (2018).

14. See 15 U.S.C. § 78d(a).

15. See, e.g., *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 496 (2010) (noting that the President might “intervene” in the SEC only if its determinations are “so unreasonable as to constitute ‘inefficiency, neglect of duty, or malfeasance in office’” (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 620 (1935))); *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 94 (D.C. Cir. 2018) (“[T]he independence of financial regulators . . . is so well established by tradition and precedent that courts have assumed these agencies’ heads have removal protection even in the absence of clear statutory text so directing.”), abrogated by *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

16. See *PHH Corp.*, 881 F.3d at 127–28 (Griffith, J., concurring) (“[T]he meaning of the standard’s three grounds for removal remains largely unexamined. Congress has nowhere defined these grounds and the Supreme Court has provided little guidance about the conditions under which they permit removal.”); Breger & Edles, *supra* note 1, at 1144–45 (noting that there is no accepted definition of inefficiency, neglect of duty, or malfeasance in office); Datla & Revesz, *supra* note 1, at 787 (same); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1, 110 (1994) (same); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 *U. Chi. L. Rev.* 1, 29 (1995) (same). The meaning of the related term, “cause,” is also undefined, see John F. Manning, *The Independent Counsel Statute: Reading “Good Cause” in Light of Article II*, 83 *Minn. L. Rev.* 1285, 1306 (1999) [hereinafter Manning, *Independent Counsel*].

members of the Federal Reserve’s Board of Governors for keeping interest rates too high?<sup>17</sup> Do statutory limits on the President’s power to remove agency officials conflict with the President’s constitutional duty to take care that the laws are faithfully executed?<sup>18</sup> The Supreme Court indirectly addressed these questions eighty-five years ago in *Humphrey’s Executor v. United States*,<sup>19</sup> but judges and scholars alike are unsure why the Court decided that case the way that it did. Among other things, the origins of the INM standard are forgotten, as are the goals of the legislators who incorporated it into the federal code.<sup>20</sup>

This Article seeks to recover this lost understanding. It reconstructs the history of INM and examines its role in federal law. In so doing, it refutes the conventional interpretation of removal provisions as “protections”—text that prevents the President from removing independent agency heads at pleasure.<sup>21</sup> Rather, it shows that the default runs in the other direction—against removal, not for it. When officers are appointed for a “term of years” with the stipulation that the President may remove them for inefficiency, neglect of duty, or malfeasance in office, the language that protects them from removal at pleasure is not INM—it is the term of years.<sup>22</sup> Since before the Founding, offices held for a term of years, in the absence of constitutional or statutory language to the contrary, were designed to be inviolable: Short of impeachment, their holders could not be removed before the end of their terms. Statutory words like “inefficiency” and “malfeasance” that qualified this protection were *permissions*—

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(noting that the Court has not defined “good cause” in a removal decision), and actively disputed, with the Supreme Court facing the question this term, see *infra* note 367.

17. See, e.g., Peter Conti-Brown, Can Trump Fire Jerome Powell? It’s a Political Question, *Wall St. J.* (Dec. 10, 2018), <https://www.wsj.com/articles/can-trump-fire-jerome-powell-its-a-political-question-1544485975> (on file with the *Columbia Law Review*) (suggesting that Trump might be permitted to remove Powell from his position as Chairman of the Federal Reserve’s Board); Jeanna Smialek, Trump Redoubles Attacks on Fed Chair, Saying ‘I Made Him’, *N.Y. Times* (June 26, 2019), <https://www.nytimes.com/2019/06/26/business/jerome-powell-donald-trump.html> (on file with the *Columbia Law Review*) (contrasting President Trump’s assertions of his ability to fire the Federal Reserve chair with the requirement that Fed governors only be removed “for cause”).

18. U.S. Const. art. II, § 3; see also, e.g., *Seila L.*, 140 S. Ct. at 2191.

19. *Humphrey’s Ex’r*, 295 U.S. at 632.

20. For an excellent summary of the open issues, see Peter M. Shane, Harold H. Bruff & Neil J. Kinkopf, *Separation of Powers Law: Cases and Materials* 514–15 (4th ed. 2018).

21. See, e.g., *PHH Corp.*, 881 F.3d at 173 n.1 (Kavanaugh, J., dissenting) (“In general, an agency without a for-cause removal statute is an executive agency, not an independent agency, because the President may supervise, direct, and remove at will the heads of those agencies.”); *supra* note 15.

22. For more on the lost history of this tenure and its implications for modern doctrine and practice, see Jane Manners & Lev Menand, *Recovering the Forgotten Tenure of a Term of Years* (June 2020) (unpublished manuscript) (on file with the *Columbia Law Review*).

they authorized the removal of officers who were otherwise not removable.<sup>23</sup>

Term-of-years offices, like good-behavior offices, have been a feature of English and American law since at least the eighteenth century.<sup>24</sup> They protect officials from the uncertainty and vulnerability of an “at pleasure” appointment while still ensuring regular review of their work. Removal permissions, when added to such offices, serve as a safeguard. They limit, rather than protect, officeholder independence by authorizing removal under certain discrete circumstances.

When Congress first used the now-talismanic INM phrase in 1887, it defined these circumstances using terms that were already well-known. “Neglect of duty” and “malfeasance in office” were old common law concepts employed by courts and legislators to connote an officer’s failure to faithfully execute statutory duties. Neglect of duty indicated instances of “nonfeasance”—a failure to perform one’s duties in a way that caused injury to others. At common law, neglect had been grounds for removing the officers of English towns and boroughs for hundreds of years. It also constituted a type of “misdemeanor”—or “bad behavior”—that could trigger the removal of clerks, judges, and other officers appointed for life to “good behavior” positions. “Malfeasance in office,” meanwhile, referred to a wrongful act committed in the execution of one’s duties that caused injury to others. Malfeasance was another type of misdemeanor that warranted removal from a good behavior office, and it could also lead to removal in the municipal context.<sup>25</sup> Inefficiency, by contrast, was of newer vintage: a term increasingly used over the course of the nineteenth century to describe wasteful government administration caused by inept officers who gained their positions through political connections rather than merit. Inefficient officials lacked the skills to perform their duties, rendering them incapable of doing their jobs.<sup>26</sup>

Congress was not the first legislature to codify INM. All three terms appeared in state law, with neglect and malfeasance appearing in the laws of the colonies before that. As Professors Andrew Kent, Ethan Leib, and

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23. See *infra* section II.A. *Marbury v. Madison*—a case typically read today for its holding on judicial review—reflects this understanding. When Chief Justice Marshall describes the dispute as “a plain case for a mandamus,” he is relying on the fact that the statute authorizing Marbury’s appointment sets a five-year term and makes no mention of removal. 5 U.S. (1 Cranch) 137, 173 (1803); see also An Act Concerning the District of Columbia, ch. 15, § 11, 2 Stat. 107 (1801). Once the office had vested, there was no legal mechanism for the President to remove Marbury before his five years were up. See *infra* section II.A.

24. See *infra* section II.A. As late as 1978, terms of years were still widely understood as tenure protections. See *infra* note 377 and accompanying text. See generally Manners & Menand, *supra* note 22 (describing the use of such provisions throughout history).

25. See *infra* sections II.B.1–2.

26. See *infra* section II.B.3.

Jed Shugerman have shown, early American legislatures often required officials to take oaths to faithfully execute their duties.<sup>27</sup> These laws authorized suit against officials who violated their oaths. Often, these oath violations were liquidated as “neglect of duty” or “malfeasance in office.” Over the course of the nineteenth century, state legislatures also used neglect of duty and malfeasance in office in removal provisions to define the behavior that might forfeit an office. Sometimes, they made these words removal grounds for officers otherwise granted tenure for a term of years, using the security of term-tenure to insulate proficient administrators from partisan political pressure while employing neglect of duty and malfeasance as a safety valve. This approach became increasingly common as legislators created offices to oversee ambitious infrastructural projects such as prisons, canals, banks, and railroads—offices for which term-of-years administrators who neglected their duty or engaged in malfeasance could cause immediate and significant harm.<sup>28</sup>

In 1843, Indiana became the first state to combine neglect and malfeasance with “inefficiency.” Confronting a massive public finance crisis caused by defaulting railroad and canal projects, the state included inefficiency as a ground for removing government officers who were incapable of performing their duties promptly and effectively.<sup>29</sup> Over the next thirty years, New York, Ohio, and several other states incorporated inefficiency into removal statutes as well.<sup>30</sup>

When Congress imported INM into federal law in 1887, it used the terms to establish the Interstate Commerce Commission (ICC), a federal railroad regulator. It empowered the new commissioners to serve for terms of six years, but it also authorized the President to remove them for INM.<sup>31</sup> As the country’s economy grew increasingly technical and complex, Congress drew repeatedly on this structure, creating “independent commissions” to regulate the activities of private companies, especially those providing public infrastructure. Legislators thought of these entities as “arm[s] of the Congress” operating in a quasi-legislative, quasi-judicial manner.<sup>32</sup> They gave the President removal power, not so the President might direct the commissions, but so there would be a ready alternative to impeachment, especially when Congress was out of session. This was how judges and scholars understood removal statutes when the Court decided *Humphrey’s Executor*. And this was how legislators continued to understand these provisions when they drafted the Federal Reserve Act, created the

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27. See Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, Faithful Execution and Article II, 132 Harv. L. Rev. 2111, 2159–62 (2019).

28. See *infra* section II.C.

29. See *infra* section II.B.3.a.

30. See *infra* section II.B.3.

31. See *infra* section II.C.

32. 91 Cong. Rec. 11,965 (1945) (statement of Rep. Bland).



Maritime Commission, designed the Civil Service Merit Systems Protection Board, and set up the FEC.<sup>33</sup>

Two conclusions follow from the history. First, the law was not designed to permit the President to remove the heads of independent agencies for inefficiency or neglect of duty if they do not follow presidential policy directives or if they depart from the President's agenda. INM permits removal only in cases where officials act wrongfully in office, fail to perform their statutory duties, or perform them in such an inexpert or wasteful manner that they impair the public welfare. In reaching this conclusion, this Article looks beyond evidence regarding early understandings of INM. It interrogates legislative intent, statutory design, and the relevant case law. Its results are largely consistent with 150 years of practice by Presidents, legislators, and agency officials. To accept this Article's definitions of INM, one need not accept meanings from centuries ago, frozen in time. On the contrary, the evidence suggests that the understandings recovered here were widely shared until relatively recently.

Second, there is no need to expand the concept of neglect of duty, or to rely on the concept of inefficiency at all, to square independent agencies with the Take Care Clause, as some scholars have argued. Neglect of duty and malfeasance in office, as traditionally interpreted, encompass what we call a failure of "faithful execution": the official misbehavior that the Take Care Clause purportedly obliges the President to prevent. In other words, even assuming that the Take Care Clause creates a role for the President in overseeing independent agency officials, most existing independent agency statutes already allow Presidents to perform this role by permitting them to remove those who engage in malfeasance or neglect.

The Court's recent decision in *Seila Law v. Consumer Financial Protection Bureau* raises the salience of the analysis presented herein. In that case, Chief Justice Roberts, writing for a divided Court, held that the design of the CFPB—with a single director appointed to a five-year term, removable by the President only for INM—violates the Constitution's "separation of powers."<sup>34</sup> In reaching this conclusion, five Justices cast doubt on the idea that INM allows the President to remove officials on the basis of policy disagreements and stated that the Court had not been presented with "any workable standard derived from the statutory language."<sup>35</sup> This Article supplies such a standard.

This Article also provides support for Justice Kagan's suggestion in her dissent that there is an equivalence between neglect and malfeasance, on the one hand, and a failure of faithful execution, on the other.

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33. See *infra* notes 363–364 and accompanying text. See generally Manners & Menand, *supra* note 22 (analyzing the history behind the enactment of these provisions).

34. 140 S. Ct. 2183, 2192 (2020).

35. *Id.* at 2206.

Explaining that INM provisions permit the President to remove for “incompetence” and a “failure to ‘faithfully execute[]’ the law,”<sup>36</sup> Justice Kagan concluded that statutes limiting the President’s authority to remove domestic officers who execute the laws do not conflict with the Take Care Clause so long as the President can remove such officers for cause.<sup>37</sup> The potential implications of the dissent’s interpretation of Article II—including the extent to which it would permit statutory restrictions on the President’s power to remove principal officers outside of the independent agency context—are beyond the scope of this Article. But the majority’s unwillingness to adopt a broad reading of INM, coupled with the dissent’s conclusion that INM permits removal for incompetence and a failure of faithful execution, underscores the significance of this Article’s analysis—analysis that offers legally grounded definitions of these terms and provides historical ballast to the hypothesis that neglect and malfeasance correspond to a failure to faithfully execute the law.<sup>38</sup>

This Article proceeds in three Parts. Part I reviews recent scholarly and judicial treatments of for-cause removal statutes and identifies unsettled questions. Part II excavates the lost history of removal law and examines the origins and function of INM. Part III returns to the questions Part I raises and examines them in light of the evidence Part II uncovers.

## I. INTERPRETING REMOVAL STATUTES

Over the past forty years, stark disagreements have emerged regarding the constitutionality of independent agencies and, relatedly, how and when INM permits the President to fire independent agency officials. This Part reviews the removal canon and identifies two unsettled questions regarding the meaning of INM: whether, on the basis of INM provisions, the President can fire the heads of independent agencies for policy disagreements or failing to follow presidential directives; and if not, whether INM provisions conflict with the Constitution’s Take Care Clause.

### A. *The Removal Canon*

Over thirty statutes feature either INM or NM as removal grounds.<sup>39</sup> At least another twenty authorize the President to remove officials “for

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36. Id. at 2238 (Kagan, J., concurring in the judgment and dissenting in part) (quoting U.S. Const. art. II, § 3).

37. Id. at 2235 & n.9.

38. An earlier version of this Article was publicly available under a different title (“Faithful Administration and the Limits of Agency Independence”) during the pendency of this case and was cited by that title in one of the amicus briefs submitted to the Court. See Brief of Harold H. Bruff et al. as Amici Curiae in Support of Court-Appointed Amicus Curiae, in Support of the Judgment Below at 7, 19, 20, *Seila L.*, 140 S. Ct. 2183 (No. 19-7).

39. For a list of these statutes, see *infra* Appendix B.

cause,” which courts and commentators generally understand to encompass removal for INM.<sup>40</sup> Despite the contemporary significance of the question of the President’s power to remove independent agency officials, the Supreme Court has analyzed these statutes only five times.<sup>41</sup> None of these cases directly consider the meaning of INM or engage with the relevant legislative history. Several, however, interpret the scope of INM provisions in general terms.

The seminal case, *Humphrey’s Executor v. United States*, suggests that the meaning of INM is quite narrow. In that case, the Court concluded that President Franklin D. Roosevelt improperly removed William Humphrey from his post at the FTC.<sup>42</sup> The relevant statute stated that commissioners like Humphrey “shall continue in office for terms of . . . seven years.”<sup>43</sup> The statute further provided that commissioners “may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.”<sup>44</sup> Humphrey was duly appointed by President Hoover.<sup>45</sup> But with nearly five years left on his term, President Roosevelt asked Humphrey to resign, telling him that “your mind and my mind [do not] go along together on either the policies or the administering of the Federal Trade Commission.”<sup>46</sup> When Humphrey declined, Roosevelt removed him.<sup>47</sup> Humphrey sued, arguing that Roosevelt had exceeded his authority.<sup>48</sup>

In ruling for Humphrey’s estate, the Court cabined its holding in a controversial case that it had decided nine years earlier, *Myers v. United*

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40. See *infra* Appendix B. Congress has also restricted the President’s ability to remove members of the civil service. In 1912, Congress passed the Lloyd–LaFollette Act, which provided that “no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service.” Ch. 389, § 6, 37 Stat. 539, 555 (1912) (codified as amended at 5 U.S.C. §§ 5501, 3103, 7351 (2018)).

41. The first time was in *Shurtleff v. United States*, 189 U.S. 311 (1903). See *infra* note 137 and accompanying text. The other times are discussed in the main text that follows. The canon of Supreme Court cases regarding presidential removal generally is more extensive. See generally *Wiener v. United States*, 357 U.S. 349 (1958) (removal of a member of the War Claims Commission); *Myers v. United States*, 272 U.S. 52 (1926) (removal of a postmaster); *Wallace v. United States*, 257 U.S. 541 (1922) (removal of an army officer); *Parsons v. United States*, 167 U.S. 324 (1897) (removal of a U.S. attorney); *McAllister v. United States*, 141 U.S. 174 (1891) (removal of a territorial judge); *Blake v. United States*, 103 U.S. 227 (1880) (removal of an army officer); *Territory v. Lockwood*, 70 U.S. (3 Wall.) 236 (1865) (removal of a territorial judge); *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284 (1854) (same).

42. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 631–32 (1935).

43. *Id.* at 620.

44. *Id.* (citing Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717, 718 (1914) (codified at 15 U.S.C. § 41 (2018))).

45. *Id.* at 618.

46. *Id.* at 619.

47. *Id.*

48. *Id.*

*States*.<sup>49</sup> In *Myers*, the Court had invalidated a provision requiring the President to obtain the Senate's consent before removing postmasters.<sup>50</sup> According to Chief Justice Taft's majority opinion, "[Article II] grants to the President the executive power of the government . . . a conclusion confirmed by his obligation to take care that the laws be faithfully executed."<sup>51</sup> Taft reasoned that because requiring the Senate to consent to the President's decision to remove a postmaster "would make it impossible for the President, in case of political or other difference[s] with the Senate or Congress, to take care that the laws be faithfully executed,"<sup>52</sup> the provision was invalid.<sup>53</sup>

Distinguishing *Myers*, the Court in *Humphrey's Executor* explained that the FTC is "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed [prohibiting unfair competition], and to perform other specified duties as a legislative or as a judicial aid."<sup>54</sup> According to the Court, Congress could create such a body, make it "free from executive control,"<sup>55</sup> and "as an appropriate incident" to that power, "fix the period during which [FTC commissioners] shall continue, and . . . forbid their removal except for cause in the meantime."<sup>56</sup> "[I]t is quite evident," the Court explained, "that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."<sup>57</sup> Limiting the President to removing commissioners for cause was necessary to protect "the independence of [the] commission."<sup>58</sup>

Fifty years later, the Court appeared to take a different stance in *Bowsher v. Synar*, a case involving the Comptroller General of the United States, who is removable by joint resolution of Congress for various causes, including INM.<sup>59</sup> In *Bowsher*, the Court, citing comments by two Congressmen from the early twentieth century, characterized INM as "very

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49. 272 U.S. 52 (1926).

50. *Id.* at 176.

51. *Id.* at 163–64.

52. *Id.* at 164.

53. For an illuminating discussion of Taft's drafting process in *Myers*, including his vacillation over whether the decision would apply to "the removal of Interstate Commerce Commissioners doing legislative work,' who 'may be different from purely executive boards and therefore not seemingly included in [the] decision,'" see Robert Post, Tension in the Unitary Executive: How Taft Constructed the Epochal Opinion of *Myers v. United States*, 45 J. Sup. Ct. Hist. 167, 179 (2020) (quoting Letter from William Howard Taft, C.J., Sup. Ct., U.S., to Willis Van Devanter, Assoc. J., Sup. Ct., U.S. (Dec. 30, 1925)).

54. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 (1935).

55. *Id.*

56. *Id.* at 629.

57. *Id.*

58. *Id.* at 630.

59. 478 U.S. 714 (1986).

broad,” explaining that, as “interpreted by Congress, [INM] could sustain removal of a Comptroller General for any number of actual or perceived transgressions of legislative will.”<sup>60</sup> In light of the apparent extent of legislative control over the office, the Court struck down provisions granting the Comptroller General what the Court considered to be executive functions, concluding that assigning such functions to such an office impermissibly expanded Congress’s reach.<sup>61</sup>

Three years later, in *Morrison v. Olson*, the Court mostly sidestepped the scope of for-cause removal statutes, upholding provisions of the Ethics in Government Act creating an independent counsel’s office in the Justice Department.<sup>62</sup> The Court reasoned that the Attorney General’s power to remove the independent counsel for good cause preserved the President’s ability “to assure that the counsel is competently performing his or her statutory responsibilities” and, acting through the Attorney General, to remove the counsel “for ‘misconduct.’”<sup>63</sup>

In 2010, in *Free Enterprise v. Public Company Accounting Oversight Board*, the Court adopted a narrow interpretation of INM.<sup>64</sup> Invalidating a statute authorizing the SEC to remove members of the Public Company Accounting Oversight Board (PCAOB) only in certain limited circumstances, the Court noted that “simple disagreement with the Board’s policies or priorities could [not] constitute ‘good cause’ for . . . removal.”<sup>65</sup> The Court further explained that “even if the President disagree[d] with [the SEC’s] determination” concerning whether or not to remove a member of the PCAOB, the President “is powerless to intervene—unless that determination is so unreasonable as to [itself] constitute ‘inefficiency, neglect of duty, or malfeasance in office.’”<sup>66</sup>

## B. *The Removal Debate*

The question of how to interpret for-cause removal provisions and whether they comport with the Constitution is now an area of intense focus for scholars and judges skeptical of agency independence. In the absence of a definitive judicial interpretation of INM, a debate has emerged between advocates of executive power. This section first reviews the two

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60. *Id.* at 729; see also *infra* section III.B (squaring this case with *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010)).

61. *Bowsher*, 478 U.S. at 715–16.

62. 487 U.S. 654, 663 (1988); see also 28 U.S.C. § 596(a)(1) (2018) (providing that an independent counsel may “be removed from office . . . only for good cause, physical or mental disability . . . , or any other condition that substantially impairs the performance of [the independent counsel’s] duties”).

63. *Morrison*, 487 U.S. at 692. For a thorough and thoughtful analysis of the Court’s opinion in this case, see Manning, *Independent Counsel*, *supra* note 16, at 1306–08.

64. 561 U.S. 477 (2010).

65. *Id.* at 502.

66. *Id.* at 496 (citing *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 620 (1935)).

divergent positions, one interpreting INM narrowly, the other embracing *Bowsher*. Then it examines two judicial decisions involving the enabling act for the CFPB, the most recent of which, *Seila Law*, casts doubt on *Bowsher*'s broad interpretation but leaves the precise contours of agency independence undefined.

1. *Two Challenges to Agency Independence*. — Independent agencies face a pincer movement. One set of challengers reads INM narrowly. These scholars posit that the Constitution creates a “hierarchical, unified executive department under the direct control of the President.”<sup>67</sup> And they argue that laws limiting the President’s ability to remove executive officials conflict with two constitutional provisions: the Vesting Clause, which “vests” the “executive Power” in the President, and the Take Care Clause, which requires the President “take care that the Laws [are] faithfully executed.”<sup>68</sup> The merits and demerits of these arguments generally are beyond the scope of this Article. But one claim is relevant: that for-cause removal statutes are, in some circumstances, too narrow to permit the President to take care that the laws are faithfully executed.<sup>69</sup>

In part in response to these “unitary executive” theorists, another group seizes on *Bowsher* and argues that “the statutory words”—inefficiency, neglect of duty, and malfeasance in office—actually “allow a degree of substantive supervision [of independent agency officials] by the President.”<sup>70</sup> On this view, the “best read[ing]” of these terms, and existing case law, is that they probably “allow [the President to] discharge . . . [officials] who have frequently or on important occasions acted in ways inconsistent with the President’s wishes with respect to what is required by sound policy.”<sup>71</sup> For example, “A commissioner of the FTC

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67. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *Harv. L. Rev.* 1155, 1165 (1992); see also Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush 3–4* (2008); Saikrishna Bangalore Prakash, *Imperial from the Beginning: The Constitution of the Original Executive 3* (2015).

68. Calabresi & Rhodes, *supra* note 67, at 1175–85, 1207.

69. Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 *Ala. L. Rev.* 1205, 1214 (2014) (explaining that the Take Care Clause “is phrased as a duty to ‘take’ care of faithful execution, but such a duty must include a grant of executive power that allows for fulfillment of the duty”); *id.* at 1243 (explaining that removal law is what allows Presidents to fulfill their constitutional duty by “directing and controlling [officials] to take care of faithful execution”). This claim was central to the Court’s holding in *Myers*. See *supra* notes 50–53 and accompanying text. It also appears in Chief Justice Roberts’s majority opinion in *Free Enterprise*, 561 U.S. at 496–97 (“He can[not] . . . ensure that the laws are faithfully executed . . . . This violates the basic principle that the President ‘cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,’ because Article II ‘makes a single President responsible for the actions of the Executive Branch.’” (quoting *Clinton v. Jones*, 520 U.S. 681, 712–13 (1997) (Breyer, J., concurring in the judgment))).

70. Lessig & Sunstein, *supra* note 16, at 111.

71. *Id.*; see also *id.* at 112 (arguing “that [the President] has far more authority [to discharge independent agency officials] than is usually thought”).

might . . . be thought to neglect her duty if she consistently ignores what the President has said, at least if what the President has said is supported by law or by good policy justifications.”<sup>72</sup> In other words, the President might “discharge[] as inefficient . . . [those] whom [the President] finds incompetent because of their consistently foolish policy choices.”<sup>73</sup>

These scholars hypothesize that the Court could appropriately embrace a broad reading of inefficiency and neglect of duty in order to accommodate expansive views of presidential power, including the unitary executive theory.<sup>74</sup> If INM is a “very broad” concept, as the Court in *Bowsher* concluded, then the President would “turn[] out to have considerable power over” independent agencies.<sup>75</sup> In other words, “the ‘independent’ agencies would be subject to a significant degree of legally legitimate presidential oversight.”<sup>76</sup>

Professor Geoffrey Miller advances a variant of this position,<sup>77</sup> arguing that courts ought to interpret INM more or less broadly depending on the relevant agency and its characteristics.<sup>78</sup> In certain circumstances, courts

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72. *Id.* at 111.

73. Pildes & Sunstein, *supra* note 16, at 30; see also Peter L. Strauss, *The Places of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *Colum. L. Rev.* 573, 667 n.402 (1984) (hypothesizing that a court might conclude “that a commission’s refusal . . . to await the results of OMB review of agency comments on a rule[] or to attend a meeting called to discuss them gave rise to ‘cause’ for removal” such that the President has “*directory power*” (emphasis added)); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 *Admin. L. Rev.* 181, 203–05 (1986) (arguing that the “[removal] statutes governing the ‘independent’ agencies should not be interpreted to foreclose presidential supervisory power of the sort reflected in” executive orders requiring government agencies to prepare “cost-benefit statements” or orders similarly “procedural in character”).

74. See Strauss & Sunstein, *supra* note 73, at 204.

75. Pildes & Sunstein, *supra* note 16, at 31.

76. *Id.*; see also *id.* at 32 (“For those troubled by the independent agency form as a matter of policy or constitutional law, such an approach would minimize the risks of this form and promote coordination and accountability in government.”). Manning makes a similar point with respect to the “good cause” removal standard in the Independent Counsel statute, suggesting “some preliminary reasons for concluding that” the language “authorize[s] the independent counsel’s removal for disobeying the President’s legal directives, at least on matters of reasonably contestable legal judgment.” Manning, *Independent Counsel*, *supra* note 16, at 1288.

77. Geoffrey P. Miller, *The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation*, 15 *Cardozo L. Rev.* 201, 213 (1993) [hereinafter Miller, *Unified Theory*]. Miller anticipated the arguments of Sunstein and his coauthors as early as 1986, when he argued that statutes with ordinary INM provisions can “easily be interpreted as including within the concept of cause the failure of an agency head to comply with the President’s instructions to take some action otherwise within his or her statutory authority.” Geoffrey P. Miller, *Independent Agencies*, 1986 *Sup. Ct. Rev.* 41, 87 [hereinafter Miller, *Independent Agencies*].

78. Miller, *Unified Theory*, *supra* note 77, at 213 (“While the President rightly enjoys a very broad scope of interpretative control over the administrative state, that control is not

should give INM a narrow construction since “Congress could appropriately vest interpretive powers in an administrative agency, free of most forms of presidential oversight and control.”<sup>79</sup> Miller gives the example of the Federal Reserve, which is charged with “interpret[ing] a congressional directive regarding the conduct of monetary policy.”<sup>80</sup> Meanwhile, where agencies must be “subject to a high degree of presidential control,” courts could interpret INM provisions more broadly.<sup>81</sup> On Miller’s view, agency independence would be somewhat attenuated, but the precise extent would be decided by jurists on a case-by-case basis.

2. *The CFPB Litigation.* — In 2018’s *PHH Corp. v. CFPB*, a lawsuit challenging the constitutionality of the CFPB, the D.C. Circuit engaged with both of these views.<sup>82</sup> As relevant, the CFPB is led by a single Director appointed by the President to a five-year term.<sup>83</sup> The statute permits the President to remove the Director for INM.<sup>84</sup> *PHH Corp.*, drawing on the scholarship of the unitary executive theorists and on the Supreme Court’s decision in *Free Enterprise*, argued that statutory limits on the President’s authority to remove the Director unconstitutionally upset the separation of powers.<sup>85</sup>

A majority of active judges concluded that it did not, reasoning that the agency’s “authority is not of such character that removal protection of its Director necessarily interferes with the President’s Article II duty or prerogative.”<sup>86</sup> According to Judge Cornelia Pillard’s majority opinion, Congress is constitutionally able to “value and deploy a degree of independence on the part of certain executive officials.”<sup>87</sup> In reaching this conclusion, Judge Pillard noted that “the ability to remove a Director when cause to do so arises and to appoint a replacement” provides “ample authority to assure that the [Director] is competently performing his or her statutory responsibilities,” as “the terms ‘inefficiency, neglect of duty, or malfeasance in office’ are ‘very broad.’”<sup>88</sup>

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unfettered; the extent of presidential control turns, instead, on the nature of the matter in question and the context in which the issue arises.”).

79. *Id.* at 216.

80. *Id.* (“[A]lthough the consequence of the Fed’s monetary policy decisions are widely felt throughout the government . . . the instructions about the conduct of monetary policy that might be contained in legislation are unlikely, in themselves, to have cross-cutting implications for other agencies as far as interpretation is concerned.”).

81. *Id.* at 206.

82. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (en banc), abrogated by *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

83. 12 U.S.C. § 5491(c) (2018).

84. *Id.*

85. *PHH Corp.*, 881 F.3d at 108–09.

86. *Id.* at 84.

87. *Id.* at 88.

88. *Id.* at 100 (quoting *Morrison v. Olson*, 487 U.S. 654, 692 (1988); *Bowsher v. Synar*, 478 U.S. 714, 729 (1986)).



Judge Pillard did not elaborate. But the meaning of INM was contested in two concurring opinions by Judge Thomas Griffith and Judge Robert Wilkins. Judge Griffith argued that INM “provide[s] only a minimal restriction on the President’s removal power, even permitting him to remove the Director for ineffective policy choices.”<sup>89</sup> Inefficiency, Judge Griffith explained, is a broad concept because “an officer is inefficient when he fails to produce or accomplish the agency’s ends, as understood or dictated by the President operating within the parameters set by Congress.”<sup>90</sup> In Judge Griffith’s view, “Congress establishes the broad purposes . . . and the President assesses whether the officer has produced the ‘desired effect.’”<sup>91</sup>

Judge Wilkins disagreed.<sup>92</sup> According to Judge Wilkins, inefficiency, “[a]s interpreted by courts and agencies for nearly a century, “provides a broad standard allowing for the removal of employees whose performance is found lacking” due to “incompetence or deficient performance.”<sup>93</sup> But “[w]hat constitutes ‘inefficiency’ has varied depending on the context of the officer or employee’s responsibilities and functions.”<sup>94</sup> In the case of an independent agency official and the President, Judge Wilkins argued, inefficiency does not encompass mere policy disagreements.<sup>95</sup> Instead, some sort of incompetence is necessary.<sup>96</sup> With respect to the CFPB specifically, “the promulgation of a rule contrary to consensus expert advice without sufficient grounds or explanation would subject the

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89. *Id.* at 124 (Griffith, J., concurring in the judgment).

90. *Id.* at 134. Judge Griffith notes that, while “the standard may seem to be a unitary, general ‘for cause’ provision, the Supreme Court has clarified that these three grounds carry discrete meanings.” *Id.* at 131. This Article provides extensive evidence supporting this proposition. See *infra* Part II.

91. *PHH Corp.*, 881 F.3d at 134. In support of his theory, Judge Griffith cites two D.C. Circuit cases involving the civil service: *Meehan v. Macy*, where the court held that “[t]here can be no doubt that an employee may be discharged for failure to obey valid instructions, or that a discharge for insubordination will promote the efficiency of the service,” 392 F.2d 822, 836 (D.C. Cir. 1968) *reh’g* on other grounds, 425 F.2d 469 (D.C. Cir. 1968), *aff’d en banc*, 425 F.2d 472 (D.C. Cir. 1969), and *Leonard v. Douglas*, which upheld the removal of a prosecutor whose “professional competence [wa]s not questioned,” but whose superior found him to be generally “unsuitab[le]” for a “policy-determining position,” 321 F.2d 749, 750–53 (D.C. Cir. 1963). The applicability of civil service cases, such as those cited by Judge Griffith, involving “efficiency” and failure to follow orders, to cases involving the President and independent agencies, turns on whether the heads of these agencies (like the civil service) are under a legal obligation to follow the President’s orders (i.e., whether those orders have any legal basis).

92. *PHH Corp.*, 881 F.3d at 123 (Wilkins, J., concurring) (“I do not agree that ‘inefficiency’ is properly construed to allow removal for mere policy disagreements. Such a capacious construction would essentially remove the concept of ‘independence’ from ‘independent agencies.’”).

93. *Id.* at 122.

94. *Id.*

95. *Id.* at 123.

96. *Id.* at 122.

Director to risk of removal for inefficiency.”<sup>97</sup> Further, “[T]he Director’s failure to abide by the stringent statutory requirements of consultation or coordination would almost certainly constitute ‘neglect of duty’” or “subject [the Director] to supervision and discipline for ‘inefficiency.’”<sup>98</sup>

Then-Judge Kavanaugh filed a dissenting opinion striking a similar note. “To cabin the effects of *Humphrey’s Executor* on the Presidency,” Judge Kavanaugh explained, “some have proposed reading the standard for-cause removal restrictions in the statutes creating independent agencies to allow for Presidential removal of independent agency heads based on policy differences.”<sup>99</sup> But “[t]he *Free Enterprise Fund* Court expressly confirmed that *Humphrey’s Executor* ‘rejected a removal premised on a lack of agreement on either the policies or the administering of the Federal Trade Commission,’” and Justice Scalia had “once memorably noted [that] an attempt by the President to supervise, direct, or threaten to remove the head of an independent agency with respect to a particular substantive decision is statutorily impermissible and likely to trigger ‘an impeachment motion in Congress.’”<sup>100</sup> On Judge Kavanaugh’s view, “With independent agencies, the President is limited . . . in essence to indirect cajoling.”<sup>101</sup>

In 2020’s *Seila Law*, a subsequent challenge to the CFPB’s constitutionality, the Supreme Court appeared to endorse then-Judge Kavanaugh’s narrow understanding of INM.<sup>102</sup> However, in holding that INM unconstitutionally limited the President’s ability to remove the CFPB Director,<sup>103</sup> the majority once again avoided precisely defining the scope of INM. Instead, it explained that “while both *amicus* and the House of Representatives invite us to adopt whatever construction would cure the constitutional problem, they have not advanced any workable standard

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97. Id. at 121.

98. Id. at 121–22.

99. Id. at 191 n.16 (Kavanaugh, J., dissenting).

100. Id. at 191 & n.16 (first quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 502 (2010); then quoting Transcript of Oral Argument at 60, *Free Enter.*, 561 U.S. 477 (No. 08-861)).

101. Id. at 191.

102. See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2199–200 (2020) (noting that *Humphrey’s Executor* and *Morrison* represent the “outermost constitutional limits of permissible congressional restrictions on the President’s removal power” (internal quotation marks omitted) (quoting *PHH Corp.*, 881 F.3d at 196 (Kavanaugh, J., dissenting))).

103. Characterizing the Director as an official who exercises significant executive power, the Court explained in a footnote that Article II “expressly entrusts [the President] to take care that the laws be faithfully executed” and that accordingly no distinction can be drawn between the President’s constitutional duties in war and “his duty to execute laws passed by Congress.” Id. at 2206 n.11.

derived from the statutory language.”<sup>104</sup> The dissent, too, declined to offer a definition. Although it explicitly rejected the argument that INM permitted the President to remove the CFPB Director for policy differences, the dissent found no constitutional problem with the agency’s structure because Congress authorized the President to remove the Director for “basic incompetence” or a “failure to faithfully execute the law.”<sup>105</sup> Yet in reaching this conclusion about INM’s scope, the dissent cited only *Morrison*, omitting discussion of legislative history or other precedent and postponing once again a definitive resolution to the INM debate.

## II. EXCAVATING REMOVAL LAW

Existing interpretations of for-cause removal statutes are historically ungrounded. This Part takes up the Court’s call in *Seila Law* for an interpretation of INM rooted in the statutory text. It resurrects the common law and statutory basis for removal law in order to define its core concepts—neglect of duty, malfeasance in office, inefficiency, and, crucially, terms of years. INM and related removal provisions, this Part shows, are not *protections* against an at-will removal, but *permissions* allowing the removal of an otherwise unremovable term-tenured officer. Neglect of duty and malfeasance in office are terms that have been used for hundreds of years on both sides of the Atlantic by courts and legislatures to articulate what it means for officers to “faithfully execute” their duties. Inefficiency was incorporated into statutes by nineteenth-century legislators seeking also to promote capable government. When lawmakers combined such removal provisions with offices granted for a term of years, they did so to strike a balance between security in office—necessary to protect officeholders from political meddling—and oversight essential to the performance of key government functions.

### A. *Removal Provisions Are Permissions*

This section shows that from at least the eighteenth century on, term-of-years tenures in both England and America were understood to be inviolable: Without provisions to the contrary in a controlling statute,

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104. *Id.* at 2206. Leaving the question open for a future case, the majority explained that, in the absence of any evidence regarding the statutory text, it would “take Congress at its word that it meant to impose a meaningful restriction on the President’s removal authority.” *Id.* at 2207.

105. *Id.* at 2238 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (quoting U.S. Const. art. II, § 3). The use of INM in the CFPB’s enacting legislation, the dissent explained, “would allow the President to discharge the Director for a failure to ‘faithfully execute[]’ the law, as well as for basic incompetence. But it would not permit removal for policy differences.” *Id.* (alteration in original) (citations omitted) (quoting U.S. Const. art. II, § 3).

constitution, or grant of office, an officer serving for a term of years could not be removed mid-term short of impeachment or other extraordinary measure.<sup>106</sup> As argued at length elsewhere,<sup>107</sup> terms for a definite period were one form of tenure among a menu of options. They struck a balance between job security and oversight, protecting officers from the uncertainty and vulnerability of an “at pleasure” appointment while still ensuring regular review of their performance.

Grants of office in early modern England covered a variety of tenures, ranging from offices held in fee to offices held at will.<sup>108</sup> As Professor Daniel Birk recently explained, offices had long been conceived of as property rights,<sup>109</sup> and vestiges of the property conception of office remain to this day: We “take” and “hold” and “forfeit” office, and the roots of the word tenure—as in “tenure in office”—lie in the Latin “tenere”: “to hold.”<sup>110</sup> Different tenures, it was thought, led to different behaviors. At common law, for instance, the jurist Matthew Bacon wrote in 1740 that “Officers of Justice” held life tenures and “could not be removed but for Misdemeanors,” and this security “was an Encouragement to the faithful Execution of their Duties” and to the acquisition of “Knowledge and Experience in their Employments.”<sup>111</sup>

In the middle of the spectrum of tenures were those offices held “for Years or a limited Time.”<sup>112</sup> Under the prevailing property conception of office, a term of years was something that its holder possessed—something defeasible, and something that would descend to the officer’s heirs should the officer die in the middle of their term. Thus, Bacon explained, offices

106. In addition to impeachment, officers in England and early America could be removed by an address of both houses, a process generally understood to be less cumbersome than impeachment. See Raoul Berger, *Impeachment: The Constitutional Problems* 152 & n.137 (1973); see also James Willard Hurst, *The Growth of American Law: The Law Makers* 137 (1950); Ellen Langill, *Levi Hubbell and the Wisconsin Judiciary: A Dilemma in Legal Ethics and Non-Partisan Judicial Elections*, 81 *Marq. L. Rev.* 985, 993 (1998).

107. Manners & Menand, *supra* note 22. Given this Article’s focus on INM, this section’s recovery of a term of years is necessarily abbreviated.

108. 3 Matthew Bacon, *A New Abridgement of the Law* 732 (1740) (“Offices in respect to their Duration and Continuance, are distinguished in those which are of Inheritance, or in Fee, or Fee-tail, those of Freehold or for Life, those for Years or a limited Time, and those which are at Will only . . .”); see also 1 W.S. Holdsworth, *A History of English Law* 247–50 (3d ed. 1922) (discussing the grants of offices, to be held “in fee, in tail or for life,” as a perpetuation of feudal ideology that “came very naturally to the mediæval common law”).

109. Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 *Stan. L. Rev.* (forthcoming 2021) (manuscript at 21), <https://ssrn.com/abstract=3428737> (on file with the *Columbia Law Review*).

110. See *Tenure*, n., *Oxford Eng. Dictionary Online*, <https://www.oed.com/view/Entry/199286?p=emailA45iZFwziB8Tg&d=199286> [<https://perma.cc/8NHN-J8WY>] (last visited Sept. 28, 2020).

111. Bacon, *supra* note 108, at 733.

112. *Id.* at 732.

“of great Trust concerning the Administration of Justice” should not be granted for a term of years, because if the officeholder died before the expiration of the term, “it would go to Executors or Administrators,” leaving the office “in suspense” until the will was probated, thereby injuring “the Publick.”<sup>113</sup> Moreover, it was unclear whether the office was even forfeitable in cases of “Outlawry,” a punishment that rendered the person literally outside the protection of the law.<sup>114</sup> An office granted for a term of years was so secure, Bacon explained, that it should only be granted to ministerial rather than judicial offices, such as the “Office of Garbler of Spices in London” or the “Office of Register of Policies of Assurance in London concerning Merchants.”<sup>115</sup>

In Revolutionary America, the idea of offices as property was roundly rejected.<sup>116</sup> And yet, while no longer treated as a defeasible property right, the stickiness of term-of-years offices remained, as evidenced by states’ early constitutions, legislative history, and the statements of Framing-Era jurists and legal thinkers.<sup>117</sup> By 1787, America’s theorists had developed a clear rule of republican officeholding. Rather than the lengthy list of tenures that had existed in England, in the United States there were only three: at pleasure, on good behavior, or for a term of years. And rather than emanating from the Crown, the power these officers exercised derived from the people themselves. James Madison described the rule in Federalist No. 39:

[W]e may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior . . . [t]he tenure of ministerial offices generally, will be a subject of

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113. See *id.* at 734.

114. *Id.* at 734, 745–46.

115. *Id.* at 734.

116. See 1 *Annals of Congress* 480 (1789) (Joseph Gales ed., 1834). But see *id.* at 458 (presenting an argument from South Carolina’s Mr. Smith that officers have a property in their office that they cannot be deprived of except by impeachment for a criminal conviction).

117. As Justice William Mitchell explained in 1893, there is nothing “better settled than that while the incumbent has no vested right of property as against the state, in a public office [for a term of years], yet his right to it has always been recognized by the courts as a privilege entitled to the protection of the law,” including due process and judicial review. *State ex rel. Hart v. Common Council of Duluth*, 55 N.W. 118, 119 (Minn. 1893). For another perspective on why a term of years is legally protected, where the Georgia Supreme Court noted that “[i]t is not a matter of right in the officer, but a question of power in the agent who undertakes the removal,” see *City Council of Augusta v. Sweeney*, 44 Ga. 463, 465 (1871). We explore these dimensions of term tenure in *Manners & Menand*, *supra* note 22.

legal regulation, conformably to the reason of the case and the example of the State constitutions.<sup>118</sup>

To Madison, the duration and terms of ministerial offices—a term he, like Bacon, used in contradistinction to judicial offices—were up to the legislature, which would design the tenure “conformably to the reason of the case,”<sup>119</sup> taking into account Bacon’s insight that different tenures lead to different behaviors and the wisdom derived from previous colonial and state experimentation.

A handful of other examples from the Early Republic both demonstrate this understanding of terms of years and suggest one reason that contemporary observers have forgotten it.<sup>120</sup> The first example comes from a discussion in the House of Representatives on June 29, 1789, a mere ten days after the debate over the President’s power to remove the Secretary of Foreign Affairs (a debate that is today known as the “Decision of 1789”).<sup>121</sup> During debate over the establishment of the Treasury Department, James Madison proposed that the Comptroller of the Treasury be a term-of-years office.<sup>122</sup> Madison thought that such offices created accountability between an officer and the legislature, and that such accountability was especially important for the Treasury’s Comptroller, whose job it would be to adjudicate individual citizens’ money claims against the federal government.<sup>123</sup> The duties of such an officer, Madison reasoned, were “not purely of an Executive nature,”<sup>124</sup> and thus “there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government.”<sup>125</sup> A short term of years would give the Senate a regular opportunity to refuse the officer’s reappointment.

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118. The Federalist No. 39, at 188–89 (James Madison) (Lawrence Goldman ed., 2008); see also *People ex rel. Lyndes v. Comptroller*, 20 Wend. 595, 597 (N.Y. Sup. Ct. 1839) (noting that the New York State Constitution “provides, that ‘where the duration of any office is not prescribed by the constitution, it may be declared by law; and if not so declared, such office shall be held during the pleasure of the authority making the appointment’” (emphasis omitted) (quoting N.Y. Const. of 1821, art. IV, § 16)).

119. The Federalist No. 39, *supra* note 118, at 189 (James Madison).

120. For an in-depth examination of these and other examples, see generally *Manners & Menand*, *supra* note 22.

121. The critical House vote on this decision took place on June 19th. See *The Congressional Register* (June 17, 1789), reprinted in *11 Documentary History of the First Federal Congress, 1789–1791*, at 999, 1024 (Charlene Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds., 1992) [hereinafter *Documentary History*].

122. 1 *Annals of Cong.* 611–12 (1789) (Joseph Gales ed., 1834).

123. *Id.* For more on the legislature’s role in the adjudication of such claims in the Early Republic, see Jane Manners, *Congress and the Problem of Legislative Discretion, 1790–1870*, at 63–113 (Nov. 17, 2018) (unpublished Ph.D. dissertation, Princeton University), <https://ssrn.com/abstract=3344925> (on file with the *Columbia Law Review*).

124. 1 *Annals of Cong.* 611 (1790) (Joseph Gales ed., 1834).

125. *Id.* at 612.

Madison's wish to make the Comptroller "responsible to the public generally"<sup>126</sup> by giving all of the political branches some degree of control over him<sup>127</sup> is itself illuminating, reflecting as it does both a nuanced understanding of the ways in which different tenures encouraged different behaviors and the idea that some of the Comptroller's duties were not purely "executive." But for our purposes, what is most interesting is the language Madison proposed. He suggested amending the bill to state that "the Comptroller should hold his office during \_\_\_\_\_ years, unless sooner removed by the President"<sup>128</sup>—a term of years, in other words, conditioned by supplemental removal language. Madison acknowledged that such a combination—a term-of-years appointment plus mid-term removability—was rare, but he assured his colleagues that it was not "altogether novel."<sup>129</sup> Madison's careful word choice, together with the fact that he anticipated that his colleagues would cavil at the unusual tenure combination, indicates that he knew that his contemporaries understood an ordinary term-of-years tenure to be one that did not allow for removal.<sup>130</sup>

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126. *Id.*

127. The House, Madison reasoned, would also exercise control, by setting the officer's salary and through the power of impeachment. *Id.*

128. *Id.*

129. *Id.* Notably, Madison's passive voice formulation echoes that of the compromise reached ten days earlier in the Decision of 1789. See *The Congressional Register*, *supra* note 121, at 1028 (discussing the clause "when ever [sic] the said principal officer shall be removed from office by the president of the United States, or in any other case of vacancy"). In a persuasive new paper, Professor Shugerman sheds light on the likely motives behind the Decision of 1789 formulation. According to Shugerman, not only did Madison seek to persuade his House colleagues to approve the bill even though he lacked the votes for an unambiguous assertion of an exclusive Article II removal power, but he also sought language that would permit his allies in the Senate—where hostility to the Senate's exclusion from removal decisions understandably ran high—to plausibly deny that the clause gave the President exclusive removal authority. See Jed Handelsman Shugerman, *The Indecisions of 1789: Strategic Ambiguity and the Imaginary Unitary Executive (Part I)* 2–4, 50 (Oct. 7, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3596566> (on file with the *Columbia Law Review*). Shugerman ultimately concludes that the Decision of 1789 in fact decided very little, and that the common reading of its outcome—that the Constitution gave the President the power to remove officers at pleasure, at least in the absence of language to the contrary—is mistaken. See *id.*; see also Jonathan Gienapp, *Making Constitutional Meaning: The Removal Debate and the Birth of Constitutional Essentialism*, 35 *J. Early Republic* 375, 379–82 (2015) (emphasizing the multiple, confused, and uncertain approaches to constitutional interpretation employed by debate participants).

For the purposes of this Article, whether Madison and some number of his colleagues believed the President possessed an Article II-based power to remove is ultimately immaterial. This Article's concern is with the ordinary meaning of an office granted for a term of years, and whether, in the absence of statutory language indicating otherwise, it allowed for in-term removal. This Article contends that it did not, and that none of the various readings of the Decision of 1789 disturb this conclusion.

130. Intriguingly, Shugerman concludes that Madison's June 29th formulation ("unless sooner removed by the president"), combined with the proposed term of years, was

Although Madison's proposal was not adopted, Congress would ultimately employ its approach—a term of years plus statutory removal permissions—dozens of times over the next two centuries.<sup>131</sup> Indeed, despite the relative rarity of that tenure combination at that time, the Judiciary Act of 1789, passed just three months after Madison's comptroller proposal, established that “a marshal shall be appointed in and for each district for the term of four years, but shall be removable from office at pleasure.”<sup>132</sup> Congress's choice to start the removability phrase with the conjunction “but”—a formulation Congress would repeat—underscores the contrast between the ordinary understanding of a term of years and the tacked-on removal permission.<sup>133</sup>

In 1820, Congress used the model again, passing a law that over the next half century<sup>134</sup> helped to routinize at the federal level Madison's tenure combination—term of years plus removal at pleasure. The statute, which was commonly known as the Four Years' Law, provided that dozens of jointly appointed officers, including district attorneys and collectors of customs would be “appointed for the term of four years, but shall be removable from office at pleasure.”<sup>135</sup> Prior to the law's enactment, these offices had been removable at pleasure,<sup>136</sup> a feature that Congress did not wish to upset, even as it facilitated rotation in office. To do so, they knew they had to make their intention explicit, since absent any statutory language to the contrary, offices granted for a term of years would not allow presidential removal. The law was quickly folded into appointments practice, allowing the Senate a regular opportunity to weigh in without encroaching on the President's power to remove at pleasure. Looking back over the history of nineteenth-century politics from our twenty-first-century vantage point, it can be easy to forget how unusual the combination of a term of years with at-pleasure removal had once been. And it can be easy to forget that, without the Four Years' Law's crucial

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intended to establish a good-behavior office, rather than a term-limited office held at the President's pleasure. See Shugerman, *supra* note 129, at 20.

131. See *infra* Appendix B. See generally Manners & Menand, *supra* note 22 (developing the relevant history).

132. Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87. This was only one of many positions that the First Congress established for a fixed term. Carl Russell Fish, *The Civil Service and the Patronage* 82–83 (1905). Fish concludes that the tenure of federal marshals was modeled on term-tenured state marshals, and he speculates that the need for rotation in such an office was related to the marshal's role in jury selection, a power that “rendered him more dangerous than the [prosecuting] attorney, whose term is seldom regulated.” *Id.* at 83.

133. See generally Manners & Menand, *supra* note 22 (expanding on this contrast in greater depth).

134. The law was not repealed until 1887. Act of Mar. 3, 1887, ch. 353, 24 Stat. 500.

135. Act of May 15, 1820, ch. 102, § 1, 3 Stat. 582, 582.

136. See Saikrishna Prakash, *Removal and Tenure in Office*, 92 Va. L. Rev. 1779, 1794 (2006) [hereinafter Prakash, *Removal and Tenure*].



phrase “*but shall be removable from office at pleasure,*” those four-year appointees would not have been removable at all, in keeping with practice up to that point.<sup>137</sup>

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137. The history of the Four Years’ Law is critical to understanding the outcome in *Parsons v. United States*, 167 U.S. 324 (1897), a case that is often read today to stand for the proposition that a fixed term of years does not restrict the President’s ability to remove at pleasure. See, e.g., Memorandum Opinion from Caroline D. Krass, Principal Deputy Assistant Att’y Gen., Off. of Legal Couns., DOJ, to the Couns. to the President, *Constitutionality of Legislation Extending the Term of the FBI Director*: Memorandum Opinion for the Counsel to the President 3–4 (June 20, 2011), <https://www.justice.gov/file/18356/download> [<https://perma.cc/2BCE-5U3B>]. Although a comprehensive analysis of recent case law is beyond the scope of this Article, the correct reading of *Parsons* is far narrower. Justice Peckham acknowledges that the opinion’s lengthy Article II analysis is dicta. *Parsons*, 167 U.S. at 335 (“It is unnecessary for us in this case to determine the important question of constitutional power above stated.”). Stripped of this analysis, the case simply holds that, in light of its legislative history and the confusion generated by the interaction of the Four Years’ Law with the Tenure of Office Act and its repeal, discussed *infra* at notes 346–353 and accompanying text, a statute that appeared to “prohibit[.] . . . removal” of the U.S. attorneys during their four-year terms should not be read to take away the President’s power, exercised since the Founding, to remove such attorneys at will. *Parsons*, 167 U.S. at 334. Such a reading, although perhaps the natural one on the face of the statute, “could never have been the intention of Congress,” Peckham explains, given the unusual drafting history of the relevant provision. *Id.* at 343.

*Shurtleff v. United States*, 189 U.S. 311 (1903), decided six years later, has also been misinterpreted in recent years as standing for the proposition that the President might remove term-tenured officials for other causes notwithstanding language stating that the President might remove them for INM. See, e.g., Aditya Bamzai, Taft, Frankfurter, and the First Presidential For-Cause Removal, 52 U. Rich. L. Rev. 691, 699 (2018) (explaining that the Court in *Shurtleff* held that an act “authorizing the President to remove [officials] for [INM] did not prohibit the President from removing [said officials] for other reasons”); Miller, *Independent Agencies*, *supra* note 77, at 88 n.170 (“[T]he fact that the statute specified certain causes for removal [(i.e., INM)] did not exclude the President’s right to remove for other causes.”). What the Court in fact held was that the President might replace *Shurtleff* without cause at pleasure, notwithstanding a provision permitting him to remove *Shurtleff* for INM, because the statute did not otherwise specify that *Shurtleff* should continue in office for a term of years. According to the Court, in the absence of explicit tenure-granting language, the Court would not read in tenure for life. The Court thus interpreted the position as an at-pleasure office, rendering the removal permissions irrelevant. *Shurtleff*, 189 U.S. at 318 (explaining that adopting *Shurtleff*’s interpretation would mean creating a highly unusual tenure of office, something which the Court “[could not] bring [itself] to [believe] that Congress ever intended” given its failure to “use language which would put that intention beyond doubt”); see also *id.* at 316 (“The right of removal would exist if the statute had not contained a word upon the subject. It does not exist by virtue of the grant, but it inheres in the right to appoint, *unless limited by Constitution or statute*. It requires plain language to take it away.” (emphasis added)). As explained in detail elsewhere, *Manners & Menand*, *supra* note 22, treatment of a term of years as an inviolate “term certain” continued mostly uninterrupted through the early 1980s, when unitary executive theorists succeeded in altering the baseline understanding. See, e.g., A Bill to Reform the Civil Service Laws: Hearings on H.R. 11280 Before the H. Comm. on Post Off. & Civ. Serv., 95th Cong. 887–88 (1978).

A final piece of evidence comes from Chief Justice Marshall's opinion in *Marbury v. Madison*.<sup>138</sup> At its most basic level, *Marbury* was a case about a President's effort to remove an officer holding an office for a term of years. As the familiar story goes, right before the end of his term, President John Adams, together with the Senate, made a series of last-minute appointments, including naming William Marbury a justice of the peace for the District of Columbia.<sup>139</sup> Unfortunately for Marbury, Adams's Secretary of State—who was none other than John Marshall, already doubling as Chief Justice—failed to deliver Marbury's commission, and the new Secretary, James Madison, refused. After a ten-month wait, Marbury sought a writ of mandamus from the Supreme Court ordering Madison to deliver his commission. Under the act that created the office, Marbury's lawyer explained, the position was for a term of five years, full stop. The act gave the President no authority to remove justices of the peace in the middle of their terms, and thus none existed.<sup>140</sup>

The Court agreed.<sup>141</sup> Madison had a duty to deliver the commission, Marshall concluded. Were it not for constitutional limits on the Supreme Court's original jurisdiction, Marshall wrote, this would be "a plain case for a mandamus."<sup>142</sup> "Some point of time," he explained,

must be taken when the power of the executive over an officer [like Marbury], not removable at his will, must cease . . . [A]s the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of his country.<sup>143</sup>

At the time of the Founding and for at least several decades thereafter, Marshall's understanding—that absent statutory or constitutional language to the contrary, a term-of-years office foreclosed executive removal—was uncontroversial and widely accepted. It is reflected in

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138. 5 U.S. (1 Cranch) 137 (1803).

139. For a detailed account of the multiple roles and responsibilities of a justice of the peace in colonial Virginia, see George Webb, *Office and Authority of a Justice of Peace* (1736).

140. *Marbury*, 5 U.S. (1 Cranch) at 151.

141. *Id.* at 162.

142. *Id.* at 173.

143. *Id.* at 157, 162.

state<sup>144</sup> and federal case law, treatises,<sup>145</sup> and legislative history throughout the nineteenth century. Although a comprehensive review of these sources is beyond the scope of this Article,<sup>146</sup> it bears noting that we have found no nineteenth-century case, at either the state or federal level, in which a court disavowed this understanding of a term of years, despite more than one opportunity to do so.<sup>147</sup> Even *Parsons v. United States*, *McAllister v. United States*, and *Shurtleff v. United States*, three Supreme Court opinions known for their robust vision of the President's authority to remove executive officers, do not refute the limitations inherent in a term-of-years office.<sup>148</sup> Indeed, we argue in other work that this understanding persisted

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144. See, e.g., *Townsend v. Kurtz*, 34 A. 1123, 1123–24 (Md. 1896) (holding that, where tenure of office was for a definite term, an officer was rendered removable by language providing “unless sooner removed by the governor, treasurer, and comptroller”); *Speed v. Common Council of Detroit*, 57 N.W. 406, 408 (Mich. 1894) (finding that where an officer is appointed for a term of years without qualification, no removal is permitted, not even for cause); *Stadler v. City of Detroit*, 13 Mich. 346, 347 (1865) (Cooley, J.) (finding that the appointment of a new marshal halfway through the incumbent's two-year term did not remove the incumbent, as “the term of the office being for two years, the council had no power to limit it to one”); *State v. Taylor*, 2 Bail. 524, 535–36 (S.C. Ct. App. 1831) (holding that a term-of-years office was not vacated by the incumbent's breach of duty where the state constitution only permitted removal by impeachment).

145. 2 John F. Dillon, *Commentaries on the Law of Municipal Corporations* 791 (1911) (“[T]he general rule is that where the [appointment power] is conferred in general terms and without restriction, *the power of removal*, in the discretion and at the will of the appointing power . . . , is implied and always exists, unless restrained [by another law,] or by appointment for a fixed term.”); James Hart, *Tenure of Office Under the Constitution: A Study in Law and Public Policy* 64–65 (1930) (recognizing “different degrees of independence of tenure” including “relative independence when the officer is chosen for a fixed term of years, and liable only to impeachment” and a “lower order . . . where the officer is subject to removal, but only for specified causes, after notice and a public hearing”).

146. For an in-depth examination of these sources, see *Manners & Menand*, *supra* note 22.

147. Frequently, federal courts dodged the question. See, e.g., *Nebraska Territory v. Lockwood*, 70 U.S. (3 Wall.) 236, 239–40 (1865) (declining to rule on the lawfulness of the removal of a territorial judge appointed to an unqualified four-year term on procedural grounds); *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284, 292 (1855) (declining to rule on the lawfulness of the removal of a territorial judge appointed to an unqualified four-year term on jurisdictional grounds); *Marbury*, 5 U.S. (1 Cranch) at 175–76 (declining to issue mandamus ordering delivery of commission on jurisdictional grounds). But see *Goodrich*, 58 U.S. (17 How.) at 312 (McLean, J., dissenting) (arguing that the Court erred in not ruling on the merits, and that once Congress has fixed the tenure of an office, “the President has no more power to remove a territorial judge, than he has to repeal a law”).

148. See *supra* note 137 for discussion of *Parsons* and *Shurtleff*. *McAllister* involved President Cleveland's suspension of a territorial judge under the Tenure of Office Act, which authorized the President to “suspend any civil officer appointed by and with the advice and consent of the Senate, except judges of the courts of the United States.” *McAllister v. United States*, 141 U.S. 174, 177 (1891). The Court held that because territorial judges were not Article III judges, the suspension was lawful under the Tenure of Office Act. *Id.* at 184–86. Although the case reached the Court after the repeal of the Tenure of Office

for most of the twentieth century.<sup>149</sup> And at the time of the Interstate Commerce Act's passage in 1887, all evidence suggests that this understanding of a term of years was very much intact.

### B. *Defining Removal Grounds*

Part of the reason that the precise meaning of INM has eluded scholars in recent decades is the erasure of the understanding, dominant through most of American history, that an unqualified term of years was inviolable. The previous section's recovery of that term-of-years understanding thus enables the recovery of the meanings of what we label not removal *protections*, but removal *permissions*: "inefficiency," "neglect of duty," and "malfeasance in office."

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Act, the Court stated explicitly that it was deciding only the lawfulness of the suspension under the law in force at the time of the suspension and that it was not deciding the President's power to remove a territorial judge in the wake of the Act's repeal. *Id.* at 178. Even *Myers v. United States*, 272 U.S. 52 (1926), with its emphatic assertion of the President's Article II power to remove executive officers at will, does not squarely address whether its holding prevents Congress from limiting such a power by establishing an office for a term of years.

149. *Manners & Menand*, *supra* note 22; see also *Wiener v. United States*, 357 U.S. 349, 353 (1958) (stating that for officials who are "members of a body 'to exercise its judgment without the leave or hindrance of any other official or any department of the government' . . . a power of removal exists only if Congress may fairly be said to have conferred it" (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625–26 (1935))); *Federal Election Reform, 1973: Hearings on S. 23, S. 343, S. 372, S. 1094, S. 1189, S. 1303, S. 1355, and S.J. Res. 110 Before the Subcomm. on Priveleges [sic] & Elections and the S. Comm. on Rules & Admin., 93rd Cong. 225 (1973)* (statement of Robert O. Dixon, Jr., Assistant Att'y Gen.) (testifying that the proposed Commission was unconstitutional in part because the Commissioners' terms of years, unaccompanied by removal permissions, meant that they "could not be removed by the President during their term of office"); Memorandum from Ramsey Clark, Deputy Att'y Gen., DOJ, to Jake Jacobsen, The White House (July 2, 1965) (stating that where a term is "prescribed by statute, it is reasonably clear that," once confirmed, an office holder cannot be removed before the end of that term). But see, e.g., *The Independent Regulatory Commissions: A Report to the Congress by the Commission on Organization of the Executive Branch of Government 6 (1949)* (assuming commissioners appointed to terms of years without removal permissions serve at pleasure). Contrary contemporary interpretations typically cite a 1976 statute prescribing a ten-year "term of service" for the Director of the FBI. See, e.g., Memorandum from Daniel L. Koffsky, Acting Assistant Att'y Gen., Off. of Legal Couns., DOJ, to Stuart M. Gerson, Acting Att'y Gen., DOJ, *Removal of the Director of the Federal Bureau of Investigation* (Jan. 26, 1993), <https://www.justice.gov/olc/page/file/1085346/download>, [<https://perma.cc/3ZQT-BAFV>]; see also *Omnibus Crime Control and Safe Streets Act of 1968*, Pub. L. No. 94-503, sec. 203, § 1101(b), 90 Stat. 2427 (1976) (codified at 28 U.S.C. § 532 (2018)). But the legislative history reveals that members of Congress treated the Director's term as a tenure the President could probably override under *Myers*. And they nonetheless seemed to relish the ambiguity. See S. Comm. on the Judiciary, *Ten-Year Term for FBI Director*, S. Rep. No. 93-1213, at 6 (1974) ("The President may well have illimitable constitutional power to remove an FBI Director, as that office is presently constituted by law. . . . That the Director of the FBI is within the class of officials subject to the President's illimitable power of removal is highly likely." (citing *Myers*, 272 U.S. 52)).

This section proceeds with a brief overview of early removal law before unpacking the meaning of INM. Neglect of duty and malfeasance in office, it shows, are terms that have been used for hundreds of years to address the problem of an officer's failure to faithfully execute the laws. Courts have used them to define and analyze the obligations of officeholding, while legislatures have employed them to motivate an office's "faithful execution." In attempting to legislate faithful execution, these lawmakers used a range of techniques, including authorizing private suits against officers for breaching their official duties, separating the power to remove from the power to appoint, and combining term-of-years appointments with a limited power to remove for discrete forms of misbehavior. Inefficiency, meanwhile, was added to the removal lexicon only in the middle of the nineteenth century, when legislators used the term to describe wasteful government administration caused by inept officers.

1. *The Common Law Roots of Removal Law.* — The concepts animating nineteenth-century American removal law derive primarily from two sources in English common law. The first is the law of municipal corporations, which governed the ability of towns and boroughs to remove officers whose positions derived from the terms of their municipal charter.<sup>150</sup> The second is what we call the law of public officeholding,<sup>151</sup> which governed the removal of public officials, ranging from justices of the peace to stewards of the manor,<sup>152</sup> who held their office by virtue of appointment. This second subset of cases often involved people appointed with good behavior commissions—clerks, judges, stewards, and others whose offices

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150. Nineteenth-century municipal law treatises sometimes note the different historical origins of English municipalities incorporated by royal charter and those that "claim[ed] their franchise[] by prescription" and later accepted charters of confirmation. J.W. Willcock, *The Law of Municipal Corporations; Together with a Brief Sketch of Their History, and a Treatise on Mandamus and Quo Warranto* 7–8 (London, William Benning 1827); see also 1 Frederick Pollack & Frederic William Maitland, *The History of English Law Before the Time of Edward I*, at 520 (Cambridge, University Press 1895). For the purposes of this Article, however, the distinction is not significant. Cf. *R v. Corp. of Wells* (1767) 98 Eng. Rep. 41, 44; 4 Burr. 1999, 2003 (KB) (noting, as one of several reasons that the recorder did not breach his corporate duty, that the town of Wells was a corporation by prescription and thus the meeting at which it elected its members of Parliament was not a corporate meeting).

151. Professors Leib and Shugerman, writing about the connection between the phrase "faithful execution" and fiduciary obligations in private law relationships, refer similarly to "the law of public office." Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*, 17 *Geo. J.L. & Pub. Pol'y* 463, 466 (2019).

152. See, e.g., *R v. Steward of the Manor of Richmond* (1839) 55 *Rev. Rep.* 829, 830; 3 *Jurist* 998, 999 (QB) (referring to a steward appointed *quamdiu se bene gesserit*); *R v. Mayor of London* (1787) 100 *Eng. Rep.* 96, 97; 2 *T.R.* 177, 179 (KB) (same).

were, by the terms of a deed, commission, or controlling statute,<sup>153</sup> *quamdiu bene se gesserint* (“so long as they well behave themselves”).<sup>154</sup>

By the end of the eighteenth century, case law in both contexts held that “neglect of duty”<sup>155</sup> and “malfeasance in office”<sup>156</sup> were “misdemeanors”<sup>157</sup> that breached the terms of office and could lead to removal.<sup>158</sup> These cases made plain that both terms had specific meanings: “Neglect of duty” meant failing to perform one’s duties in a way that caused specific harm to the entity—town, court, or person—to which the duties were owed, while “malfeasance” connoted the commission of an unlawful act in the performance of one’s official duties. This section describes the evolution of the doctrine in these two areas of removal law to give a fuller sense of both the terms’ meanings and the larger concerns involved.

153. A range of authority controlled the terms under which offices were held outside of the municipal context, from Parliamentary statutes to charters from the King. See, e.g., 1 Richard Burn, *The Justice of the Peace, and Parish Officer* 755 (London, T. Cadell; Longman, Rees, Orme, Brown, Green & Longman; J.G. & F. Rivington; Saunders & Benning 1836) (explaining that although most coroners are elected in their counties, “[c]oroners by charter, or commission or privilege, were ordinarily made by grant or commission without election”). See generally Birk, *supra* note 109 (undertaking a “comprehensive investigation of whether the ability to remove and direct the activities of royal officers were inherent features of the executive power as it was practiced and understood in England at the time of the framing”).

154. An office appointed *quamdiu* or on good behavior was “in law a freehold for life.” Thomas Tapping, *The Law and Practice of the High Prerogative Writ of Mandamus, as It Obtains Both in England, and in Ireland* 223 (Phila., T. & J.W. Johnson 1853); see also *Harcourt v. Fox* (*Harcourt II*) (1693) 89 Eng. Rep. 720, 734–38; 1 Show. K.B. 506, 534–36.

155. See, e.g., *Respublica v. Meylin*, 3 Yeates 1, 1, 4 (Pa. 1800) (discussing an “indictment for a misdemeanor” of county commissioners for “neglect of duty”); see also *Page v. Hardin*, 47 Ky. (8 B. Mon.) 648, 664, 677 (1848) (examining “neglect of duty” as a misdemeanor).

156. See *Commonwealth v. Barry*, 3 Ky. (Hard.) 229, 249 (1808) (considering an act of “malfeasance” as a “misdemeanor”).

157. In this context, a misdemeanor was a “failure[] to demean oneself appropriately in public office.” *Kent et al.*, *supra* note 27, at 2170. Courts used the terms misdemeanor and misbehavior interchangeably. See, e.g., *Harcourt v. Fox* (*Harcourt I*) (1692) 89 Eng. Rep. 680, 684; 1 Show. K.B. 426, 433 (“The statute having impowered [sic] him who has the right, to nominate one to hold it, for ‘so long . . . as he shall . . . *demean* himself in the office,’ goes on, and makes provision how he may be removed for a *misbehaviour* . . . having made him removable only for *misdemeanor* . . .” (emphasis added)); see also James Baker, *An Introduction to English Legal History* 502 (4th ed. 2002) (describing the use of misdemeanor to mean a civil, as opposed to a criminal, wrong); John Rastell, *Les Termes de la Ley* 111 (1659) (outlining how misdemeanor or forfeiture of a deputy shall cause the officer “whose deputy he is” to lose his office).

158. See, e.g., *R v. Corp. of Wells* (1767) 98 Eng. Rep. 41, 42, 44; 4 Burr. 1999, 1999, 2003 (KB) (discussing an act as both a malfeasance and a breach of the relator’s corporate duty, where he was both the town’s recorder and, by virtue of that position, a justice of the peace, a *quamdiu* office); *Ex p Parnell* (1820) 37 Eng. Rep. 439, 441; 1 Jac. & W. 450, 456 (Ch) (employing “neglect of duty” outside of the municipal corporation officeholding context).

a. *Municipal Officer Removal.* — At the start of the seventeenth century, many towns, boroughs, and other municipalities exercised power by virtue of a corporate charter—a grant from the Crown that gave the corporation certain rights and powers.<sup>159</sup> At common law, these municipal corporations had little ability to remove their officers. Municipal offices were part of an officer’s “freehold” or “freedom,” which derived from the officer’s status as a member of the corporation.<sup>160</sup> Municipal offices often entitled their holders to an interest in the town’s lands and goods, or were connected to their holders’ trade or living: They were, in short, valuable, property-like positions.<sup>161</sup> As Lord Coke explained in 1615’s *Rex v. Plymouth*, commonly known as *Bagg’s Case*, a municipal corporation—absent an express grant of removal power in its charter—could not remove a municipal officer for anything short of a conviction in a court of law.<sup>162</sup>

This rule did not last. In 1728, King’s Bench<sup>163</sup> announced in *Lord Bruce’s Case* that an express grant of removal authority in the charter was unnecessary, as “the modern opinion has been, that a power of amotion”<sup>164</sup>—the removal of a corporate officer—“is incident to the corporation, though *Bag’s* [sic] *Case* seems to the contrary.”<sup>165</sup> Lord Mansfield affirmed this shift, holding in 1758’s *Rex v. Richardson* that where a corporate officer had violated his oath and the duties of his office, and thus its “tacit condition,” the power to remove for cause was “incident to every corporation,” as such a power was “necessary to the good order and government of corporate bodies.”<sup>166</sup>

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159. See Willcock, *supra* note 150, at 7–8.

160. See 1 William Blackstone, *Commentaries on the Law of England*, bk. II, ch. 3, at 37 (George Sharswood ed., 1860) (discussing the corporate “franchise” or “liberty”).

161. See, e.g., *R v. Ponsonby* (1755) 30 Eng. Rep. 201, 201; 1 Ves. Jun. 1, 2 (KB); *R v. Mayor of Plymouth (Bagg’s Case)* (1615) 77 Eng. Rep. 1271, 1278; 11 Co. Rep. 93 b, 98 b (KB).

162. *Bagg’s Case*, 77 Eng. Rep. at 1279; 11 Co. Rep. at 99 a. The conviction, Coke explains, could be either for an infamous crime such as perjury, forgery, or conspiracy, the taint of which would render the officer unfit for any public office, or for an offense that involved the violation of his corporate duty, such as defacing the borough charter. *Id.*

163. King’s Bench heard all cases involving the “misbehaviours” of corporations because by law the King was, “in the strictest and original sense,” the founder of all corporations and thus charged with ensuring that all corporations hewed to their established ends. 1 Blackstone, *supra* note 160, bk. I, ch. 18, at 478–79.

164. The power to “amove” is the power to remove an officer, while the power to disfranchise is the power to take away a corporator’s “freedom,” or franchise. In *Bagg’s Case*, as subsequent commentators have noted, Coke used amotion and disfranchisement for the most part interchangeably. See Willcock, *supra* note 150, at 245.

165. *Lord Bruce’s Case* (1728) 93 Eng. Rep. 870, 870; 2 Strange 819, 820 (KB).

166. *R v. Richardson* (1758) 97 Eng. Rep. 426, 438; 1 Burr. 517, 538–39 (KB) (emphasis omitted). By 1827, the transformation of corporate removal law from *Bagg’s Case* to *Lord Bruce’s Case* to *Richardson* was a set piece of municipal law. In that year, Chancellor James Kent included the trifecta in his *Commentaries on American Law*, relying on them to assert that, in a corporation, “[t]he power of amotion, or removal of a member for a reasonable

Another principle of municipal removal that solidified over the course of the eighteenth century was that an officer could only rarely be removed “without some act of ceremony.”<sup>167</sup> An officer could not simply be declared to have forfeited his office; instead, the corporation had to exercise its “power of amotion” by granting the officer some sort of process to determine whether his misdemeanor amounted to a “cause of forfeiture.”<sup>168</sup> The process granted was a “formal” one conducted by the corporation itself, as the corporation was “the best judge[] of the nature [of its] own constitution.”<sup>169</sup> The person to be dispossessed had to be given legal notice and “a proper opportunity of making a defence to the charge upon which he is removed.”<sup>170</sup> And where the corporation wished to remove or “amove” an officer for a violation of duty that was also a crime at common law, that amotion had to be preceded by a criminal trial.<sup>171</sup>

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cause, is a power necessarily incident to every corporation.” 2 James Kent, Commentaries on American Law 238 (N.Y., O. Halsted 1827). Kent was so certain that that the power was incident to the corporation that he added “the power of amotion” as a sixth item to the conventional list of a corporation’s five incident powers: to elect members, to sue and be sued, to purchase and hold land and chattels, to have a common seal, and to make by-laws. *Id.* at 224. It is worth noting, moreover, the closeness between Mansfield’s logic and that employed thirty-one years later in “the Decision of 1789.” Both Mansfield and those who in 1789 desired to locate in the President an inherent removal power rooted their arguments in the idea that because the power to remove officers was a power necessary to good government, it must be incidental to the institution. For more on the intellectual parallels between the development of an incidental municipal removal power and the growth of the unitary executive theory, see Manners & Menand, *supra* note 22.

167. *R v. Ponsonby* (1755) 30 Eng. Rep. 201, 204; 1 Ves. Jun. 1, 6–7 (KB); see also *Avery v. Inhabitants of Tyringham*, 3 Mass. 160, 182 (1807) (stating that although many varieties of misfeasance or nonfeasance might “cause a forfeiture of the office,” parishioners cannot appoint a new minister without process, such as a legal meeting of the town at which the parishioners “assign[] in their votes the causes of the forfeiture and of their dismissal”); cf. *R v. Mayor of London* (1787) 100 Eng. Rep. 96, 98; 2 T.R. 177, 181–82 (KB) (explaining that the suspension of an officer holding a *quandiu* office without first summoning him to answer to the charge was not improper in light of his “extremely reprehensible” conduct and the fact that the suspension could still be rescinded); *Lord Bruce’s Case*, 93 Eng. Rep. at 870; 2 Strange at 819–20 (suggesting—although the context makes it unclear—that a “forfeiture” results in immediate vacancy in office, while “misdemeanour” does not).

168. *Ponsonby*, 30 Eng. Rep. at 204; 1 Ves. Jun. at 7.

169. *Id.* at 204; 1 Ves. Jun. at 8 (citing Lord Holt).

170. *Mayor of London*, 100 Eng. Rep. at 98; 2 T.R. at 181 (quoting *R v. Mayor of Liverpool* (1759) 97 Eng. Rep. 533, 539; 2 Burr. 723, 734 (KB)); see also *R v. Bailiffs of Gippo* (1705) 92 Eng. Rep. 313, 317; 2 Ld. Raym. 1232, 1240 (QB) (acknowledging that notice must be given but may also be waived by the officer); *City of Exeter v. Glide* (1691) 90 Eng. Rep. 992, 992; 1 Holt K.B. 169, 170 (requiring notice of the particular charge). Professor James Pfander notes that the members of the Constitutional Convention rejected removal of judges by joint address of the legislature in favor of impeachment because the process that inhered in impeachment “provided greater security for judicial tenure and ensured a trial-type proceeding at which the judge could mount a defense against claims of misbehavior.” James E. Pfander, *Removing Federal Judges*, 74 U. Chi. L. Rev. 1227, 1243 (2007).

171. The concern was that an amotion ought not prejudice. See *Richardson*, 97 Eng. Rep. at 438; 1 Burr. at 538; see also *R v. Mayor of London (Wooldridge’s Case)* (1785) 99 Eng. Rep.



Not every “misbehaviour” rose to the level of a forfeiture. Disruptive words of contempt, for instance, were not a sufficient cause for removal, even if they were against “the chief officer.”<sup>172</sup> Nor was one instance of knowingly neglecting to perform a corporate duty, at least where it had not been shown that the failure had interfered with the business of the corporation.<sup>173</sup> If it were sufficient, Mansfield warned, “[t]here is not an officer or freeman in the kingdom . . . that might not be removed or disfranchised.”<sup>174</sup> Bankruptcy was not enough,<sup>175</sup> nor was a four-month absence from office.<sup>176</sup> For these and other instances of misbehavior that did not rise to the level of removal, there were other remedies: One could, as Lord Coke suggested in *Bagg’s Case*, demand that the officer find “good sureties for his good behavior,”<sup>177</sup> and sometimes, penalties for neglect were assigned by statute.<sup>178</sup>

Removal, the case law shows, was a measure to be taken only when the officer’s neglect threatened the municipality’s wellbeing. To meet this standard, a pattern of willful neglect was enough,<sup>179</sup> and both voluntary<sup>180</sup> and involuntary<sup>181</sup> nonattendance, where the circumstances (including being imprisoned for debt) made future attendance unlikely, were also enough. By the end of the eighteenth century, the mass of precedent held that as a species of officer “misbehaviour,” neglect of duty only amounted to a “cause of forfeiture” where an officer’s failure to do his job caused meaningful harm to the public good.

The judges of King’s Bench emphasized that it was the municipality, rather than a superior officer, to which the officer owed his duties. In *Rex v. Corporation of Wells*, for example, Lord Mansfield rejected the argument that an officer of the town of Wells had breached his duty by disobeying the mayor’s order, explaining that the officer’s actions had not been illegal

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922, 933; 4 Dougl. 360, 381 (KB); *Bagg’s Case* (1615) 77 Eng. Rep. 1271, 1278; 11 Co. Rep. 93 b, 98 a (KB); Willcock, *supra* note 150, at 264–68 (describing the required procedures for amotion).

172. *Bagg’s Case*, 77 Eng. Rep. at 1278; 11 Co. Rep. at 98 a–b.

173. *Richardson*, 97 Eng. Rep. at 439; 1 Burr. at 540–41; see also *R v. Corp. of Wells* (1767) 98 Eng. Rep. 41, 46; 4 Burr. 1999, 2007 (KB); *R v. Halford* (1733) 27 Eng. Rep. 748, 748; 1 Ridg. T.H. 31, 32–33 (KB); cf. *Bailiffs of Gippo*, 92 Eng. Rep. at 316; 2 Ld. Raym. at 1237 (explaining that, in the case of a “public office concerning the administration of justice, . . . non-attendance [at a sessions of the peace] is a cause of forfeiture” and pointing out the “difference . . . between public and private offices” in this regard).

174. *Richardson*, 97 Eng. Rep. at 440; 1 Burr. at 541.

175. See *Mayor of Liverpool*, 97 Eng. Rep. at 538; 2 Burr. at 732.

176. See *R v. Leicester* (1767) 98 Eng. Rep. 88, 89; 4 Burr. 2087, 2089 (KB).

177. *Bagg’s Case*, 77 Eng. Rep. at 1278; 11 Co. Rep. at 98 b.

178. See, e.g., *Feltham v. Terry* (1773) 98 Eng. Rep. 613, 613; 1 Lofft 207, 207 (KB) (stating that a churchwarden was convicted under a statute for neglect of duty).

179. *R v. Bailiffs of Ipswich* (1708) 91 Eng. Rep. 378, 378; 2 Salk. 434, 435 (KB).

180. See *City of Exeter v. Glide* (1691) 90 Eng. Rep. 992, 992; 1 Holt K.B. 169, 169–70.

181. See *Wooldridge’s Case* (1785) 99 Eng. Rep. 922, 933; 4 Dougl. 360, 382–83 (KB).

and had been motivated by “a sincere opinion.”<sup>182</sup> It did not matter that he had offered advice that went against the mayor’s admonition or that it had turned out to be bad advice. “He g[ave] his opinion,” Mansfield explained, and “his opinion was wrong. They who were his friends, suffer by it. This is no breach of his corporate duty.”<sup>183</sup> Mansfield’s holding was unambiguous: The officer’s duty was to the town, not the mayor, and could not be violated by an exercise of discretion, no matter how erroneous.

Thus, by the Founding Era, we can identify four principles of officer removal in the municipal law context: first, that a municipal corporation had the inherent power to amove an officer for violating his official duties; second, that removing a municipal officer required notice and an opportunity to be heard; third, that to be a cause of “forfeiture,” a municipal officer’s “neglect of duty” had to cause harm to the municipal welfare; and fourth, that a corporate officer’s duties were owed not to any superior but to the corporation itself.<sup>184</sup>

b. *Public Officer Removal.* — Where the evolution of municipal law over the seventeenth and eighteenth centuries made it easier to remove corporate officers, the law of noncorporate public officeholding moved in the opposite direction over the same period, gradually limiting an appointer’s ability to remove an officer. In this second subset of the English common law of removal, the absence of a municipal charter meant that the baseline was different: If the grant of office or the controlling statute imposed no limits, an appointer could appoint a replacement officer at any time.<sup>185</sup> (This, perhaps, is the origin of the oft-asserted dictum that the power to remove an officer is “an incident” of the power to appoint; where an appointer can remove an incumbent officer simply by appointing a replacement, no separate removal authority is necessary.<sup>186</sup>) Where the statute or grant did impose limits, however,

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182. (1767) 98 Eng. Rep. 41, 44; 4 Burr. 1999, 2003 (KB).

183. *Id.* at 44; 4 Burr. at 2004.

184. For a late-nineteenth-century American treatise that reaches many of the same conclusions, see Dillon, *supra* note 145, at 222–29.

185. This is not to underplay the range of tenures that did exist. See *supra* note 108 and accompanying text.

186. See *infra* notes 189–211; see also *Stadler v. City of Detroit*, 13 Mich. 346, 348–49 (1865) (“It has been held that where an officer is appointed during the pleasure of the appointing power, an appointment of another person is a removal of the incumbent.”); cf. *Avery v. Inhabitants of Tyringham*, 3 Mass. 160, 179–82 (1807) (acknowledging that the power to appoint at pleasure entails the power to remove but holding that in the instant case custom made the office in question a life appointment, removable only for misbehavior). Whether the Framers of the U.S. Constitution subscribed to this understanding is a topic of some debate. Professor Saikrishna Prakash has argued that they did not. Prakash, *Removal and Tenure*, *supra* note 136, at 1834. But Prakash’s argument that the Constitution rejects what he labels the “symmetry” rule rests on flawed logic. Because the Electoral College cannot recall the President or the Vice President and the electors of members of Congress cannot remove their delegates, he argues, the Framers

courts increasingly interpreted them as meaningful constraints on the appointer's removal power,<sup>187</sup> such that by the late-eighteenth century, the limits on officer removal that had emerged in the municipal officer context applied with equal force to cases involving the removal of officers outside of the corporate setting.<sup>188</sup>

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evidently rejected the idea that appointment and removal powers were aligned. This reasoning misses the crucial point that the President, the Vice President, Senators, and Representatives all hold offices established for a term of years and thus are not removable (outside of impeachment) absent a provision to the contrary. See *infra* section II.B.2. The lawyer for the relator in 1839's *Ex parte Hennen* made a similar argument, which the Court did not adopt. 38 U.S. (13 Pet.) 230, 259 (1839) (rejecting the relator's argument and holding that "[i]n the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment"). Compare Prakash, Removal and Tenure, *supra* note 136, at 1834 (arguing the symmetry rule does not apply to the U.S. Constitution because "[t]he Electoral College has no authority to oust presidents and vice presidents[,] the people of a congressional district may not recall their Representative[,] [and] state assemblies [do not] have the power to dismiss Senators"), with *Hennen*, 38 U.S. (13 Pet.) at 235 (presenting the relator's argument that "the debate in 1789" had rejected the symmetry rule for federal officeholding because presidential electors cannot remove the President or Vice President, state legislatures cannot revoke Senate appointments, and "members of the House of Representatives, when once elected, are independent of those whom they represent"). It is, in other words, possible and even likely that the Framers embraced the symmetry rule for non-term-of-years offices. Indeed, this was one of the main reasons that the decision to permit the President alone to remove officers who had been appointed by both the President and the Senate was controversial. See, e.g., 1 *Annals of Cong.* 455–79 (1789) (Joseph Gales ed., 1834); William H. Rogers, *The Executive Power of Removal* 14 (Washington, G.S. Gideon 1856).

187. See generally Birk, *supra* note 109 (describing instances in which Parliament instituted protections against removal). Among other limits, notice and process were generally required. See, e.g., *Harcourt I* (1692) 89 Eng. Rep. 680, 685; 1 Show. K.B. 426, 434 (stating that a statute making the clerk of the peace removable only on misbehavior requires "that an accusation shall be put against him in writing, and this to be done in open sessions before the justices, where it shall be examined into and proved"); cf. *Ex p Parnell* (1820) 37 Eng. Rep. 439, 441; 1 Jac. & W. 451, 456 (Ch) (Eldon, L.C.) (addressing a county coroner removed from office who did not receive the removal writ because he was imprisoned for debt in another county and finding removal nonetheless appropriate because the coroner's prolonged neglect of his duties made it "the duty of the great seal to remove him"); 1 Sir Edward Coke, *The Second Part of the Institutes of the Laws of England* 175 (London, W. Clarke & Sons 1817) (explaining a thirteenth-century instance of removal, via Lord Chancellor's writ issued upon petition by the county sheriff, of a county coroner who was elected for life and was unable to pay a fine for a false return). The process varied according to the public or private nature of the office, in addition to the terms of the grant. See, e.g., *R v. Mayor of London* (1787) 100 Eng. Rep. 96, 96–98; 2 T.R. 177, 179–81 (KB) (analogizing an officer's case to those of corporate officers who require "nothing short of legal notice," even though the officer did not possess a "corporate office" but rather a "private appointment by the corporation"). See generally Tapping, *supra* note 154, at 221–53 (describing various factors courts considered in deciding whether to grant or deny writs of mandamus for office).

188. See, e.g., *R v. Barker* (1762) 97 Eng. Rep. 823, 823–24; 3 Burr. 1265, 1266 (KB) (Mansfield, C.J.) (granting a writ of mandamus to admit a displaced preacher—a noncorporate office—where the preacher possessed "a right to execute an office, perform

One case of nonmunicipal removal from this period, *Harcourt v. Fox*, helpfully illuminates the logic behind the shift towards tighter constraints. In 1689, Simon Harcourt II was appointed the clerk of the peace of Middlesex County.<sup>189</sup> The office involved both clerical and legal duties for the Middlesex justices of the peace and enabled Harcourt to earn generous fees.<sup>190</sup> Under a recent Parliamentary statute, the office was to last “so long as [its holder] did well behave himself in it,” which was widely understood to make the role a life appointment.<sup>191</sup> Harcourt was chosen by the Earl of Clare,<sup>192</sup> who had himself only recently been appointed *custos rotulorum*<sup>193</sup> of Middlesex, the officer entitled to appoint the clerk.<sup>194</sup>

Two years later, the Earl of Clare was replaced by the Earl of Bedford;<sup>195</sup> a year after that, the Earl of Bedford appointed his own steward, John Fox, to take Harcourt’s place.<sup>196</sup> Harcourt challenged the appointment by suing Fox for the money he had received.<sup>197</sup> A special verdict found that Harcourt was “capable and sufficient,” that he had taken the required oath of office, and that he had indeed “well behave[d]

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a service, or exercise a franchise”); *R v. Bloer* (1760) 97 Eng. Rep. 697, 697–98; 2 Burr. 1043, 1043–45 (KB) (Mansfield, C.J.) (explaining that mandamus will issue “where a person is wrongfully dispossessed of any office or function which draws after it temporal rights”). That this doctrinal transformation appears to be almost entirely the work of Lord Mansfield is in keeping with previous treatments of Mansfield’s revolutionary tenure on the bench. See generally James Oldham, *English Common Law in the Age of Mansfield* (2004) (describing Lord Mansfield’s jurisprudence in various areas of English common law). On the question of the circumstances under which a writ of mandamus will issue and the writ’s jurisdictional implications, see *supra* notes 138–148 and accompanying text.

189. *Harcourt II* (1693) 89 Eng. Rep. 720, 730; 1 Show. K.B. 506, 527; Stuart Handley, *Harcourt, Simon II* (1653–1724), of the Middle Temple and Pendley, Herts., *The Hist. of Parliament: Brit. Pol., Soc. & Loc. Hist.* (2002), <https://www.historyofparliamentonline.org/volume/1690-1715/member/harcourt-simon-ii-1653-1724> [<https://perma.cc/VR73-QSHJ>].

190. Middlesex Sessions of the Peace: Clerk of the Peace, Archives in London & the M25 Area, [https://aim25.com/cgi-bin/vcdf/detail?coll\\_id=14580&inst\\_id=118&nv1=browse&nv2=repos](https://aim25.com/cgi-bin/vcdf/detail?coll_id=14580&inst_id=118&nv1=browse&nv2=repos) [<https://perma.cc/Q6KA-GUYT>] (last visited Sept. 29, 2020).

191. *Harcourt II*, 89 Eng. Rep. at 730; 1 Show. K.B. at 527.

192. Coming just one year after the Glorious Revolution, Harcourt’s appointment had probably not been a sure thing: He had reportedly served as a clerk to the Lord Chief Justice during the so-called Bloody Assizes of the previous monarch, James II, in addition to other Crown service not likely to endear him to the Whig supporters of the new King and Queen. See Handley, *supra* note 189.

193. Merriam-Webster defines *custos rotulorum* as “the principal justice of the peace in an English county who is also keeper of the rolls and records of the sessions of the peace.” *Custos Rotulorum*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/custos%20rotulorum> [<https://perma.cc/AS3N-ETAF>] (last visited Oct. 20, 2020).

194. See *Harcourt II*, 89 Eng. Rep. at 720; 1 Show. K.B. at 507; Handley, *supra* note 189.

195. *Harcourt I* (1692) 89 Eng. Rep. 680, 681; 1 Show. K.B. 426, 427. The Earl of Bedford’s son had been executed for opposing James II’s accession many years earlier. Handley, *supra* note 189.

196. *Harcourt I*, 89 Eng. Rep. at 681; 1 Show. K.B. at 427.

197. *Id.* at 681; 1 Show. K.B. at 426.

himself” in the job.<sup>198</sup> The remaining legal question, as Chief Justice Holt put it, was whether a newly appointed *custos rotulorum* for Middlesex County could remove the county’s clerk, who had been appointed on good behavior, simply because he wished to.<sup>199</sup>

No, Holt explained, he could not. There were certainly good reasons to allow a justice to appoint his own clerk, since the justice would be the one dishonored by any mistakes the clerk might make, and the justice would also know best who “is most fit and proper” to do the job.<sup>200</sup> But Parliament quite clearly had other objectives in mind when it rewrote the law. Initially, Holt explained, the standard rule had applied: Only the *custos* could remove the clerk “because he put him in.”<sup>201</sup> But two statutory revisions had changed that. The first had specified that the clerk “shall be clerk so long as the *custos* remains in his office, if he behaved himself well.”<sup>202</sup> The second stated simply that the clerk “shall hold the office for so long time only as he shall behave himself well in it”—without providing, as Holt pointedly noted, “if so be the *custos* remain *custos*.”<sup>203</sup> These changes, together with the fact that the second revision newly empowered the justices as a whole to remove the clerk “for misdemeanor,”<sup>204</sup> could not have been accidental. “The design of the makers of this [second] Act was,” Holt reasoned, “to take off much of that dependance which the clerk before had upon the *custos*, and to make him more dependant on the justices of the peace.”<sup>205</sup> The upshot was that the clerk’s office had gone from an at-pleasure appointment to a good-behavior appointment dependent on the *custos* to a good-behavior appointment independent of the *custos*: in other words, “an estate *for life*.”<sup>206</sup> By making the clerk’s tenure independent of his appointer, Parliament had severed the relationship between the two. Holt knew why: to “encourage [the clerk] in the faithful execution of [his] office” by “put[ting] him out of fear of losing [his estate] for any thing but his own misbehavior in it.”<sup>207</sup> “[I]t seems,” Holt concluded, that Parliament had designed the structure to

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198. Id. at 681; 1 Show. K.B. at 427.

199. Id. at 681–82; 1 Show. K.B. at 428.

200. *Harcourt II* (1693) 89 Eng. Rep. 720, 732; 1 Show. K.B. 506, 531.

201. Id. at 733; 1 Show. K.B. at 534.

202. Id. at 733; 1 Show. K.B. at 532 (internal quotation marks omitted) (quoting 37 Hen. 8, c. 1).

203. Id. (internal quotation marks omitted) (quoting 37 Hen. 8, c. 1).

204. Id. at 728; 1 Show. K.B. at 523. Chief Justice Holt uses “misdemeanor” and “misbehaviour” as cognates throughout his opinion. See, e.g., id. at 722; 1 Show. K.B. at 510 (“[H]e shall [not] be removable by the *custos* . . . but for misbehaviour . . . I conceive they will find it as hard to make out any such inference from the intention of this Act . . . that he shall be removable any ways but misdemeanor.”).

205. Id. at 733; 1 Show. K.B. at 533.

206. Id. at 734; 1 Show. K.B. at 535–36.

207. Id. at 734; 1 Show. K.B. at 534.

advance “the public good . . . for it was a great mischief to have the office so easily vacable.”<sup>208</sup>

Holt’s opinion in *Harcourt* was regularly cited during the nineteenth century, in America as well as England, as establishing legislative authority to limit an appointer’s removal power for the “public good.”<sup>209</sup> The common law rule for removal had been that an appointer could remove an appointee absent statutory, customary, or constitutional limitations.<sup>210</sup> *Harcourt* established beyond any doubt that legislatures could curtail that power. Where the legislature provided an officeholder with some form of tenure protection—either on good behavior or for a term of years—it was exclusively the legislature’s choice whether to also permit the appointer to remove such an official and, if so, on what grounds.

The case also illuminates the structural stakes of such disputes. Should powerful patrons—such as modern Presidents—be able to replace an officer whom they politically disfavor, solely based on that disagreement? What are the costs of limiting an appointer’s discretion when the appointer knows best “who is most fit and proper” to do the work and when the appointer will suffer the “dishonour” if the appointee does poor work?<sup>211</sup> By making the position removable only on misbehavior, and by making all of the justices of the peace the judges of that misbehavior, Parliament struck a balance between job security on the one hand and effective service on the other. The goal, as with the emerging principles of officer removal in the municipal context, was to engineer a mix of incentives to ensure “faithful execution.”<sup>212</sup> The techniques used in both settings aimed to advance the public good by protecting officers from political meddling while establishing procedures to remove officers whose actions—or failures to act—imperiled the common welfare. The principles and standards undergirding these efforts would echo powerfully throughout centuries of transatlantic legal practice, as jurists and lawmakers drew on the lessons of their English forebears to hold public officers to account.

2. *Neglect of Duty, Malfeasance in Office, and Faithful Execution.* — This section shows how early American legislatures, courts, and constitutional drafters used the terms “neglect of duty” and “malfeasance in office” to articulate the meaning of an officer’s “faithful execution” and employed a range of statutory tools to strike a balance between tenure security and oversight. Section II.B.2.a examines the range of tools employed in colonial statutes to hold officers accountable, together with the

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208. *Id.*

209. See, e.g., *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 236–37 (1839); *R v. Hayward* (1862) 121 Eng. Rep. 1190, 1193; 2 B. & S. 585, 592 (QB).

210. *Hennen*, 38 U.S. (13 Pet.) at 247.

211. *Harcourt II* (1689) 89 Eng. Rep. at 732; 1 Show. K.B. at 531.

212. *Id.* at 734; 1 Show. K.B. at 534.

restrictions these early documents placed on the executive's authority to remove public officers, particularly those involved with public finance. Section II.B.2.b, meanwhile, addresses the use of "neglect" and "malfeasance" in nineteenth-century state statutes, showing the terms' continued use in efforts to motivate officers' "faithful execution."

a. *Colonial Statutes.* — England's North American colonies began experimenting with ways to ensure officers' faithful execution of their duties long before the Founding Era.<sup>213</sup> Among the several tools colonies used to hold officers accountable were terms of years, which facilitated rotation in office, regular elections,<sup>214</sup> and the authorization of private suits against public officers for neglect.<sup>215</sup> According to the historian Carl Russell Fish, rotation in office was a favorite tool in the colonies, intended "to educate the people and equalize the burdens of officeholding" by

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213. Officers who handled their neighbors' money, affected their livelihoods, or exercised control over the personal liberty of others—sheriffs, constables, handlers of precious commodities, members of slave patrols—received particular focus, and statutes governing these positions employed a mix of carrots and sticks to encourage faithful execution. In South Carolina, for instance, a 1736 law establishing "constant Patrols . . . for the better preventing any future Insurrections or Cabals of . . . Slaves" authorized the militia captains in charge to assess penalties for "Breach or Neglect of Duty" on any person who refused to do their month's service. An Act for the Better Establishing and Regulating of Patrols, reprinted in *Acts Passed by the General Assembly of South-Carolina* 29, 29–35 (Charles Town, Lewis Timothi 1736).

214. Elections were particularly prevalent where the official in question was in charge of critical colonial commodities or other property. In colonial New York, for instance, any town that produced "caskes" (containers) "for any Liquors[,] fish, Beefe, Porke or other Commodities to be put to Sale" was to "yearely make Choice of a fitt man" to serve as a "gager" or "packer," a critical role in a colony intended to generate wealth for the Crown from the sale of such goods. 1 *The Colonial Laws of New York from the Year 1664 to the Revolution, Including the Charters to the Duke of Work, the Commissions and Instructions to Colonial Governors, the Duke's Laws, the Laws of the Dongan and Leisler Assemblies, the Charters of Albany and New York and the Acts of the Colonial Legislatures from 1691 to 1775 Inclusive* 58–59 (Albany, James B. Lyon 1894) [hereinafter *Colonial Laws of New York*]. The elected officer was then to be approved by the constable before taking his oath before the justices of the peace. *Id.* If he refused to take his oath, both he and the constable or town were to pay a fine, and another "gager" or "packer" was to be chosen in his place. And if, in the performance of his duties, he failed to "see that all Caske he Packs . . . bee . . . true and full," he would be assessed ten shillings for every defective cask packed, half of which would go to the governor and half to the person who had informed on the packer. *Id.*

215. See, e.g., Act of Sept. 26, 1772, reprinted in 5 *Laws of the Royal Colony of New Jersey, 1770–1775*, at 145, 145–47 (Bernard Bush ed., 1986) (noting that land clearance commissioners were to serve a term of years, that they were suable and removable by assembly for neglect, and that damages were to be applied to the clearance project); 1 *Colonial Laws of New York*, supra note 214, at 13, 59–65 (encouraging fines of sheriffs and constables by moiety). A moiety was a common way to incentivize private action against public officers, similar to today's *qui tam* statutes. Successful plaintiffs would receive half of the monetary award. See Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780–1940*, at 26–29 (2013).

ensuring a taking of turns.<sup>216</sup> Massachusetts's Elbridge Gerry described terms of years as a solution to "the overbearing insolence of office."<sup>217</sup> As Gerry put it, rotation "keeps the minds of man in equilibrio, and teaches him the feelings of the governed, and better qualifies him to govern in his turn."<sup>218</sup> The range and ingenuity of these pre-revolutionary statutes testify to the importance that lawmakers attached to officer accountability. Early state constitutions, replete with positions held for terms of years or on good behavior, reveal a similar focus.<sup>219</sup>

b. *State Statutes.* — After the Revolution, Americans continued to experiment with statutory solutions to the puzzle of faithful execution. One primary way in which early legislators encouraged officers' good behavior was through laws requiring officers to swear an oath and post a bond conditioned on the "faithful execution" of the duties of their office.<sup>220</sup> As Professors Andrew Kent, Ethan Lieb, and Jed Shugerman have

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216. Fish, *supra* note 132, at 80.

217. *Id.* at 81 (internal quotation marks omitted) (quoting Elbridge Gerry). To protect the independence of public offices, several constitutions underscored the importance of such offices having "an honorable stated salary, of a fixed and permanent value, amply sufficient for those purposes, and established by standing laws." Mass. Const. pt. II, ch. II, § 1, arts. 1, 2, 13 (speaking of annually elected governor); see also Pa. Const. of 1776, § 23 (establishing that supreme court judges have fixed salaries and seven-year commissions only). Professor Pfander argues that Article III's "presumption in favor of salary-based compensation" for federal judges, rather than the then-common system of fee-based compensation, was an effort both to "ward off corruption" and to discourage the expansion of federal jurisdiction through the use of legal fictions. See James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 *Mich. L. Rev.* 1, 4 (2008).

218. Fish, *supra* note 132, at 81 (internal quotation marks omitted) (quoting Elbridge Gerry).

219. Scholars have long commented on the relative weakness of the executive in early state models. See, e.g., Gordon S. Wood, *The Creation of the American Republic, 1776–1787*, at 143–50 (1969) (highlighting the connection Revolutionary-era thinkers drew between executive tyranny and the power of appointment); Miriam Seifter, *Gubernatorial Administration*, 131 *Harv. L. Rev.* 483, 493–95 (2017). Professor Peter Shane focuses on how little removal authority early state constitutions gave their chief executive officers, describing the fractured nature of gubernatorial control. Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 *U. Pa. J. Const. L.* 323, 338–44 (2016). It is striking that, at a moment of such legislative ingenuity in the area of officer accountability, unfettered executive removal authority is absent from the list of solutions these early state constitutions employed. Such an omission is strong evidence that, at the time of the Founding, executive removal authority was seen neither as essential to good governance nor as an inherent aspect of executive power.

220. See, e.g., Act of Mar. 12, 1784, ch. 44, § 1, reprinted in 1 *The General Laws of Massachusetts, from the Adoption of the Constitution, to February, 1822 with the Constitutions of the United States and of this Commonwealth, Together with Their Respective Amendments, Prefixed* 129, 129 (Theron Metcalf ed., Bos., Wells & Lilly, Cummings & Hilliard 1823) (requiring every sheriff to give sufficient security for the faithful performance of the duties of his office and to answer for the malfeasance and misfeasance of all his deputies); see also Act of July 14, 1699, ch. 9, § 1, reprinted in 1 *The Acts and*



recently shown, such obligations were “part of an anticorruption strategy” that had existed for centuries and spanned both sides of the Atlantic.<sup>221</sup> Usually, the bond would be made out to a state official, often the treasurer, to be used to indemnify those injured by the officer’s breach.<sup>222</sup> As courts adjudicated the suits filed on these bonds, they used the concepts “neglect

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Resolves, Public and Private, of the Province of the Massachusetts Bay: To Which Are Prefixed the Charters of the Province with Historical and Explanatory Notes, and an Appendix 381, 381 (Bos., Wright & Potter 1869) (requiring the sheriff to give security “unto the king’s majesty” at the discretion of the sessions for the due and faithful discharge of his office).

221. Kent et al., *supra* note 27, at 2151 n.231. In England, for instance, a sheriff had to answer for the escape of people held in a county jail and thus had to possess “sufficient lands within the county” to cover the expense. See 1 Blackstone, *supra* note 160, bk. I, ch. 9, at 346 & n.18.

222. See, e.g., *Skinner v. Phillips*, 4 Mass. 68, 73–74 (1808) (“[W]here the commonwealth has received no injury . . . the damages are to be recovered . . . for the use . . . of those who have suffered them and . . . the state treasurer is a mere trustee of the bond for the use of those who may suffer a breach of its condition . . .”).

of duty”<sup>223</sup> and “malfeasance in office”<sup>224</sup> to liquidate the meaning of faithful execution,<sup>225</sup> along with “misfeasance,”<sup>226</sup> “nonfeasance,”<sup>227</sup> “misconduct,”<sup>228</sup> and “non-user.”<sup>229</sup> Did a coroner breach his bond of faithful performance by seizing a wagon that he erroneously believed to belong to a debtor against whom he was to execute a writ?<sup>230</sup> Had a constable

223. *People ex rel. Kellogg v. Schuyler*, 4 N.Y. 173, 180 (1850) (“Where the duty exists, and it is neglected, or performed in an improper manner, the sureties upon the principle should be liable, otherwise not.”); *id.* at 192 (“There is clearly a duty resting upon the sheriff, not only to return the writ but to return it truly. If he should fail to do so, it would most clearly be a violation of official duty.”); *People v. Spraker*, 18 Johns. 390, 396 (N.Y. 1820) (examining whether a sheriff’s alleged neglect of duty by failing to execute a writ must be “judicially ascertained”).

224. *Harris v. Hanson*, 11 Me. 241, 245–46 (1834) (holding that “[i]t is malfeasance [in office], if the officer under color of his office does what the law prohibits” and that “[m]alfeasance in office is . . . a breach of the condition for faithful performance”); *Skimmer*, 4 Mass. at 73 (concluding that malfeasance in office violates the defendant’s oath to “faithfully execute all the duties of his office” and that “the condition of the bond is broken by the malfeasance of the sheriff in his office”); 2 John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States* 90 (Phila., T & J.W. Johnson 1839) [hereinafter Bouvier, 1839 ed.] (defining “malfeasance” as “the unjust performance of some act which the party had no right, or which he had contracted not to do”).

225. Justice Kagan implies such a correspondence in her recent dissent in *Seila Law*, writing that INM would allow the President to remove the CFPB Director for “a failure to ‘faithfully execute[]’ the law, as well as for basic incompetence.” *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2238 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (quoting U.S. Const. art. II, § 3).

226. Misfeasance is a distinct concept from malfeasance. See supra note 224. Rather than an “unjust performance of some act which the party had no right . . . to do,” a misfeasance is “the performance of an act *which might lawfully be done*, in an improper manner, by which another person receives an injury.” Bouvier, 1839 ed., supra note 224, at 135 (emphasis added). Misconduct, see infra note 228, often encompasses both misfeasance and malfeasance. See, e.g., *Commonwealth v. Barry*, 3 Ky. 229, 246–47 (1808) (describing instances of misfeasance and malfeasance as misconduct).

227. “[T]he non performance of some act which ought to be performed.” Bouvier, 1839 ed., supra note 224, at 186. Nonfeasance is distinct from misfeasance and malfeasance. See supra note 226; see also *Earl of Shrewsbury’s Case* (1611) 77 Eng. Rep. 798, 805; 9 Co. Rep. 46 a, 50 b (KB).

228. “Unlawful behavior by a person intrusted [sic] in any degree with the administration of justice, by which the rights of the parties and the justice of the case may have been affected.” 2 John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States* 240 (15th ed. 1885) [hereinafter Bouvier, 1885 ed.]. Misconduct does not appear in the 1839 edition.

229. “[T]he neglect to make use of a thing . . . Every public officer is required to use his office for the public good; a non-user of a public office is therefore a sufficient cause of forfeiture.” Bouvier, 1839 ed., supra note 224, at 186 (citing 1 Blackstone, supra note 160, bk. II, ch. 10, at 153); see also *People ex rel. Kellogg v. Schuyler*, 4 N.Y. 173, 179 (1850) (“If he had neglected to act without some legal excuse, it would have been a nonfeasance; if he had acted wrongfully in attempting to obey the mandate, it would have been a misfeasance . . .”).

230. See *Harris v. Hanson*, 11 Me. 241, 245–46 (1834) (holding that the defendant’s act constituted malfeasance in office and thus breached the condition of his bond); *Kellogg*, 4

breached his official duty by seizing property whose value exceeded the maximum he was permitted to seize under the statute?<sup>231</sup> In determining whether an officeholder who had engaged in such “misbehavior”<sup>232</sup> had breached the condition of his bond, judges engaged in the ongoing, mutually constitutive process by which courts and legislatures gave shape and color to the meaning of an officer’s faithful execution.

In addition to making officers accountable to those wronged by their failure to faithfully execute their duties, legislatures encouraged faithful execution in several other ways. Pennsylvania made officers of various tenures liable for fines or forfeiture for “neglect of duty.”<sup>233</sup> Sheriffs, justices of the peace, burgesses, appraisers, overseers of the poor, officers in the militia, constables, coroners, and supervisors of the public roads were also liable for monetary penalties for “neglecting” or “refusing” to execute their offices.<sup>234</sup> Some officials, like the clerk of the market, could be removed for “malfeazance,”<sup>235</sup> while others could not be removed short of impeachment,<sup>236</sup> so that personal liability for neglect and misconduct existed as a separate deterrent and remedy. New York employed a similar mechanism for firemen,<sup>237</sup> inspectors of beef and pork,<sup>238</sup> highway supervisors,<sup>239</sup> surveyors,<sup>240</sup> and public auctioneers,<sup>241</sup> who were either made subject to specific fines and penalties for neglect or “fraud” (in the case of inspectors of beef and pork) or made liable to suit by the government. Virginia, too, imposed monetary forfeiture on officials—like

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N.Y. at 173 (finding that a sheriff who seized the wrong person’s goods had committed official misconduct in breach of his bond); see also *Lammon v. Feusier*, 111 U.S. 17, 21 (1884) (citing cases affirming the liability of the sureties of an officer).

231. See *City of Lowell v. Parker*, 51 Mass. (10 Met.) 309, 313 (1845).

232. “Improper or unlawful conduct.” Bouvier, 1885 ed., *supra* note 228, at 239. Misbehavior does not appear in the 1839 edition.

233. Act of June 21, 1781, ch. 945, § 7, 1781 Pa. Laws 337, 342.

234. See Act of Apr. 10, 1807, ch. 132, § 17, 1807 Pa. Laws 259, 265 (justices of the peace); Act of Mar. 27, 1784, ch. 134, § 7, 1784 Pa. Laws 188, 190 (appraisers); Act of Sept. 12, 1783, ch. 76, §§ 10, 27, 1783 Pa. Laws 124, 128, 134 (burgesses, constables, and supervisors of the highways); Act of Mar. 21, 1783, ch. 67, §§ 10, 16, 1783 Pa. Laws 105, 108, 110 (officers in the militia); Act of Mar. 16, 1779, ch. 828, § 1, 1779 Pa. Laws 320, 320–21 (sheriffs, coroners, constables, overseers of the poor, and supervisors of the highway).

235. See Act of Apr. 13, 1782, ch. 14, § 9, 1782 Pa. Laws 25, 29.

236. See Pa. Const. of 1776, § 22.

237. Act of Mar. 26, 1803, ch. 58, § 4, 1803 N.Y. Laws 242, 243.

238. Act of Apr. 9, 1804, ch. 98, § 11, 1804 N.Y. Laws 630, 633.

239. See Act of Feb. 22, 1803, ch. 14, § 3, 1803 N.Y. Laws 325, 326 (stating that if the superintendents of highways “refuse or neglect to account with the supervisors . . . then it shall be the duty of the said supervisors” to notify the treasurer to prosecute the superintendents “by an action of debt”).

240. Act of Mar. 9, 1790, ch. 22, § 11, 1790 N.Y. Laws 299, 304.

241. Act of Feb. 20, 1784, ch. 4, § 3, 1784 N.Y. Laws 590, 592.

sheriffs,<sup>242</sup> justices of the peace,<sup>243</sup> and “[i]nspectors of fish”<sup>244</sup>—who neglected or refused to perform their duties.

States also regularly separated the power to remove from the power to appoint, and they continued to use the three tenures that James Madison had identified as central to republican officeholding: “at pleasure,” “good behavior,” and “for a limited period,” otherwise known as a term of years.<sup>245</sup> Some states, such as Virginia, began to specify removal grounds with a particularity that went beyond “good behavior.” Starting in 1796, Virginia passed a series of statutes regulating the inspection of economically vital tobacco warehouses. These laws provided that the courts should annually appoint commissioners “of capacity and integrity” to oversee the court-appointed inspectors of the state’s tobacco warehouses.<sup>246</sup> The commissioners were to report to the governor “any negligence or breach of . . . duty . . . if it be of such a nature as to remove such inspector from office” while certifying “such neglect or breach of duty” to the court so that the court might “proceed against him according to law.”<sup>247</sup> A little over four years later, Virginia amplified its oversight regime, requiring that the warehouses’ superintendents “be subject to the same remedies, penalties, forfeitures and incapacities that inspectors of tobacco are by law liable to for the misfeasance, non feasance and malfeasance in office.”<sup>248</sup>

In 1828, the commissioners appointed to revise New York’s statutes<sup>249</sup> proposed amending the state’s laws governing its prisons to provide that the prisons’ agents and clerks “be nominated by the governor, and appointed with the consent of the Senate” to “hold their offices for four years,” but that they be removable “by the inspectors of their respective prisons, for misconduct or neglect of duty.”<sup>250</sup> Under the current law, the

242. Act of Dec. 10, 1793, ch. 9, § 2, 1793 Va. Acts 21, 21.

243. Act of Dec. 24, 1792, ch. 120, § 6, 1792 Va. Acts 233, 234.

244. A Table of Fines, Forfeitures, Penalties and Amercements, *in* 2 Collection of All Such Acts of the General Assembly of Virginia of a Public and Permanent Nature as Have Passed Since the Session of 1801, at 213, 218 (Samuel Pleasants, Jr. ed., 1808) (“Inspectors of fish neglecting their duty in attending to inspect, or stamping any barrel contrary to the directions of the act, forfeit for each neglect of duty, and for each barrel of fish not duly qualified, one dollar—*To the informer.*”).

245. See *supra* note 118 and accompanying text.

246. Act of Dec. 26, 1796, ch. 12, § 1, 1796 Va. Acts 12, 12.

247. *Id.*

248. Act of Jan. 2, 1801, ch. 23, § 4, 1801 Va. Acts 14, 15.

249. The legislature had appointed Benjamin Butler, John Spencer, and John Duer as commissioners to revise the state’s statutes. Butler and Spencer proposed the revisions here in the fourth part of the commissioners’ report and included explanatory notes to the legislature throughout the text of the report. B.F. Butler & J.C. Spencer, Report of the Commissioners Appointed to Revise the Statute Laws of This State, pt. 4 (Albany, Crosswell & Van Benthuyzen 1828).

250. Butler & Spencer, *supra* note 249, ch. 3, tit. 2, art. 1, § 14, at 15.

commissioners explained, the prisons' inspectors appointed their own clerks; switching their appointment to the governor and Senate was intended to "secure their independence," a change that was deemed "particularly important" when it came to the clerks (who were, presumably, the prisons' bookkeepers).<sup>251</sup> Yet the commissioners did not wish to sever the relationship between the clerk and the inspector entirely: "[I]t is obvious," they explained, "that the inspectors should have power to remove for misconduct or neglect of duty."<sup>252</sup> The commissioners' logic is a striking echo of that which lay behind Parliament's revisions to the tenure of the county clerk at issue in *Harcourt*.<sup>253</sup> By separating the power of removal from the power of appointment, the commissioners hoped to make the inspector and the clerk checks on each other, aligning their accountability in a way that would maximize oversight and minimize opportunities for corruption.

As the states began to commission officials to oversee more complex infrastructural projects like schools, prisons, railroads, and canals, they also incorporated the terms "neglect of duty" and "malfeasance in office" into statutes as grounds for removing officials otherwise tenured for a term of years.<sup>254</sup> Statutes with these removal grounds were the subject of suit in state courts, and a body of law interpreting the terms developed.<sup>255</sup> By the time Congress incorporated INM into the U.S. Code in 1887, there was

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251. *Id.*

252. *Id.*

253. See *supra* notes 189–210 and accompanying text.

254. See, e.g., Safety Fund Act, ch. 91, § 23, 1829 N.Y. Laws 167, 171 (providing that the governor might remove the state's three banking commissioners prior to the end of their terms for "misconduct or neglect of duty").

255. See, e.g., *Page v. Hardin*, 47 Ky. (8 B. Mon.) 648, 672–77 (1848) (examining whether the governor can remove the Secretary of State for neglect of duty as a violation of the term of office "during good behavior" and concluding that the "Secretary is not removeable either at the pleasure of the Governor, or on his judgment for a misdemeanor . . . in office"); *Commonwealth ex rel. Bowman v. Slifer*, 25 Pa. 23, 28 (1855) (concluding that the "omission to give bond" is "not a neglect of official duty for which the governor is authorized to remove an incumbent duly commissioned for a term of years"). Professor Miriam Seifter has characterized state courts' treatment of agency independence as differing markedly from that of their federal counterparts, in that state courts largely embrace "ordinary interpretation" of "directly relevant statutes and constitutional clauses" and eschew the federal courts' "abstract, categorical approach." Miriam Seifter, *Understanding State Agency Independence*, 117 Mich. L. Rev. 1537, 1544 (2019) (internal quotation marks omitted) (citing John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 1941 (2011)). This approach, Professor Seifter argues, accords with the "judicial[ly] modest[]" approach to agency independence that many scholars have advocated at the federal level. *Id.* The cases cited herein largely support this characterization, rendering their interpretation of state law removal provisions particularly useful guides to the meanings of the terms that Congress ultimately codified in 1887. See *id.*

nothing novel about the concepts of either neglect of duty or malfeasance in office.<sup>256</sup>

3. *Inefficiency and the Spoils System.* — In addition to tackling the longstanding problems of neglect of duty and malfeasance in office, legislators over the course of the nineteenth century developed novel methods to encourage competent, methodical execution of the laws. Seeking to prevent ineffective and wasteful administration, these legislators introduced a new term to the removal lexicon, “inefficiency,” completing the INM framework that is so prevalent today. This section describes the factors that led to the incorporation of “inefficiency” in Indiana state law in 1843, as well as the concept’s relevance to post–Civil War reforms concerning the federal civil service. In the second half of the nineteenth century, “inefficiency” was associated not only with incompetence but with the wasteful expenditure of government resources resulting from the “spoils system,” in which key offices were distributed on the basis of political favoritism rather than merit. The term was thus added to the removal lexicon at both the state and federal levels to enhance bureaucratic effectiveness.

a. *The Case of Indiana.* — The middle decades of the nineteenth century saw an uptick in state experimentation with tenures in office. Just

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256. Professor Aditya Bamzai recounts an illuminating instance of a for-cause removal during Taft’s presidency. See Bamzai, *supra* note 137, at 733–37. He describes the findings of a 1913 report by a commission assembled by Taft (which included future Justice Frankfurter) recommending the removal of two members of the Board of General Appraisers, which Congress had established in 1890 to adjudicate disputes over duty appraisals. The Report recommended removal of the members for “malfeasance in office” and “neglect of duty,” finding, among other things, that one member had used “official power to compel personal favors” from railroads and had interfered in adjudications before the Board to aid his son, a litigator. *Id.* at 734–35 (internal quotation marks omitted) (quoting President’s Comm. of Inquiry on the Proc., Prac., Admin. Methods & Pers. of the Bd. of the U.S. Gen. Appraisers, Separate Report on the Personnel 1–2, 4, 6–8 (1913), microformed on The Papers of Felix Frankfurter (1983), reel 31 (Libr. of Cong.) [hereinafter Separate Report on the Personnel]). The Report’s legal analysis, which Bamzai describes as “sparse,” nevertheless reinforces this Article’s conclusions, interpreting malfeasance as “misconduct,” “impropriety of conduct,” “maladministration,” or “misbehavior showing clear and flagrant disqualification and unfitness to exercise the office” and likening the term to the Constitution’s “high crimes and misdemeanors” standard. *Id.* at 736 (internal quotation marks omitted) (quoting Separate Report on the Personnel, *supra*, at 12). The other member was found to be “incompetent”—a term used as a synonym for inefficient—because he had “personal habits [that] destroy[ed] his usefulness as a member” and lacked “the necessary qualifications for the performance of his duties”; the fact that he was not a lawyer and did not possess “a natural aptitude for [the relevant] kind of [classification] work” rendered him, in the eyes of the committee, “totally useless to the Board,” while his alcohol consumption had “brought scandal upon the Board.” *Id.* at 736–37 (internal quotation marks omitted) (quoting Separate Report on the Personnel, *supra*, at 13–14). Taft accepted the committee’s recommendations and dismissed the members for malfeasance, neglect, and inefficiency in letters sent on his last day in office; neither member pursued a legal challenge. See *id.* at 738.

as other laws sought to protect states' most valuable investments, midcentury tenure experiments often aimed to ensure competent management of ambitious state building projects such as railroads, canals, and banks. The experience of Indiana, one of the first states to use the INM standard in a removal statute, helps to tell the story.<sup>257</sup>

In 1836, Indiana invested heavily in a statewide system of canals and railroads.<sup>258</sup> The legislation enacting the projects was projected to cost over \$10 million, to be funded by bonds backed by state credit.<sup>259</sup> In 1838, the governor informed the state's legislative assembly that while the interest then due on the projects was \$193,350, the state's tax revenue was only \$45,000.<sup>260</sup> One year later, the problem was significantly exacerbated by the collapse of the Morris Canal and Banking Company, which had received millions of dollars in Indiana state bonds on the promise of large cash repayments.<sup>261</sup> Work stopped on all internal improvements in August 1839.<sup>262</sup>

By 1841, Indiana needed to significantly tighten its belt. That December, the governor reported to the legislature that "Indiana has been in many instances the victim of preconcerted imposition and fraud."<sup>263</sup> He urged further investigation and advised the legislature, "with a view to the

257. A law using inefficiency in the tenure context prior to Indiana's 1843 code has not been found, but there are several examples from the years that followed. See, e.g., Act of Mar. 30, 1860, ch. 53, § 2, 1860 Iowa Acts 410, 410 ("The governor shall have power to remove such commissioner for inefficiency and misconduct in the discharge of the duties of his office, and to appoint some proper person in his place."); Act of May 1, 1873, ch. 6, § 53, 1873 Ohio Laws 195, 209–10 ("The board of education of each school district shall have . . . power to dismiss any appointee for inefficiency, neglect of duty, immorality or improper conduct . . .").

258. See, e.g., Logan Esarey, *A History of Indiana: From Its Exploration to 1850*, at 363–65 (1915).

259. Naomi R. Lamoreaux & John Joseph Wallis, *Fixing the Machine that Would Not Go of Itself: State Constitutional Change and the Creation of an Open-Access Social Order in the Mid-Nineteenth-Century United States* 29–30 (Sept. 16, 2018) (unpublished manuscript), <https://economics.yale.edu/sites/default/files/files/Faculty/Lamoreaux/Lamoreaux%20Wallis%2C%20Fixing%20the%20Machine%2C%202018-09-16.pdf> [<https://perma.cc/3G3S-WQ7Z>]; see also Naomi R. Lamoreaux & John Joseph Wallis, *General Laws and the Mid-Nineteenth-Century Transformation of American Political Economy: Massachusetts, New York, Indiana, and Beyond* 22–23 (Oct. 4, 2019) (unpublished manuscript), <https://ccl.yale.edu/sites/default/files/files/Lamoreaux%20and%20Wallis%2C%20General%20Laws%2C%202019-10-04.pdf> [<https://perma.cc/N5QG-HFWN>] [hereinafter Lamoreaux & Wallis, *General Laws*].

260. Esarey, *supra* note 258, at 368.

261. Lamoreaux & Wallis, *General Laws*, *supra* note 259, at 24–27. Logan Esarey describes other financial shenanigans, such as how one group of canal commissioners kept no books and whose poor management was what "finally bankrupted the State." Esarey, *supra* note 258, at 373.

262. Esarey, *supra* note 258, at 373.

263. Governor's Message, *Wabash Courier* (Terre Haute, Ind.), Dec. 11, 1841 (on file with the *Columbia Law Review*).

most rigid economy,” to trim the public works staff, ensuring that those retained “are competent, and under a proper supervision.”<sup>264</sup>

The following February, the state adopted a raft of legislative reforms, including several changes to office tenure.<sup>265</sup> The Indiana Constitution, ratified in 1816, addressed the selection and tenure of state officers only sparingly, hewing closely to the federal model and leaving it to the legislature to supply the details.<sup>266</sup> Seeking to ensure faithful execution of government work, the reforms included a range of new offices and tenures. Specific canal, railroad, and turnpike agents would be elected by the Indiana General Assembly for two-year terms “subject to removal, at any time, by joint resolution of the general assembly.”<sup>267</sup> The superintendent of the state prison, which had been the subject of frequent “rumors . . . of mismanagement and want of proper attention,”<sup>268</sup> would be elected by the General Assembly to a five-year term, removable by joint resolution only “for misconduct, inefficiency, or neglect of duty in his office.”<sup>269</sup> The governor’s private secretary would be appointed by the governor and serve a one-year term on good behavior; notary publics, also appointed by the governor on good behavior, would serve five years.<sup>270</sup> The clerk of the state prison would likewise be appointed by the governor to a five-year term, but could be removed by the governor “for incompetency, neglect of duty, or maleconduct [sic] in office.”<sup>271</sup> The prison’s visitor,<sup>272</sup> meanwhile, would be appointed by the governor to a one-year term with no removal provision, but no one from the town of Jeffersonville—the

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264. *Id.*

265. The governor’s proposals were part of a revised code he had drafted at the legislature’s behest. The legislature apparently saw no constitutional problem with asking a sitting executive to rewrite the state’s laws. On the muddying of lines between the branches of government where statutory revision was concerned, see Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 *Md. L. Rev.* 712, 717 (2018). On the nineteenth-century American codification movement and the spread of state codes in general, see Kellen Funk & Lincoln Mullen, *The Spine of American Law: Digital Text Analysis and U.S. Legal Practice*, 123 *Am. Hist. Rev.* 132, 137 (2018).

266. The 1816 Constitution specified that the governor “shall nominate, and, by and with the advice and consent of the senate, appoint and commission all officers, the appointment of which is not otherwise directed by this Constitution, and all offices . . . created by the General Assembly, shall be filled . . . as . . . directed by law.” *Ind. Const. of 1816*, art. IV, § 8.

267. 1843 *Ind. Rev. Stat.*, ch. 4, § 36.

268. Governor’s Message, *supra* note 263.

269. 1843 *Ind. Rev. Stat.*, ch. 4, § 37.

270. *Id.* §§ 39–40.

271. *Id.* § 41.

272. The visitor of an eleemosynary institution was charged with ensuring that it was continuing to serve the purpose for which it had been created. See 1 Blackstone, *supra* note 160, bk. I, ch. 18, at 478–79.



town in which the prison was located, and the source of frequent complaints of prison mismanagement<sup>273</sup>—was eligible for the role.<sup>274</sup>

The judges of the supreme court would be appointed on good behavior by the governor with the advice and consent of the senate but would be limited to a seven-year term.<sup>275</sup> The supreme court could appoint its own clerk to a seven-year renewable term, but it possessed no removal authority before those seven years were up.<sup>276</sup> The court's sheriff would also be appointed by the court and could be removed by the court at any time "for inefficiency, neglect of duty, or maleconduct in office."<sup>277</sup>

Indiana's inventive use of the tenure toolkit reveals both anxieties about the state's governance and a belief that strategically crafted office tenures could solve the problems of government corruption, mismanagement, and waste. By including "inefficiency" as grounds for removing the prison superintendent and the court's sheriff, Indiana used a word whose meaning shifted over the course of the nineteenth century from a synonym for ineffectiveness to something closer to our current understanding of minimization of waste, especially where that waste resulted from self-interested dealing.<sup>278</sup> The legislature used the word purposefully, focusing

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273. See Governor's Message, *supra* note 263.

274. 1843 Ind. Rev. Stat., ch. 4, § 42.

275. *Id.* §§ 44–45.

276. *Id.* § 46.

277. *Id.* § 47. The specification of "misconduct" in the case of the prison superintendent and "maleconduct" in the case of the prison clerk and the supreme court's sheriff was likely not an instance of sloppy drafting but rather deliberate references to two different kinds of misbehavior. While neither word was included in law dictionaries of the period, see, e.g., Bouvier, 1839 ed., *supra* note 224, words such as "malfeasance," "misfeasance," and "misbehavior" were. On the basis of the distinctions among these terms, we speculate that misconduct referred to a pattern of misfeasance, which was in turn "the performance of an act which might lawfully be done, in an improper manner, by which another person receives an injury." *Id.* at 135. Maleconduct, meanwhile, was probably used to refer to a pattern of illegal acts. See, e.g., *id.* at 90 ("Malfeasance . . . is the unjust performance of some act which the party had no right, or which he had contracted not to do. It differs from misfeasance . . . and nonfeasance . . .").

278. See generally Jennifer Karns Alexander, *The Mantra of Efficiency: From Waterwheel to Social Control* (2008) (tracing, through six case studies, the evolution of "efficiency" from a term applied mainly to machines to one applied to human behavior); Samuel Haber, *Efficiency and Uplift: Scientific Management in the Progressive Era, 1890–1920* (1964) (offering an intellectual history of the influence of the idea of efficiency on major progressive political thinkers and proposals, including the importance of a strong executive and the separation of politics from administration); Emmette S. Redford, *Ideal and Practice in Public Administration* 4 (1958) ("Until the twentieth century [efficiency] seems to have been synonymous with effectiveness in achieving results, i.e. without respects to costs incurred . . . . But the literature of . . . public management made men familiar with the idea that achievement of results with unnecessary expenditure of effort, time, and money was obviously inefficiency."); Efficient, Merriam-Webster, <https://www.merriam-webster.com/dictionary/efficient> [<https://perma.cc/Z9E9-8UFL>] (last visited Oct. 20, 2020) (defining "efficiency" as "productive of desired results; especially: capable of

on positions where competence and honesty were at a premium. The superintendent oversaw an institution that took up a sizable chunk of state resources and was rumored to use them in a profligate (if not corrupt) manner. In a state desperate for revenue, meanwhile, the supreme court sheriff's timely and effective performance of his duties—in particular, serving writs of attachment—was key to the state's ability to collect on its debts. Adding inefficiency to the lexicon of removal law was an effort to relieve Indiana's financial burdens by ensuring that its officers did their jobs competently and honestly.

b. *Civil Service Reform*. — In the aftermath of the Civil War, efficiency became a prime objective for lawmakers who sought to reduce the size and cost of government, as peacetime brought a focus on taxpayer relief.<sup>279</sup> This emphasis on financial austerity dovetailed with a growing hostility to patronage practices that both parties had used for decades to reward party loyalists with federal jobs.<sup>280</sup> The most vocal opponents of the patronage power were people who saw themselves as outside of and above politics: lawyers and businessmen who sought to use principles of economy and

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producing desired effects with little or no waste (as of time or materials)"). Case law from this period suggests both this earlier sense and the term's gradual and ongoing shift in meaning. Examples of the term's earlier usage include: *Lowry v. The Portland*, 15 F. Cas. 1052, 1052, 1056 (D. Mass. 1839) (dismissing a suit against a steamship where the collision had not been caused by the captain's "gross carelessness, inefficiency, and mismanagement"); *Bulkley v. Chapman*, 11 Conn. 5, 8–9 (1831) (describing a poorly conceived deed that threatened to frustrate the intent of the parties, thanks to the "inefficiency" of the contract); and *Boyle v. Reeder*, 23 N.C. 607, 613 (1841) (Ruffin, C.J.) (holding that a jury could award damages for "the inefficiency of the work" involved in a made-to-order engine, "whether arising from the badness of the materials or workmanship, or because it did not correspond in form and parts with the contract"). Cases arising during and after the Civil War that reflect the term's evolving meaning include: *Smith v. Whitney*, 116 U.S. 167, 169, 182 (1886) (declining to prohibit court-martial from trying a Navy officer on a charge of "culpable inefficiency in the performance of duty" for unlawfully altering terms of supplier contracts); *Providence Tool Co. v. Norris*, 69 U.S. 45, 54 (1864) (Field, J.) (finding that an agreement promising compensation upon the procurement of a government contract to furnish war supplies is unenforceable, as such agreements "directly lead to inefficiency in the public service" and instead suggesting such contracts go to "those . . . who will execute them most faithfully, and at the least expense"); *Hudson v. State*, 76 Ga. 727, 731 (1886) (finding that a lawyer drunk at his client's trial for murder might be judged "inefficient"); *People ex rel. Campbell v. Campbell*, 82 N.Y. 247, 252 (1880) (noting that the fact that an arch had been constructed imperfectly and with bad material "prove[d] inefficiency or dishonesty" on the part of the supervising city engineer). In the *Hudson* case, note that the language resembles the contemporary "ineffective assistance of counsel" standard. See *Strickland v. Washington*, 466 U.S. 668, 691–92 (1984).

279. See A. Bower Sageser, *The First Two Decades of the Pendleton Act: A Study of Civil Service Reform 17* (1935) (describing the public desire for a return to prewar expenditures); Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920*, at 50 (1982) (describing the widely held interest in retrenchment).

280. See Skowronek, *supra* note 279, at 50–53; see also Fish, *supra* note 132, 210–12.

efficiency to break party corruption and lower tax bills in the process.<sup>281</sup> It was their belief that efficiency was the key to effective government and could only be achieved by extracting politics from administration that motivated Congress's civil service reform efforts from 1865 through the passage of the first major reform law, the Pendleton Act, in 1883.<sup>282</sup>

Between 1865 and 1868, Rhode Island's Thomas Allen Jenckes, a wealthy lawyer, a member of Congress's Joint Select Committee on Retrenchment,<sup>283</sup> and a staunch ally of civil service reformers, introduced several bills and reports aimed at overhauling government administration.<sup>284</sup> "Let us seek," Jenckes urged his colleagues, "to obtain skill, ability, fidelity, zeal and integrity in the public service, and we shall not be called upon to increase salaries or the number of offices."<sup>285</sup> By rooting out "inefficient" men and replacing them with "competent" ones, he assured, the "efficiency of the whole force of the civil service [will be] increased [by] one half."<sup>286</sup> By overhauling the civil service, Jenckes and his colleagues promised to eradicate what they saw as inextricably connected evils: wasteful government spending and the patronage power.

To achieve these objectives, the Select Committee proposed to establish a civil service commission to determine eligibility criteria for civil

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281. See Martin J. Schiesl, *The Politics of Efficiency: Municipal Administration and Reform in America, 1800–1920*, at 8–10 (1977); Skowronek, *supra* note 279, at 52.

282. See Skowronek, *supra* note 279, at 51–53. On separating politics and administration, see Woodrow Wilson, *Congressional Government* 263–65 (1885).

283. The Committee was formed by joint resolution on July 19, 1866. See H.R. Rep. No. 39-8, at 1 (1867). Prior to the Select Committee's creation, Jenckes was a member of the Select Committee on the Civil Service, and it was in this capacity that he introduced his 1866 reform bill. H.R. 673, 39th Cong. (1866).

284. See Fish, *supra* note 132, at 210–12; Sageser, *supra* note 279, at 15–19; Skowronek, *supra* note 279, at 51. Charles Sumner had introduced a bill aimed at civil service reform in 1864, but Sageser, Skowronek, and Fish identify Jenckes's bill as the start of the legislative movement for reform. Notably, Sumner's bill omits any mention of efficiency but does specify that applicants for the civil service examination shall be "citizens," a category he defines to include "all persons born in the United States, and not owing allegiance elsewhere." See 8 Charles Sumner, *The Works of Charles Sumner* 453 (Boston, Lee & Shepard 1883). In 1864, four years before the Fourteenth Amendment constitutionalized birthright citizenship, this was a boldly egalitarian claim. The bill also contained a proviso stipulating that although civil service posts within a particular state's borders were to go to applicants who had lived in that state for at least one year preceding the applicant's examination, the President could suspend this requirement for any state or portion of a state as he saw fit. See *id.* These specifications suggest that at least part of Sumner's focus in proposing civil service legislation was to ensure that African Americans would be eligible for federal jobs at the war's end, that their candidacies would be assessed at least in part on the basis of merit, and that civil service positions in the South would not be limited to longtime locals with uncertain allegiances. See 4 Edward L. Pierce, *Memoir and Letters of Charles Sumner, 1860–1874*, at 190–92 (Boston, Roberts Brothers 1893).

285. Cong. Globe, 39th Cong., 2d Sess. 838–39 (1867) (statement of Rep. Jenckes).

286. *Id.*

service officers<sup>287</sup> and to identify and rank promising candidates through a civil service exam.<sup>288</sup> Removal, crucially, would also be limited under the Committee's plan: The commission would have the "power to prescribe, by general rules, what misconduct or inefficiency shall be sufficient for the removal or suspension" of civil service officers, and to "establish rules" for the "trial of the accused."<sup>289</sup> In the words of British reformer John Stuart Mill, whose writings the Select Committee frequently quoted, limitations like these were necessary to enable the civil service to attract serious professionals. "With regard to that large and important body which constitutes the permanent strength of the public service," Mill had written,

those who do not change with changes of politics, but remain to aid every minister by their experience and traditions . . . those, in short, who form the class of professional public servants, entering their profession as others do while young . . . ; it is evidently inadmissible that these should be liable to be turned out, and deprived of the whole benefit of their previous service, except for positive, proved, and serious misconduct.<sup>290</sup>

By limiting removal to proven instances of inefficiency or misconduct, the latter a category that Mill's excerpt defined as including unlawful acts, "voluntary neglect of duty, or conduct implying untrustworthiness for the purposes for which . . . trust is given,"<sup>291</sup> Jenckes and his colleagues hoped to attract highly promising civil service candidates and inspire in them earnestness, diligence, and an "esprit du [sic] corps" that would prove a powerful "stimulant to success."<sup>292</sup> In employing the term "inefficiency," they used a word whose meaning had been established by case law.<sup>293</sup> Like

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287. The bill applied to all civil officers who were not required by law to be appointed by the President with the advice and consent of the Senate. See Thomas Allen Jenckes, Joint Select Comm. on Retrenchment, *The Civil Service: Report of Mr. Jenckes, of Rhode Island, from the Joint Select Committee on Retrenchment, Made to the House of Representatives of the United States, May 14, 1868*, at 217 (Wash., D.C., Gov't Printing Off. 1868) [hereinafter Jenckes, *Civil Service Report*].

288. Jenckes specified that women as well as men were eligible for the civil service—this alone, he assured, would generate considerable savings, presumably because women would command lower salaries. See *id.* at 219; Sageser, *supra* note 279, at 17.

289. Jenckes, *Civil Service Report*, *supra* note 287, at 218.

290. H.R. Rep. 39-8, at 4 (1867) (quoting John Stuart Mill).

291. *Id.*

292. Cong. Globe, 39th Cong., 2d Sess. 841 (1867) (statement of Rep. Jenckes). In the civil service reform bill Jenckes introduced in June 1866, he used "malfeasance" as a term encompassing both inefficiency and misconduct. See H.R. 673, 39th Cong. § 5 (1866).

293. See *supra* note 278; see also State ex rel. Hart v. Common Council of Duluth, 55 N.W. 118, 121 (Minn. 1893) (explaining that "incompetency might result from physical disability, from mental disability, or from lack of integrity" and that "inefficiency might consist of habitual neglect of duty, incapacity to preserve discipline, or of a variety of things").

neglect and malfeasance, inefficiency required notice and a hearing,<sup>294</sup> and it had an objective rather than a subjective meaning: An officer could not be replaced simply because the would-be remover believed someone else was more “efficient.”<sup>295</sup> Inefficiency, in the states and in the series of civil service reform bills put forward over the next fifteen years, was a high bar to removal: Inefficient employees were those whose actions demonstrated that they could not be relied on to do the job they were hired to do.

C. *The Birth of the Independent Commission*

The need for federal regulation of the nation’s increasingly complex economy led Congress to incorporate state innovations in federal office design: to create offices for a term of years with discrete removal permissions to ensure maximum effectiveness and administrative efficacy. This section examines the creation of the ICC, the independent agency that first featured INM and that served as the model for the dozens of independent agencies that Congress has established in the years since.<sup>296</sup> As we demonstrate, Congress’s decision to incorporate INM in the ICC’s enabling statute was based on the lessons it drew from earlier state efforts at regulation—efforts that taught federal legislators that for the commis-

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294. See, e.g., *Lynch v. Chase*, 40 P. 666, 666–67 (Kan. 1895) (noting that “it is well settled that where an officer is chosen for a definite term, and provision is made for his removal for cause, the causes for removal must be alleged, the party notified, and a hearing had” before removal for “inefficiency, immorality, misconduct,” or inattention to duty); *Hart*, 55 N.W. at 119 (explaining that removal of a fire commissioner for “inefficiency” is “adversary and judicial” in nature, requires notice and a hearing, and “may be reviewed on certiorari”); *People ex rel. Campbell v. Campbell*, 82 N.Y. 247, 250–51 (1880) (explaining that the standard for removal of the chief engineer of the department of public works for inefficiency is high because protection given to his tenure is “substantial and effective” rather than “merely shadowy or formal”); *People ex rel. Munday v. Bd. of Fire Comm’rs*, 72 N.Y. 445, 449–50 (1878) (requiring that removal of a fire department clerk be for cause, meaning “some dereliction or general neglect of duty, or incapacity to perform the duties, or some delinquency affecting his general character and his fitness for office,” and that cause be explained in the notice and at a hearing).

295. See, e.g., *Hart*, 55 N.W. at 121 (striking as legally insufficient charges of inefficiency against a fire commissioner, explaining that inefficiency “might consist of habitual neglect of duty” or “incapacity to preserve discipline” and that to be legally sufficient the charges must “advise the officer in what respect he is claimed to be . . . inefficient”); *Munday*, 72 N.Y. at 449 (noting that where removal is “for cause,” the cause invoked must be “personal to [the officeholder],” meaning the availability of “a better man than the accused, or [one] more congenial to the appointing or removing power is . . . no cause of removal within the statute”).

296. Professor Jerry Mashaw notes that the ICC was far from the first independent federal agency, a label he assigns to the Patent Office, created ninety-seven years earlier. Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* 5 (2012).

sion to be effective, commissioners needed insulation from political intermeddling, while the executive needed the ability to remove commissioners who were manifestly neglectful, malfeasant, or incompetent.

1. *The Need for Federal Regulation.* — The first federal law to incorporate the now-familiar INM removal provisions was the Interstate Commerce Act (ICA), passed in early 1887 and modeled on similar state statutes. The ICA regulated interstate railroads, whose rates and business practices had produced varying degrees of political outrage for decades.<sup>297</sup> States began passing oversight legislation in earnest in the 1870s,<sup>298</sup> and by 1883, the year the ICA's Senate sponsor first proposed a federal commission, twenty-five states had their own railroad commissions.<sup>299</sup> Roughly half of those state commissions were primarily supervisory, with the power to recommend legislation and arbitrate disputes between railroads and private citizens but not to set rates or refer disputes for prosecution.<sup>300</sup> The other half could set rates and call on the attorney general to prosecute rate violations in court, where railroads bore the burden of showing that their deviation from prescribed rates was reasonable.<sup>301</sup>

Although the push for federal regulation had been underway long before the Supreme Court held in *Wabash, Saint Louis and Pacific Railway Co. v. Illinois* that states could not regulate rates on interstate lines,<sup>302</sup> the 1886 decision effectively forced Congress's hand.<sup>303</sup> The idea that the

297. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887).

298. See Frederick C. Clark, *State Railroad Commissions and How They May Be Made Effective*, in 6 *Publications of the American Economic Association* 11, 12, 22 (1891); George H. Miller, *Railroads and the Granger Laws* 154–56 (1971) [hereinafter Miller, *Railroads and the Granger Laws*]. New Hampshire was an early adopter; it established a railroad commission in 1844, although its initial focus was on safety rather than rates. Clark, *supra*, at 23.

299. Clark, *supra* note 298, at app. tbl.I. Four of these commissions did not supervise, advise, or regulate, but instead existed to assess taxes, collect statistics, or both. *Id.*

300. *Id.* at app. tbls.I–IV. We rely here on Frederick Clark's appendix, which presents tables that group state commissions into different classes based on their relative power, despite inevitable areas of overlap. The primary dividing line between “weak” and “strong” appears to be whether the commissions' rates could serve as *prima facie* evidence of reasonableness in court and whether the railroad would bear the burden of proof. See *id.* at app. tbl.IV.

301. *Id.* at 33–35, app. tbls.II–IV. George Miller shows that the Illinois legislature's decision to cede the definition of reasonableness to the courts was a major win for the railroads; farmers and other shippers would have preferred to leave the definition of reasonableness in legislative hands. See Miller, *Railroads and the Granger Laws*, *supra* note 298, at 89–96.

302. 118 U.S. 557, 563 (1886).

303. See Shelby Cullom, *Fifty Years of Public Service: Personal Recollections of Shelby M. Cullom, Senior United States Senator from Illinois* 312–13 (1911); Cushman, *supra* note 1, at 38. Charles Francis Adams, Jr., hardly a radical, had written fifteen years earlier that the fact “[t]hat the national government must then, soon or late, and in a greater or less

country's railroads needed a federal regulatory framework had long attracted adherents, including farmers, shippers, and even some railroad men who wanted to end rate wars and other harmful competition.<sup>304</sup> The mechanism for federal regulation was less clear. John Reagan, a Democratic House member from Texas, favored a regime in which competition would set rates subject to judicial review for reasonableness.<sup>305</sup> In the Senate, however, Shelby Cullom, Illinois's junior Senator, was a firm proponent of a commission system.

2. *The Inclusion of INM.* — When Cullom introduced a bill proposing the creation of a federal railroad regulatory commission in December 1883, he drew on ideas he had developed as both a state legislator and a governor. The railroad regulatory regime in Cullom's home state of Illinois was generally considered a model "strong" state commission system,<sup>306</sup> and Cullom had been Illinois's House speaker when the commission was being developed and governor during its early years.<sup>307</sup> To Cullom, a system of "five wise, able, experienced men of reputation, commanding general confidence and clothed with a limited discretion" was necessary to ensure an effective regulatory regime,<sup>308</sup> and that is what he proposed in December of 1883.

Cullom's first bill differed from Illinois's law in two pertinent respects: It did not require an oath from commissioners to faithfully execute the duties of their office, and it did not provide any mechanism to remove commissioners before the end of their terms.<sup>309</sup> By leaving out an oath requirement, Cullom probably intended to preclude private suits for neglect or malfeasance, which Cullom would have viewed as allowing politically motivated interference by interested parties. Omitting removal

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degree, assume a railroad jurisdiction, is accepted as an obvious conclusion to be deduced from the irresistible development of the system." Charles Francis Adams, Jr., *The Government and the Railroad Corporations*, 112 N. Am. Rev. 31 (1871), reprinted in R.R. Gazette, Jan. 14, 1871, at 362, 363 [hereinafter Adams, *Government and the Railroad Corporations*].

304. Political historians have identified a range of influences leading to the passage of the ICA. See, e.g., Lee Benson, *Merchants, Farmers, & Railroads: Railroad Regulation and New York Politics, 1850–1887*, at 204–07 (1955); Gabriel Kolko, *Railroads and Regulation, 1877–1916*, at 30–44 (1965); Skowronek, *supra* note 279, at 131, 139; see also Edward A. Purcell, Jr., *Ideas and Interests: Businessmen and the Interstate Commerce Act*, 54 J. Am. Hist. 561, 562–75 (1967) (describing the contributions of various historians).

305. Skowronek, *supra* note 279, at 140–45.

306. See, e.g., *id.* at 146; see also Clark, *supra* note 298, at 32–35 (describing Illinois's as a typical "strong" commission); Cushman, *supra* note 1, at 26.

307. See Cullom, *supra* note 303, at 306.

308. Skowronek, *supra* note 279, at 145 (internal quotation marks omitted) (quoting Shelby Cullom); see also Cullom, *supra* note 303, at 306–10.

309. A Bill to Establish a Board of Railroad Commissioners, to Regulate Inter-State Commerce, and for Other Purposes, S. 840, 48th Cong. §§ 1–10 (1883) [hereinafter 1883 Bill].

authority would likewise insulate commissioners from politically motivated interference by the President.

In contrast to Cullom's federal proposal, Illinois's statute allowed the governor to remove commissioners for multiple causes. Under the terms of Illinois's 1870 Constitution, the governor was authorized to remove any officer he had appointed "in cases of incompetency, neglect of duty, or malfeasance in office."<sup>310</sup> And under the terms of the railroad statute, he was authorized to remove a commissioner who had violated the statute's prohibition on having an interest in or connection with a railroad.<sup>311</sup> This latter provision had been fiercely criticized in the nation's leading treatise on railroad regulation because it left state governors

[s]o afraid . . . of a bias, that they sought out men whose minds were a blank . . . . [S]ome very competent men were appointed who did excellent work so long as they remained in office. But a long continuance in office was again looked upon as undesirable, and these men were either speedily removed to make way for incompetents, or they voluntarily passed into the employ of the railroad corporations before they had fairly mastered the situation.<sup>312</sup>

Instead of barring railroad men and allowing for executive removal, Cullom's federal bill provided terms of five years.<sup>313</sup> By allowing railroad men to serve on his commission, Cullom likely sought to avoid some of the perceived problems with commissioner ineptitude. His omission of removal permissions, meanwhile, may have been an oversight. But it is also plausible that Cullom thought that stipulating a term of years was a sufficient solution, because it both avoided politically motivated removals and allowed the President and Senate to simply not re-appoint an unsatisfactory commissioner once his term was up.

The Senate's Select Committee on Railroads significantly revised Cullom's original proposal, and four changes are especially important. Where the original 1883 bill focused only on rate discrimination,<sup>314</sup> the

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310. Ill. Const. of 1870, art. V, § 12.

311. See Act of July 1, 1871, § 2, 1871 Ill. Laws 618, 619.

312. Charles Francis Adams, Jr., *Railroads: Their Origin and Problems* 133–34 (1878) [hereinafter *Adams, Origin and Problems*]. Adams was widely recognized as one of the nation's top experts on the railroad problem and had himself served on Massachusetts's railroad commission. See Adams, *Government and the Railroad Corporations*, *supra* note 303, at 362; see also Cushman, *supra* note 1, at 24 (noting Adams's fame as a railroad expert). And he was far from alone in believing familiarity with railroad operations was essential to a well-functioning commission. See, e.g., 1 S. Rep. No. 49–46, app. at 24 (1886) (statement of John D. Kernan) ("A commission ought to consist of not less than five members, with two . . . of them having railroad experience. [But] [t]hey should not be permitted to be interested in the stock . . . of any carrier, nor to accept from carriers anything except the facilities needed to discharge their duties.").

313. 1883 Bill, *supra* note 309, § 1.

314. *Id.* §§ 4, 8.



1884 commission focused on discrimination and “extortion,” defined as charging “more than a reasonable rate.”<sup>315</sup> Where the 1883 commission merely “exercise[ed] supervision” over the interstate portion of a transportation company’s business,<sup>316</sup> the 1884 commission supervised all “methods of operation” of any transportation company engaged in interstate commerce.<sup>317</sup> Where the 1883 commission investigated complaints of discrimination only where the commissioners “deemed [it] necessary,”<sup>318</sup> the 1884 commission was obliged to investigate any complaint of extortion or unjust discrimination it received.<sup>319</sup> And where the strongest medicine the 1883 commission could apply to discriminating companies was to include their offenses in the commission’s annual report to the President,<sup>320</sup> the 1884 commission was empowered to assess damages on any transportation company found guilty of extortion or unjust discrimination and to refer to the U.S. attorney for prosecution any company that refused to pay.<sup>321</sup>

These changes meaningfully enhanced the commission’s supervisory powers and probably led to the bill’s other noteworthy amendments: a requirement that partisan imbalance on the commission should never exceed 3-2 and a removal provision stipulating that “any commissioner may be removed by the President for incompetency or malfeasance in office.”<sup>322</sup> Having amended the bill so that it carried the threat of real consequences for private actors, its drafters were likely anxious to guard against both partisan chicanery and the misbehavior of an inept or unfaithful commissioner.

The idea that a railroad commission ought to be both expert and impartial was, as we have seen, nothing new. Nor was the need to protect those expert commissioners from outside influence—be it from politically motivated removals or from the temptations of quid pro quo arrangements. To protect against the “inferior and, not seldom, corrupt men” who made up the majority of state commissioners, regulation advocates had urged the Illinois legislature as far back as 1871 to “create an able and experienced tribunal to stand between the community and its railroads . . . clothe[d] . . . with all necessary power and dignity, and . . . declare its

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315. A Bill to Establish a Commission to Regulate Inter-State Commerce, and for Other Purposes, S. 2112, 48th Cong. § 3 (1884) [hereinafter 1884 Bill].

316. 1883 Bill, *supra* note 309, § 3.

317. 1884 Bill, *supra* note 315, § 2.

318. 1883 Bill, *supra* note 309, § 4.

319. 1884 Bill, *supra* note 315, § 5.

320. 1883 Bill, *supra* note 309, §§ 6, 8.

321. 1884 Bill, *supra* note 315, §§ 5, 6.

322. *Id.* § 1. Other changes in the bill were probably also made to account for this augmented authority: increased commissioner salaries (from \$5,000 to \$7,500 per year), *id.* § 7, and a direction that commissioner appointments be made “so that the different interests affected by this act shall have, as nearly as possible, proper representation,” *id.* § 1.

decisions final on all points upon which no appeal lay . . . by constitutional right.”<sup>323</sup> Only such an august commission, comprising men whose “duties, . . . responsibilities, and . . . characters” were equal “with those of the judges of our courts,” would be able to command the railroads’ respect and compel their obedience.<sup>324</sup>

This was also the message that Cullom and his Senate colleagues received from several of the experts they interviewed in the spring and summer of 1885.<sup>325</sup> To ensure the commission would be capable of both designing and enforcing prudent regulations, these witnesses advised that the commission should be as court-like as possible, comprising well-regarded and well-compensated men endowed with the power to try violations and impose penalties.<sup>326</sup> Only a court-like tribunal composed of railroad specialists with the power to enforce their findings, these witnesses explained, would be able to effectively regulate the nation’s rails.

The members of the select committee were receptive to this argument, but they had one sticking point: the tenure protections that adhered to officials who exercised such judge-like authority. “If we clothe the commission with judicial power,” Senator Orville Platt of Connecticut observed, “we must make them judges and give them a life tenure.”<sup>327</sup> That was a problem, in Platt’s eyes. “The idea has prevailed,” he explained, “that it was not really a good thing to appoint judges, who may be unworthy judges, with a life tenure.”<sup>328</sup> What if, Platt was asking, the appointed commissioners, clothed with judge-like power and judge-like job security, turned out not to be up to the task?

The version of the bill that emerged from the select committee’s months of expert consultation included, for our purposes, four salient changes: It backed several of the bill’s provisions with the threat of escalating court remedies,<sup>329</sup> it made the commission’s findings prima facie evidence in subsequent court proceedings,<sup>330</sup> it barred any commissioner from participating in a hearing or proceeding in which that commissioner had a “pecuniary interest,”<sup>331</sup> and it declared that the commissioners could be “removed by the President for inefficiency, neglect of duty, or malfeasance in office.”<sup>332</sup> The reason for the committee’s shift from “incompetency or malfeasance in office” to INM is

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323. Adams, *Government and the Railroad Corporations*, supra note 303, at 364–65.

324. *Id.* at 364.

325. See Cullom, supra note 303, at 314–15.

326. See, e.g., *The Railway Question: Hearing Before the S. Select Comm. on Interstate Com.*, 49th Cong. 10, 18 (1885) (statement of Simon Sterne).

327. *Id.* at 11.

328. *Id.* at 18.

329. See *A Bill to Regulate Commerce*, S. 1093, 49th Cong. § 5 (1886).

330. *Id.* § 9.

331. *Id.* § 12.

332. *Id.* § 6.

not explained. But the select committee's expressed concerns about the problem of life tenure combined with both the widely shared belief in the importance of commissioner expertise and the revised bill's sharper teeth suggest that at least part of the reason was prophylactic: a desire to guard against the problem of inept or corrupt commissioners. "Inefficiency," in this context, conveyed a meaning that incompetency did not. Efficiency, as we have seen, with its association with both ability and moral rectitude, had been the watchword of Congress's recent debates over the Pendleton Act, and it had likewise been a focus of many of the select committee's expert witnesses.<sup>333</sup> An inefficient commissioner—a commissioner unable to comprehend the technical reports and complicated account books of the railroads he oversaw, or dishonest and unscrupulous in the exercise of his duties—would pose a considerable threat to the commission's effectiveness. So too would a commissioner who failed to attend hearings, refused to pursue complaints, or otherwise ignored the duties of the office. Having built a commission with significant investigatory and enforcement chops, the committee drafters were unwilling to risk its being upended by a dishonest, incompetent, or neglectful commissioner.

By authorizing the President to remove commissioners for INM, the bill provided an escape hatch in case the commission failed to accomplish its important work. At the same time, by providing commissioners with terms of years qualified only by discrete, limited removal permissions, the bill insulated the commissioners from both "the temptations of their position"<sup>334</sup> and the politically motivated removals that had plagued state commissions.<sup>335</sup> When the measure finally passed both houses and was signed by President Cleveland a year later, it retained these key provisions.

3. *The Missing Constitutional Concern.* — The years of congressional debate over the ICC reveal an omission that might surprise modern proponents of presidential power. Despite the ICA's obvious significance at the time,<sup>336</sup> almost no one contested its removal provisions.<sup>337</sup> Senator

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333. See *supra* notes 279–282, 325–328 and accompanying text.

334. 1 S. Rep. 49–46, app. at 24–25 (1886) (statement of John D. Kernan).

335. See, e.g., Adams, *Origin and Problems*, *supra* note 312, at 133–34. In 1926, Edward Corwin reached much the same conclusion about the aims underlying the ICA's use of INM. See Edward S. Corwin, *Tenure of Office and the Removal Power under the Constitution*, 27 *Colum. L. Rev.* 353, 356 (1927) [hereinafter Corwin, *Tenure of Office*].

336. See Skowronek, *supra* note 279, at 138 (describing the Act as passing "[n]ine years and a hundred legislative proposals after a serious effort to obtain national regulation had begun").

337. Professor Aditya Bamzai observes the same absence of concern over the Board of General Appraisers (BGA), created by Congress in 1890 to oversee tariff disputes, despite the fact that virtually the only difference between the BGA's structure and removal provisions and those of the ICC was the absence of a term of years, a difference later addressed in *Shurtleff*. See *supra* note 137. During debate over the BGA, Bamzai writes, concern over any perceived encroachments on the President's removal power prompted "only a single express reference and two passing allusions." Bamzai, *supra* note 137, at 714.

John Morgan of Alabama was the only exception, and even his arguments do not support contemporary theories about removal. In a last-ditch effort to scuttle the bill, Morgan objected to the omission of an oath requirement, reasoning that this meant that the President's removal power was the sole check on commissioner corruption, with ample opportunities for political manipulation.<sup>338</sup> But the bill's supporters dismissed Morgan's criticisms as so much sanctimony—" [t]o listen to the senator from Alabama . . . descending upon the provisions of the bill," Cullom retorted, "one can scarcely resist the conclusion that it is a bill to destroy the commerce of the country, and especially to break down all the railroads"<sup>339</sup>—and passed the bill 43-15 a few hours later.<sup>340</sup>

In the House, members paid close attention to the President's power to *appoint*, with Congressman James Weaver of Iowa protesting that under the bill's staggered terms the next President would have the power to place three political partisans on the commission. But Weaver never mentioned political bias due to the President's power to *remove*; the possibility that removal could be exploited for political ends seems not to have occurred to him.<sup>341</sup> The bill's regulatory provisions were the subject of weeks of debate. But although everyone knew that the statute gave the President only limited removal authority, not one legislator objected that such limits might be unconstitutional.

It would be implausible to read Congress's silence as evidence that its members assumed, contrary to longstanding practice, that the ICA's term of years coupled with discrete removal permissions gave the President broad removal authority. Nor does Congress's silence mean that its members were simply unaware of or unfocused on removal questions during this period. On the contrary, two contemporaneous debates reveal intense congressional attention to the President's removal power as well as its broader implications for executive power.

The first debate, concerning a board of education for the District of Columbia, took place in the House a month before the ICA's passage. Statutory language prescribed that the commissioners of Washington, D.C., "may, in their discretion, at any time remove any or all of said [Board] members from office and fill the vacancies by new appointment."<sup>342</sup> A few congressmen worried that new board members might endanger the district's superintendent, but the bill's supporters dismissed that concern. "[R]emember that these . . . men have no power over [the superintendent's] appointment except to advise," one member emphasized, and the board members "are themselves the creatures of the

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338. See 18 Cong. Rec. 657 (1887) (statement of Sen. Morgan).

339. *Id.* at 658 (statement of Sen. Cullom).

340. *Id.* at 666.

341. *Id.* at 820 (statement of Rep. Weaver).

342. *Id.* at 121.

District commissioners, appointed by them and by them subject to removal at pleasure.”<sup>343</sup> These removal provisions were “given to the bill,” they explained, “to keep it in harmony with the idea . . . that the whole power of government is vested in the commissioners.”<sup>344</sup> This statement was not controverted.

The House clearly understood the long-established principle that the combination of a term of years plus removal provisions was designed to strike a balance between protecting an officer’s independence and preventing harmful official conduct. More specifically, if subordinates could be removed “at any time” in the “discretion” of their superiors, such individuals were effectively “the creatures” of the controlling executive. By contrast, the ICA’s tenure provisions allowed little room for executive control, in terms that were themselves already familiar from similar provisions in state law and which served goals of independence and “faithful execution” that were centuries old. Congress drafted the ICA’s language to be different from the Washington, D.C., board of education legislation, and even the House members who were most anxious about excessive presidential control didn’t bother to mention them. Everyone understood that the removal provisions represented an explicit compromise between granting officials enough independence to perform their designated tasks, while providing superiors with enough authority to remove officers who failed to efficiently and faithfully execute their duties. It was entirely ordinary that concerns about what Holt and the Constitution called “faithful execution” should exist on both sides of the ledger. And it was also entirely ordinary that Congress would be the institution to design the appropriate balance.

The second removal debate during this period explicitly analyzed presidential control over federal officers. One day after the House discussed the removal provisions of the Washington, D.C., board of education bill, and one day before the Congressional Record printed the ICA conference bill in its entirety,<sup>345</sup> the Senate debated whether to repeal the Tenure of Office Act (TOA), the 1869 law that required Senate approval before the President removed any executive officer appointed to a term by and with the Senate’s advice and consent.<sup>346</sup> Repeal was necessary, as Senator George Hoar of Massachusetts argued, because the

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343. *Id.* at 127 (statement of Rep. Grout).

344. *Id.*

345. *Id.* at 171–73.

346. The 1869 law revised the earlier 1867 version that had been at issue in President Andrew Johnson’s impeachment trial. The revisions, passed shortly after Ulysses S. Grant became President, made the 1867 law essentially a dead letter, because they allowed the President to suspend and appoint a successor at his discretion. Tenure of Office Act, ch. 10, sec. 2, § 2, 16 Stat. 6, 7 (1869).

TOA unconstitutionally abridged the President's duty to ensure "the faithful execution of the laws."<sup>347</sup>

Senators' reasons for reaching that constitutional conclusion were varied. Senator Hoar, for instance, believed that it was unconstitutional to hold the President responsible for the acts of officers "forced upon him against his will."<sup>348</sup> Thus, when an officer's "conduct in office is to be determined by political theories or opinions," the President should have the right to remove him at will.<sup>349</sup> Senator William Evarts of New York, meanwhile, believed that there was a difference between an unconstitutional law like the Tenure of Office Act, with an express purpose of requiring Senate approval to remove any jointly appointed office, and Congress's "right to impress upon *an office* an indelible durability according to the will of the lawmaking power."<sup>350</sup> Evarts confessed his own bias as former chief counsel for President Andrew Johnson during his Senate impeachment trial for, among other offenses, having violated the Tenure of Office Act.<sup>351</sup> Yet even Evarts had "never been able . . . to conclude that a law which should affix a certain degree of durability in tenure of an office was in and of itself unconstitutional."<sup>352</sup> If the public interest required an office to be constituted for a term of five or six years—with either no presidential removal, or removal only by the President, or removal only by impeachment—Evarts reasoned that this would not raise constitutional concerns because such provisions lay "in the very bed of law-making authority."<sup>353</sup> No senator spoke against Evarts's constitutional argument, which was fully consistent with the history of American removal law.

Given the close constitutional scrutiny devoted to the TOA's removal restrictions, one might have expected similar discussion of the ICA's removal language. But there was none. The same Senator Hoar who fiercely defended the President's power to remove officers whose "conduct in office is to be determined by political theories or opinions" listed the establishment of a commission as one of "four great objects which this

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347. 18 Cong. Rec. 141 (1886) (statement of Sen. Hoar). Hoar had been a vocal supporter of the Pendleton Act. See Sageser, *supra* note 279, at 52.

348. 18 Cong. Reg. 141 (statement of Sen. Hoar). Senator George Edmunds of Vermont, in contrast, believed that the Tenure of Office Act was constitutional, and that an executive officer, regardless of the political nature of the role, should be

secure in the administration of the office . . . he has been selected to perform for the period fixed by the constitution of the State or by its law . . . and that nothing but his official or personal misconduct—which is something else than having an opinion and expressing it in an honest and manly way—should be the cause of his dismissal from it.

*Id.* at 137 (statement of Sen. Edmunds).

349. *Id.* at 141 (statement of Sen. Hoar).

350. *Id.* at 216 (statement of Sen. Evarts) (emphasis added).

351. *Id.* at 216–17.

352. *Id.* at 217.

353. *Id.* at 216.

bill accomplishe[d] which [he] heartily favor[ed].”<sup>354</sup> Hoar’s complaint was not that the commission was too independent of the President, but that it was not independent enough. The ICC’s “half legislative, half judicial” powers required even stronger protections against the “exposure to temptation in the way of corruption” that commissioners would face in the realm of national politics.<sup>355</sup> Similarly, Senator Evarts, the emphatic defender of presidential removal power during the Johnson Administration, criticized the ICA for unconstitutionally burdening interstate commerce, but he never objected that its removal provisions unconstitutionally diminished the presidency.<sup>356</sup>

When it came to the ICA’s stipulations about presidential removal, even the most zealous guardians of the Constitution and executive authority were not concerned. Congress understood very well the limits that were imposed by the ICA’s statutory language, and they also understood pertinent consequences for the President’s power to issue political and policy instructions. Against that familiar legal background, the ICC was effectively a creature of the legislature, just like the state commissions on which it was modeled. The commissioners were not the “political” appointees whose removal Hoar and his colleagues assigned to the President. In the eyes of Congress, commissioners were more like short-term judges, addressing complaints by applying the rules laid down in the ICA, funneling cases to the judiciary, and advising Congress on future legislation. They did not look like part of the “Executive Branch.” They looked like an arm of Congress.<sup>357</sup>

#### D. *The Proliferation of Independent Agencies*

This conception of commissions as legislative arms—agencies that perform a mix of legislative and judicial tasks—persisted, as Congress continued to use fixed terms leavened with removal permissions as a means of striking a balance between agency oversight and independence. In 1890, Congress created the Board of General Appraisers—a body it later turned into an Article III court<sup>358</sup>—using INM to denote the circumstances in which the President might remove the Board’s members prior to the end of their terms.<sup>359</sup> Woodrow Wilson’s presidency saw the creation of the

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354. *Id.* at 141, 634 (statement of Sen. Hoar).

355. *Id.* at 639.

356. *Id.* at 604 (statement of Sen. Evarts).

357. *Cf. United States v. Guthrie*, 58 U.S. 284, 296 (1854) (presenting the plaintiff in error’s argument that territorial judges “are legislative officers, and not executive officers, because it is to congress and not to the President, that the power of making rules respecting the territory of the United States has been committed”).

358. 28 U.S.C. § 251 (2018).

359. Customs Administrative Act of 1890, ch. 407, § 12, 26 Stat. 131, 136 (creating the now-defunct position of general appraiser of the merchandise and providing that appraisers “may be removed from office at any time by the President for [INM]”); see also *Shurtleff v.*

FTC<sup>360</sup> and the Tariff Commission,<sup>361</sup> both with members tenured for a term of years subject to removal by the President for only INM.<sup>362</sup> And, in 1913, Congress established the Federal Reserve Board and made its members subject to removal “for cause.”<sup>363</sup>

Congress continued to draw on the ICA and its progeny throughout the twentieth century, creating over a dozen agencies using various combinations of INM, including the Occupational Health and Review Commission, the Chemical Safety Board, the Consumer Product Safety Board, the Nuclear Regulatory Commission, the FEC, the Federal Labor Relations Authority, the Merit Systems Protection Board, the Commission

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United States, 189 U.S. 311, 313–15 (1903) (considering the President’s authority to remove an appraiser); supra note 137 (discussing *Shurtleff* in light of the Four Years’ Law).

360. Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717, 717–18 (1914) (codified as amended at 15 U.S.C. § 41 (2018)).

361. Revenue Act, ch. 463, § 700, 39 Stat. 756, 795 (1916).

362. In 1912, Congress also passed the Lloyd–LaFollette Act, which provided that “no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service.” Lloyd–LaFollette Act, ch. 389, § 6, 37 Stat. 539, 555 (1912) (codified as amended at 5 U.S.C. §§ 3103, 5501, 7351 (2018)).

363. Federal Reserve Act of 1913, ch. 6, § 10, 38 Stat. 251, 260 (codified at 12 U.S.C. § 241 (2018)). Congress used this language at least once previously when it created a consular court. See Act Creating a United States Court for China, ch. 3934, § 7, 34 Stat. 816 (1906). And it used the language again in 1916 when it created the Federal Farm Loan Board. Federal Farm Loan Act, ch. 245, § 3, 39 Stat. 360, 360 (1916). Today, “for cause” is a common removal ground, limiting the tenure of at least a dozen officials. See, e.g., *infra* Appendix B.

Where Congress enables the President to remove an official “for cause” or “for good cause,” the language is best interpreted to encompass any of the recognized removal causes contained in the U.S. Code, including INM, immorality, ineligibility, offenses involving moral turpitude, and conviction of a crime. See, e.g., *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 app. A at 549–56 (Breyer, J., dissenting) (cataloging removal grounds). Thus, the President’s power to remove Federal Reserve governors is greater than it is over many other independent agency heads. See *Datla & Revesz*, supra note 1, at 588 (“Statutes that specify that an appointee cannot be removed except for ‘good cause’ confer the weakest protection.”). This difference may seem surprising to a contemporary audience. But it is consistent with the President’s power to remove the then-primary bank regulator, the Comptroller of the Currency, see 12 U.S.C. § 2, and President Wilson’s insistence that a “government board” oversee the twelve Federal Reserve Banks, see Roger Lowenstein, *America’s Bank: The Epic Struggle to Create the Federal Reserve* 198–216 (2015) (explaining the development of Wilson’s plan for a government-controlled central bank under the dominion of the Treasury Department). Indeed, until 1935, the Fed’s Board was substantially more integrated with the executive branch than the ICC or FTC, as the Secretary of the Treasury and the Comptroller of the Currency—both removable by the President without cause—served on the Board, with the Secretary serving as “chairman.” Federal Reserve Act, ch. 6, § 10, 38 Stat. 251, 260–61 (1913). Congress may also have used the more expansive “for cause” language in the Federal Reserve Act in reaction to President Taft’s removal for INM earlier the same year of two members of the Board of General Appraisers, one of whom was accused of being intoxicated while on duty. See *Bamzai*, supra note 137, at 737.



on Civil Rights, the Sentencing Commission, the OSC, the NTSB, and the Federal Maritime Commission.<sup>364</sup>

Congress also created term-of-years offices within executive departments,<sup>365</sup> permitting presidential removal “for cause,” for INM, or for other specified grounds. For example, the National Appeals Division of the U.S. Department of Agriculture is headed by a Director appointed by the Agriculture Secretary who “shall not be subject to removal during the term of office, except for cause.”<sup>366</sup> The FHFA, created in 2008 to ensure the safety and soundness of various government banks and sponsored financial enterprises, is led by a Director, who is appointed by the President and removable only for cause.<sup>367</sup> Members of the Surface Transportation Board are appointed for terms of five years, and “[t]he President may remove” them “for inefficiency, neglect of duty, or malfeasance in office.”<sup>368</sup> INM also figures in enabling laws creating the Foreign Service Grievance Board, a division of the State Department;<sup>369</sup> the Board of Veterans Appeals, a part of the VA;<sup>370</sup> and the National Indian Gaming Commission, housed in the Department of the Interior.<sup>371</sup>

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364. See *infra* Appendix B.

365. Executive departments are parts of the federal government headed by officers who serve at the pleasure of the President. 5 U.S.C. § 101.

366. 7 U.S.C. § 6992(b)(2) (2018).

367. 12 U.S.C. § 4512(b)(2). The constitutionality of this arrangement is currently in dispute, with the Supreme Court considering this Term whether the for-cause limitation on the President’s removal authority over the FHFA Director violates the separation of powers. *Collins v. Mnuchin*, 896 F.3d 640 (5th Cir. 2018), cert. granted, No. 19-422, 2020 WL 3865248 (U.S. July 9, 2020). Although, as mentioned, “for cause” removal is broader than INM, see *supra* note 363, this text and the legislative history of these statutes are best read to foreclose removal based on policy disagreement. See *infra* Part III.

More significant for the Article II dispute in *Collins* is the fact that the challenged agency decision was made by an acting director whose tenure is not governed by the for-cause provision. Court-appointed amicus has raised this point. See Brief for Court-Appointed Amicus Curiae at 14, *Collins*, No. 19-422 (filed Oct. 16, 2020) [hereinafter *Collins* Brief] (arguing that the Fifth Circuit’s conclusion “that an Acting Director has the same tenure protection as a Senate-confirmed Director” is “incorrect”); cf. Anne Joseph O’Connell, *Actings*, 120 Colum. L. Rev. 613, 690 (2020) (noting that neither the FHFA’s acting-director provisions nor the Vacancies Act restricts removal). The at-will removability of the Acting Director is clear from the fact that, unlike the Senate-confirmed Director, the Acting Director is not appointed to any term. See section II.A (explaining that the tenure-protecting language in enabling acts is the text regarding the term of years). Amicus also makes this point. See *Collins* Brief, *supra*, at 14 (noting that “the Acting Director does not have a term at all”). Thus, the Senate-confirmed Director’s protection depends not on the scope of the “for cause” provision but on the fact that, in contrast to an Acting Director, a Senate-appointed FHFA Director is appointed to a five-year term.

368. 49 U.S.C. § 1301(b)(3) (2018).

369. 22 U.S.C. § 4135(d) (2018).

370. 38 U.S.C. § 7101(b)(2) (2018).

371. 25 U.S.C. § 2704(b)(6) (2018).

The legislative histories of these acts reflect Congress's desire to duplicate the judicial-style independence of the ICA. This desire is apparent in the debates over the independence of the Federal Reserve Board during the 1930s.<sup>372</sup> It can be seen in the way Congress characterized FTC Commissioners in debates in the 1940s,<sup>373</sup> and in the understandings that animated efforts at government reorganization after World War II.<sup>374</sup> It shows up in testimony on the Maritime Commission in 1945, when the Chairman of the House Committee on Accounts explained that the Commission "is an independent establishment—an arm of Congress—exercising quasi-judicial powers and powers legislative in character" and that appointments to the Commission were made "with the purpose of maintaining the Commission independent from political influence and . . . the changing policies or direct influences of a particular administration."<sup>375</sup>

It is the view espoused in 1977 by President Jimmy Carter, who, in proposing legislation to create the FERC—whose three members would serve four-year terms and be removable for INM—underscored the importance of "guard[ing] the quasi-judicial aspects of the regulatory process against improper influence" by establishing a Board of Hearings

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372. Banking Act of 1935: Hearings on S. 1715 Before a Subcomm. of the S. Comm. on Banking & Currency, 74th Cong. 504–06 (1935) (statement of Henry Morgenthau, Jr., Secretary of the Treasury) (explaining that he wanted to see the government's monetary powers concentrated in a body that was independent of the President and whose members could not be removed short of impeachment).

373. 87 Cong. Rec. 8165 (1941) (statement of Rep. Hobbs) ("Humphrey was a man who occupied a quasi[-]judicial as well as a quasi[-]legislative position, a member of the Federal Trade Commission. This body is not within the executive department, and must be free from executive control.").

374. See, e.g., Letter from John L. Rogers, Chairman, Interstate Com. Comm'n, to Hon. Carter Manasco, Chairman, Comm. on Expenditures in Exec. Dep'ts, House of Representatives (Sept. 10, 1945), *in* To Provide for Reorganizing Agencies of the Government, and for Other Purposes: Hearings on H.R. 3325 Before the H. Comm. on Expenditures in the Exec. Dep'ts, 79th Cong. 121 (1945) ("[The ICC] was created by the Congress to carry on legislative functions under rules and principles laid down by the Congress . . . [T]he Commission was set up in 1889 and has functioned ever since as an arm of the Congress, subject to review by the courts . . ."). On the history of twentieth-century administrative reorganization efforts, see generally Ronald C. Moe, *Administrative Renewal: Reorganization Commissions in the 20th Century* (2003). On Congress's and the executive branch's extended push and pull over control of the administrative state, see Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* 292–95 (2017).

375. 91 Cong. Rec. 11,958, 11,965 (1945) (statement of Rep. Bland). This understanding of commissions might also explain why they tend to be run by many members, despite the superior efficacy of single-director agencies. See Ganesh Sitaraman & Ariel Dobkin, *The Choice Between Single Director Agencies and Multimember Commissions*, 71 *Admin. L. Rev.* 719, 723–24 (2019).

and Appeals “free from the control of the Secretary of Energy.”<sup>376</sup> And it is the understanding expressed in 1978 by the Civil Service Commission, which explained that in designing the tenure of the members of the Merit Systems Protection Board (MSPB), it used “inefficiency, neglect of duty and malfeasance in office” because that was the language Congress had always used “to confer upon [an independent regulatory agency’s] members a tenure akin to that of the Federal judiciary.”<sup>377</sup> Although a detailed review of the legislative histories of the dozens of independent agencies created on the model of the ICC is beyond the scope of this Article, by the late-twentieth century, INM had become talismanic: a combination of words that Congress routinely paired with fixed terms in order to protect the members of a regulatory body from political interference.<sup>378</sup>

### III. RECONSTRUCTING AGENCY INDEPENDENCE

This Part addresses the questions Part I raises, indicating the ways in which the historical evidence Part II amasses complicates expansive theories of presidential power. In so doing, this Part provides ballast for two of the arguments advanced by Justice Kagan in her dissent in *Seila Law*. First, it uses the historical evidence Part II adduces to critique the hypothesis that INM provisions permit the President to fire agency officials for policy disagreements or for failing to follow presidential directives. The history of removal statutes shows that they were not written to empower executives to direct the actions of term-tenured officials but to make it easier for the government to check unfaithful and incapable administrators. Scholars who argue otherwise can of course ground their claims in other approaches to statutory or constitutional interpretation. But in recovering the meaning of INM and vindicating the congressional design behind independent agencies, this Article demonstrates that legislative and statutory history do not support such an expansive reading of the three permissions. Second, for those who view presidential removal authority as a matter to be decided by resort to constitutional “first principles,” this Article shows how an expansive reading of the Take Care Clause can nonetheless be reconciled with removal law. By recovering the meaning of “neglect of duty” and “malfeasance in office,” Parts II and III

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376. Jimmy Carter, Remarks on Proposed Department of Energy Legislation (March 1, 1977), in S. Comm. on Energy & Nat. Res., 95th Cong., Executive Energy Documents 372 (Comm. Print 1978).

377. Civil Service Reform: Hearings on H.R. 11280 Before the H. Comm. on Post Off. & Civ. Serv., 95th Cong. 824 (1978).

378. This interpretation of INM was also shared by Presidents, administrators, and scholars. See, e.g., Edward Corwin, *The President: Office and Powers, 1787–1957*, at 90–98 (4th ed. 1957); Corwin, *Tenure of Office*, supra note 335, at 357 (noting that Presidents did not veto or protest statutes creating independent agencies). See generally *Reorganization of the Government Agencies: Hearings on S. 2700 Before the S. Select Comm. on Gov’t Org.*, 75th Cong. (Aug. 11, 1937) (presenting the testimony of various independent commissioners on the topic).

bolster the argument, implicit in Justice Kagan's *Seila Law* dissent, that the President's power to remove agency officials for neglect of duty or malfeasance is the constitutional equivalent of the authority to remove officials who fail to faithfully fulfill their duties.

A. *Policy Disagreements Are Not Cause*

As Part II's history reveals, INM provisions were not designed to permit the President to direct independent agencies to take certain actions and then remove officials who fail to comply. Nor were they meant to permit the President to remove agency officials taking actions inconsistent with the President's policy agenda. INM provisions empower the President to remove for-cause officials who otherwise enjoy tenure in office for a term of years. For-cause removal is a legal process, requiring notice and a hearing,<sup>379</sup> and just as impeachment does not empower Congress to direct the President to execute statutory and constitutional responsibilities in any particular manner, for-cause removal does not serve as a source of presidential authority over other government officials. Accordingly, it does not seem likely that agency officials can, as a matter of law, be said to neglect their duties by declining to follow presidential directives, unless those directives are authorized by the Constitution or some other provision of the U.S. Code.<sup>380</sup> Nor is it likely that agency officials who pursue policies inconsistent with the President's agenda can be found inefficient as a matter of law. Inefficiency relates to an official's capacity to carry out statutory obligations. Although this term was added to expand the President's supervisory remit beyond faithful execution, it was not intended to give the President authority over an official's exercise of their lawful discretion. Instead, it was meant to allow Presidents to

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379. See *Shurtleff v. United States*, 189 U.S. 311, 314 (1903) ("It must be presumed that the President did not make the removal for [inefficiency, neglect of duty, or malfeasance in office] . . . because there was given to the officer no notice or opportunity to defend."); *Reagan v. United States*, 182 U.S. 419, 425 (1901) ("[W]here the term of office is for a fixed period, notice and hearing are essential. If there were not [notice and hearing], the appointing power could remove at pleasure or for such cause as it deemed sufficient."); see also *Bd. of Trs. of Gillett v. People ex rel. Keith*, 59 P. 72, 75 (Colo. App. 1899) ("To authorize the removal of such an officer, there must be a charge of something which constitutes a legal cause of amotion, and it must be sustained on a trial by competent legal evidence. The proceedings on the trial are judicial in their nature."); *Andrews v. King*, 77 Me. 224, 232 (1885) ("[T]he mayor and aldermen act under this statute, apart from their mere municipal duties, and in a judicial capacity. The act of hearing and deciding is always a judicial act. It should always be done, deliberately and without bias."); *Flomenbaum v. Commonwealth*, 889 N.E.2d 423, 427 (Mass. 2008) (describing how the Governor provided notice and a hearing before removing a term-tenured official for cause); *People ex rel. Mayor of N.Y. v. Nichols*, 79 N.Y. 582, 588–89 (1880) ("[T]he proceeding is judicial in its character . . .").

380. In this regard, Sunstein and Vermeule's recent argument that the President can remove, for neglect of duty, officials who willfully fail to comply with the requirements of the Administrative Procedure Act is compelling. See *supra* note 4 and accompanying text.

remove officials who are incapable: the attribute, associated with the spoils system, that the incorporation of the term “efficiency” into the civil service lexicon was trying to eradicate.<sup>381</sup>

These conclusions are buttressed by the legislative history, which strongly suggests that Congress viewed commissioners as legislative and judicial agents, not as officials performing primarily executive functions. There is no apparent support for the latter view in the debates leading to the Interstate Commerce Act, the Federal Reserve Act, the Federal Trade Commission Act, or even the more recent deliberations involving the Dodd–Frank Act.<sup>382</sup> Indeed, legislators often intentionally separate agencies from executive departments to ensure that they operate in a nonpartisan fashion and are insulated from day-to-day political influence.

B. *For-Cause Removal Is Consistent with Even Expansive Readings of the Take Care Clause*

Although the Take Care Clause cannot be reconciled with agency independence by expanding the concept of “inefficiency” to cover policy disagreements, Congress has not been on an unconstitutional legislating spree for the past 150 years either. The clearest reason for this is the one given by Justice Holmes in dissent in *Myers*: “The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.”<sup>383</sup> But even assuming that the Take Care Clause gives the President the authority to supervise term-tenured officers when those officers exercise some part of the executive power, this reading can be squared with independent agencies by recognizing that Congress designed these agencies consistent with the President’s “duty to supervise.”<sup>384</sup>

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381. The cases cited by the D.C. Circuit involving civil service members removed for insubordination or for failing to follow orders, see, e.g., *supra* notes 91, 98, are inapposite to inefficiency at independent agencies (unless those agency leaders are otherwise legally obligated to follow presidential directions) because civil service members are legally obligated to follow directives from other executive branch officials.

382. The Proposed Consumer Financial Protection Agency: Implications for Consumers and the FTC: Hearing Before the Subcomm. on Com., Trade, & Consumer Prot. of the H. Comm. on Energy & Com., 111th Cong. 209 (2009) (statement of Jon Leibowitz, Chairman, FTC) (“Four members of the Board would, like FTC Commissioners, be appointed for specified terms and be removable only for inefficiency, neglect of duty, or malfeasance in office. This arrangement would provide a level of independence.”).

383. *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting). Another interpretation that reconciles agency independence with the Take Care Clause is Justice McClean’s, asserted in his dissent in *United States ex rel. Goodrich v. Guthrie*, 58 U.S. 284, 310 (1854) (McClean, J., dissenting) (“My own view is, that the power to see that the laws are faithfully executed, applies chiefly to the giving effect to the decisions of the courts when resisted by physical force.”).

384. See Gillian Metzger, *Constitutional Duty to Supervise*, 124 *Yale L.J.* 1836, 1875–79 (2015).

This approach vindicates over a century of legislative and administrative practice and explains the lack of debate in Congress over the constitutionality of tenured officials removable only for cause in a record otherwise replete with arguments objecting to legislative interference in the executive branch.<sup>385</sup> On this view, Congress, in erecting the commission system, made room for the President's constitutional obligations by permitting the President to remove unfaithful administrators. Congress keyed the President's removal authority to long-established grounds for official liability—neglect of duty and malfeasance in office. And it is no coincidence that in the case of the NLRB, SSA, Consumer Product Safety Commission, Commission on Civil Rights, U.S. Sentencing Commission, Foreign Service Grievance Board, and Independent Medicare Advisory Board, Congress limited the President's removal authority to those two causes alone.<sup>386</sup> Article II, under *Myers*, could be said to require this minimum delegation—but nothing more.

Of course, as discussed above, Congress has often decided to permit the President to engage in additional oversight of independent agencies. Congress has done this by adding inefficiency as a further ground meriting removal. Part II shows that Congress's purpose in adding inefficiency to the removal mix was to remedy inept administration and to create a check on sinecures and patronage appointments. In our view, these good government checks go beyond the President's constitutional duties because Article II, by its plain text, does not put the President under a constitutional obligation to eliminate incompetence, a shortcoming that does not involve the breach of an official duty.

This way of reconciling removal law with the Take Care Clause also accommodates the results of each of the major cases in the removal canon.<sup>387</sup> In *Humphrey's Executor*, Congress was well within its rights to tenure FTC commissioners for a term of years and limit the President's ability to remove them to circumstances involving inefficiency and a failure to faithfully execute the law. And in *Bowsher*, the Court correctly decided

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385. The notion that faithful execution obligates the President to remove officers who unfaithfully execute their duties dates to James Madison. Daily Advertiser, June 22, 1789, reprinted in Documental History, supra note 121, at 895, 895–96.

386. See infra Appendix B.

387. The problem in *Myers*, on this view, was not tenured agency officers per se, but the fact that Congress gave itself a role in removing them, the cabined reading that *Humphrey's Executor* made explicit nine years later. See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 630–31 (1934). On this speculative reconciliation, and per Madison's position in the Decision of 1789, the Constitution prevents Congress from arrogating to itself a role in the removal of executive officers. In remedying the constitutional defect, *Myers* left untouched the removal standard—although Congress tenured Myers for a term of years, it also specified his removability at pleasure—changing only the actors involved. In other words, the Court's remedy in *Myers* was to read out the portion of the law implicating Congress in the removal decision, which left the President with power to remove the postmaster at his pleasure.

that Congress exceeded its constitutional powers by giving itself a role in executing the laws. When Chief Justice Burger wrote that the INM standard was “very broad,”<sup>388</sup> it was in the context of observing that the law had stripped the courts of jurisdiction to review a congressional decision to remove the Comptroller General. The Court’s language, therefore, can be read as expressing concern that Congress might interpret the standard loosely absent judicial review.<sup>389</sup>

*Free Enterprise*, on this interpretation, was correctly decided because the relevant enabling statute did not permit the President to remove PCAOB officials for a failure to faithfully execute the law. But the Court’s choice of remedy was wrong. The Court corrected the defect in the statute by declaring that PCAOB members were removable by the SEC at will.<sup>390</sup> A better approach would have been to make PCAOB members subject to presidential removal for a failure of faithful execution—i.e., for neglect of duty and malfeasance in office. This is the power that the Constitution arguably gives to the President. There does not appear to be any basis, even under a broad reading of Article II, for the Court to redefine the relationship between various agency officers (i.e., between SEC commissioners and PCAOB members).

Finally, this reconciliation comports with the majority’s view in *PHH Corp.* and suggests why the majority in *Seila Law* seemed reluctant to rely on the Take Care Clause to strike down the removal provisions regarding the CFPB director.<sup>391</sup> In the body of the opinion, the Court cited “separation of powers” and “first principles” rather than relying primarily on specific constitutional text, leaving the bulk of its discussion of the Clause to a footnote.<sup>392</sup> Moreover, the dissent implied precisely the correspondence argued for here, such that this Part can be read as unpacking some of the doctrinal implications of the dissent’s implicit equivalence between “NM” and “a failure to faithfully execute the law.”<sup>393</sup> Although the concepts of neglect of duty and malfeasance in office are not “very broad,” they are broad enough to accommodate even a broad interpretation of the President’s constitutional duties.

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388. *Bowsher v. Synar*, 478 U.S. 714, 729 (1986).

389. And while the Court might have remedied the defect in the Deficit Reduction Act by concluding that the Comptroller General was removable for a failure of faithful execution by the President but not by the Congress, *id.* at 734–36, it understandably chose not to take this route given the clear intent of Congress to insulate the Comptroller General from executive influence.

390. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 509 (2010).

391. See *supra* note 103.

392. See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2206–07, 2206 n.11 (2020).

393. See *id.* at 2238 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (“[INM] would allow the President to discharge the Director for a failure to ‘faithfully execute[]’ the law, as well as for basic incompetence.” (quoting U.S. Const. art. II, § 3)).

## CONCLUSION

This Article begins with two questions. First, it asks under what circumstances the President can remove agency administrators tenured for a term of years. Second, it asks whether, if those circumstances are limited—if independent agencies really are independent—such independence can be reconciled with the President’s constitutional obligation to take care that the laws be faithfully executed. Drawing on previously overlooked sources, this Article then recovers the lost history of removal law, showing that for-cause removal provisions were not primarily designed to protect agency independence. Rather, they emerged to place a *limit* on that independence by facilitating the removal of officials who otherwise enjoyed a secure tenure in office for a stated term of years. In identifying the appropriate limits of official independence—in adding provisions to permit removal for inefficiency, neglect of duty, and malfeasance in office—legislators incorporated terms aimed at eradicating unfaithful administration and incompetence. “Neglect of duty” and “malfeasance in office” have their roots in the English common law and were the terms courts traditionally used to describe an official’s failure to faithfully execute his office. “Inefficiency,” by contrast, was added to the removal lexicon in the middle of the nineteenth century by legislators concerned with public debt and wasteful spending. By drawing a line at INM, Congress created agencies designed to be independent of the President. But this independence comported with the President’s constitutional obligations even on an expansive reading of Article II. Any attempt to enlarge the President’s removal authority beyond the limits Congress intended must grapple with this historical record.



## APPENDIX A: SPECTRUM OF AGENCY INDEPENDENCE

Independence ↓	For Cause	Board of Governors of the Federal Reserve System
		Postal Regulatory Commission
		U.S. Postal Service Board of Governors
	INM+†	Legal Services Corporation
		National Mediation Board
		State Justice Institute
		U.S. Institute of Peace Board of Directors
	INM	Chemical Safety and Hazard Investigation Board
		Federal Energy Regulatory Commission
		Federal Labor Relations Authority
		Federal Maritime Commission
		Federal Mine Safety and Health Review Commission
		Federal Trade Commission
		Merit Systems Protection Board
		National Transportation Safety Board
		Nuclear Regulatory Commission
		Occupational Safety and Health Review Commission
		Office of Special Counsel
	NM	Consumer Product Safety Commission
		National Labor Relations Board
Social Security Administration Commissioner		
U.S. Commission on Civil Rights		
U.S. Sentencing Commission		

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† INM+ refers to agencies whose enabling acts include INM as well as other removal grounds such as immorality, ineligibility, offenses involving moral turpitude, and conviction of a felony.

Independence ↓	Specified Term (1926–1935) <sup>††</sup>	Federal Communications Commission
		Federal Deposit Insurance Corporation
		National Credit Union Administration
		Railroad Retirement Board
		Securities and Exchange Commission
		U.S. International Trade Commission
	Specified Term	Architectural and Transportation Barriers Compliance Board
		Arctic Research Commission
		Broadcasting Board of Governors
		Commission of Fine Arts
		Commodity Futures Trading Commission
		Defense Nuclear Facilities Safety Board
		Equal Employment Opportunity Commission
		Farm Credit Administration Board
		Federal Election Commission
		Federal Retirement Thrift Investment Board
		Marine Mammal Commission
		Millennium Challenge Corporation
		National Council on Disability
		National Labor-Management Panel
National Science Foundation		

†† The table distinguishes between two types of agencies with term-tenured officials and no removal permissions: those whose enabling acts were written after *Myers* was decided but before *Humphrey's Executor* and those whose acts were written either before *Myers* was decided or after *Humphrey's Executor*. It is fairly clear that Congress intended to deprive the President of any removal authority over the latter agency heads. It is less clear what Congress intended with respect to the agencies created in the period between *Myers* and *Humphrey's Executor*. Congress may have read the dicta in *Myers*, until it was repudiated by *Humphrey's Executor*, to give the President a constitutional power to remove agency officials in certain circumstances and thus did not include removal permissions. The agencies with a specified term are the most independent of the President, as Congress has given the President no removal authority over their leaders. The agencies at the opposite end of the spectrum—those the President can remove for cause—are the least independent, as Congress has given the President authority to remove their leaders for a range of judicially recognized “causes.”

APPENDIX B<sup>†††</sup>

Year	Agency/Office	Provision	Term	AP	FC	I	N	M
1863	Comptroller of the Currency	ch. 58, § 1, 12 Stat. 665 (1863).	5 years					
1864	Comptroller of the Currency	12 U.S.C. § 2 (2018).	5 years					
1887	Interstate Commerce Commission	ch. 104, § 11, 24 Stat. 383 (1887).	6 years					
1890	Board of General Appraisers	ch. 407, § 12, 26 Stat. 136 (1890).	None					
1893	Civil Service Commission	ch. 27, § 1, 22 Stat. 403 (1883).	None					
1906	Court for China	ch. 3934, § 7, 34 Stat. 816 (1906).	10 years					
1910	Commission of Fine Arts	40 U.S.C. § 9101(b) (2018).	4 years					
1913	Board of Governors of the Federal Reserve System	12 U.S.C. § 242 (2018).	14 years*					
1913	Board of Mediation and Conciliation	ch. 6, § 11, 38 Stat. 108 (1913).	7 years					
1914	Federal Trade Commission	15 U.S.C. § 41 (2018).	7 years					
1916	Federal Farm Loan Board	ch. 245, § 3, 39 Stat. 360 (1916).	8 years					
1916	U.S. Employees' Compensation Commission	ch. 458, § 28, 39 Stat. 748 (1916).	6 years					
1916	U.S. Shipping Board	ch. 451, § 3, 39 Stat. 729 (1916).	6 years					
1916	U.S. Tariff Commission	ch. 463, § 700, 39 Stat. 795 (1916).	12 years					
1917	Federal Board of Vocational Education	ch. 114, § 6, 39 Stat. 932 (1917).	3 years					
1920	Railroad Labor Board	ch. 91, § 304, 41 Stat. 470 (1920).	5 years					
1921	Comptroller General, General Accounting Office	ch. 18, § 303, 42 Stat. 23 (1921).	15 years					
1922	U.S. Coal Commission	ch. 412, § 1, 42 Stat. 1023 (1922).	1 year					

††† Legend—AP: Statute permits presidential removal at pleasure. FC: Statute uses “for cause.” I: Statute uses “inefficiency.” N: Statute uses “neglect of duty.” \*: Statute has been amended; entry reflects current law.

Squares in lighter gray feature similar, but different, language. A spreadsheet with specific provisions is available from the authors upon request.

1924	Board of Tax Appeals	ch. 234, § 900, 43 Stat. 336 (1924).	12 years					
1926	National Mediation Board	45 U.S.C. § 154 (2018).	3 years					
1927	Federal Radio Commission	ch. 169, § 3, 44 Stat. 1162 (1927).	6 years					
1930	Federal Power Commission	16 U.S.C. § 792 (2018).	5 years					
1930	U.S. International Trade Commission	19 U.S.C. § 1330(b) (2018).	9 years					
1932	Federal Home Loan Bank Board	ch. 522, § 17, 47 Stat. 736 (1932).	6 years					
1933	Federal Deposit Insurance Corporation	12 U.S.C. § 1812(c)(1) (2018).	6 years					
1934	Federal Communications Commission	47 U.S.C. § 154(c)(1)(A) (2018).	5 years					
1934	Federal Housing Administration	ch. 847, § 1, 48 Stat. 1246 (1934).	4 years					
1934	National Credit Union Administration	12 U.S.C. § 1752a(c) (2018).	6 years					
1934	Securities and Exchange Commission	15 U.S.C. § 78d(a) (2018).	5 years					
1935	Commissioner, Social Security Administration	42 U.S.C. § 902(a)(3) (2018).	6 years					
1935	National Bituminous Coal Commission	ch. 824, § 2, 49 Stat. 992 (1935).	4 years					
1935	National Labor Relations Board	29 U.S.C. § 153(a) (2018).	5 years					
1935	Railroad Retirement Board	45 U.S.C. § 231f(a) (2018).	5 years					
1944	National Advisory Council on National Health Service Corps	42 U.S.C. § 254j(b)(1) (2018).	3 years					
1945	Export-Import Bank of the United States	12 U.S.C. § 635a(c)(8)(A) (2018).	4 years					
1947	Director, Central Intelligence Agency	50 U.S.C. § 3036 (2018).	None					
1947	National Labor Management Panel	29 U.S.C. § 175(a) (2018).	3 years					
1950	National Science Foundation	42 U.S.C. § 1861 (2018).	6 years					
1958	Board of Veterans Appeals	38 U.S.C. § 7101(b)(2) (2018).	6 years					

1961	Director and Deputy Director, Peace Corps	22 U.S.C. § 2503 (2018).	None					
1965	Equal Employment Opportunity Commission	42 U.S.C. § 2000e-4(a) (2018).	5 years					
1970	Chemical Safety and Hazard Investigation Board	42 U.S.C. § 7412(r)(6)(B) (2018).	5 years					
1970	Inspector General of the U.S. Postal Service	39 U.S.C. § 202(e)(3) (2018).	7 years					
1970	Occupational Safety and Health Review Commission	29 U.S.C. § 661(b) (2018).	6 years					
1970	U.S. Postal Service Board of Governors	39 U.S.C. § 202(a)(1), (b)(1) (2018).	7 years					
1971	Farm Credit Administration Board	12 U.S.C. § 2242(b) (2018).	6 years					
1972	Consumer Product Safety Commission	15 U.S.C. § 2053(a) (2018).	7 years					
1972	Marine Mammal Commission	16 U.S.C. § 1401(b)(2) (2018).	3 years					
1973	Architectural and Transportation Barriers Compliance Board	29 U.S.C. § 792(a)(2)(A)(i) (2018).	4 years*					
1974	Commodity Futures Trading Commission	7 U.S.C. § 2(a)(2) (2018).	5 years					
1974	Federal Election Commission	52 U.S.C. § 30106(a)(2)(A) (2018).	6 years					
1974	Legal Services Corporation	42 U.S.C. § 2996c(b), (e) (2018).	3 years					
1974	Nuclear Regulatory Commission	42 U.S.C. § 5841(c), (e) (2018).	5 years					
1974	Pension Benefit Guaranty Corporation	29 U.S.C. § 1302 (2018).	None					
1975	U.S. Institute of Peace Board of Directors	22 U.S.C. § 4605(e), (f) (2018).	4 years					

1976	Administrator and Chief Actuary, Centers for Medicare and Medicaid Services	42 U.S.C. § 1317(b)(1) (2018).	None					
1976	Regional Fishery Management Councils (Eight)	16 U.S.C. § 1852(b)(3), (6) (2018).	3 years					
1977	Federal Energy Regulatory Commission	42 U.S.C. § 7171(b)(1) (2018).	5 years					
1977	Federal Mine Safety and Health Review Commission	30 U.S.C. § 823(b)(1) (2018).	6 years					
1978	Federal Labor Relations Authority	5 U.S.C. § 7104(b), (c) (2018).	5 years					
1978	Merit Systems Protection Board	5 U.S.C. § 1202(a), (d) (2018).	7 years					
1980	Foreign Service Grievance Board	22 U.S.C. § 4135(b), (d) (2018).	2 years					
1980	Foreign Service Labor Relations Board	22 U.S.C. § 4106(e) (2018).	3 years					
1983	U.S. Commission on Civil Rights	42 U.S.C. § 1975(c), (e) (2018).	6 years					
1984	Arctic Research Commission	15 U.S.C. § 4102(c) (2018).	4 years					
1984	National Archives and Records Administration	44 U.S.C. § 2103 (2018).	None					
1984	State Justice Institute Board of Directors	42 U.S.C. § 10703(b), (h) (2018).	3 years					
1984	U.S. Sentencing Commission	28 U.S.C. § 991(a) (2018).	6 years					
1986	Federal Retirement Thrift Investment Board	5 U.S.C. § 8472(e)(1) (2018).	4/3/2 years*					
1988	Defense Nuclear Facilities Safety Board	42 U.S.C. § 2286(d)(2) (2018).	5 years					
1988	National Indian Gaming Commission	25 U.S.C. § 2704(b) (2018).	3 years					
1989	Office of Special Counsel	5 U.S.C. § 1211(b) (2018).	5 years					
1994	Broadcasting Board of Governors	22 U.S.C. § 6203(b)(2) (2018).	3 years					

1994	Director, National Appeals Division, Department of Agriculture	7 U.S.C. § 6992(b) (2018).	6 years					
1994	Joint Staff of the National Guard Bureau	10 U.S.C. § 10506(a) (3) (A) (2018).	4 years					
1994	National Transportation Safety Board	49 U.S.C. § 1111(c) (2018).	5 years					
1995	Surface Transportation Board	49 U.S.C. § 1301(b) (3) (2018).	5 years					
1996	Administrator and Chief Actuary, Social Security Administration	42 U.S.C. § 902(c) (1) (2018).	None					
1996	Chief of Air Force Reserve	10 U.S.C. § 9038(c) (2018).	4 years					
1996	Chief of Navy Reserve	10 U.S.C. § 8083(c) (2018).	4 years					
1996	Commander, Marine Forces Reserve	10 U.S.C. § 8084(c) (2018).	4 years					
1998	National Council on Disability	29 U.S.C. § 780(b) (1) (2018).	3 years					
1998	Performance-Based Organization for the Delivery of Federal Student Financial Assistance	20 U.S.C. § 1018(d) (3) (2018).	3-5 years					
1999	Director of the Coast Guard Reserve	14 U.S.C. § 309(c) (1) (2018).	2-4 years					
2000	Medicare-Eligible Retiree Health Care Board of Actuaries	10 U.S.C. § 1114(a) (2) (A) (2018).	15 years					
2002	Public Company Accounting Oversight Board	15 U.S.C. § 7211(e) (6) (2018).	5 years					
2003	Air Traffic Services Committee	49 U.S.C. § 106(p) (6) (G) (2018).	3 years					
2004	Copyright Royalty Judgeships	17 U.S.C. § 802(i) (2018).	6 years					
2004	Millennium Challenge Corporation	22 U.S.C. § 7703(c) (4) (B) (i) (2018).	3 years					
2006	Federal Maritime Commission	46 U.S.C. § 301(b) (3) (2018).	5 years					

2006	Postal Regulatory Commission	39 U.S.C. § 502(a) (2018).	6 years					
2008	Defense Department Board of Actuaries	10 U.S.C. § 183(b)(3) (2018).	15 years					
2008	Director, Federal Housing Finance Agency	12 U.S.C. § 4512(b)(2) (2018).	5 years					
2009	Corporation for Travel Promotion	22 U.S.C. § 2131(b) (2018).	3 years					
2010	Consumer Financial Protection Bureau	12 U.S.C. § 5491(c)(3) (2018).	5 years					
2010	Independent Medicare Advisory Board	Pub. L. No. 111-148, § 3403 (g)(2)-(4), 124 Stat. 119, 503-04 (2010).	6 years					



