ESSAYS

PRESIDENTIAL POWER AND WHAT THE FIRST CONGRESS DID NOT DO

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Scholars, advocates, and judges have long debated the scope of the President's "executive Power" under Article II, Section 1, of the Constitution. New articles by, among others, Professors Jean Galbraith, Julian Mortenson, Jed Shugerman, and Ilan Wurman have sharply rekindled those contentions, particularly with regard to the President's power to remove executive officers and to conduct the foreign affairs of the United States. This Essay takes a close look at one piece of the executive power puzzle: what the First Congress did and did not do in 1789 regarding the powers of the President. Unlike prior accounts, which have devoted great effort to parsing congressional debates, it focuses specifically on the text of Congress's 1789 enactments establishing the executive departments, with particular attention to what Congress did not do. The Essay further contrasts these enactments with earlier actions of the Confederation Congress and with the 1789 Congress's amendment of the Northwest Ordinance. It finds that the nonactions of the First Congress support the view that the Constitution in Article II, Section 1, gave the President independent power over some aspects of foreign affairs and independent power to remove executive officers.

INTRODUCTION

Scholars have closely examined and sharply debated what the First Congress did in 1789 regarding the powers of the President, particularly with respect to the President's power to remove executive officers and to conduct the foreign relations of the United States. This Essay approaches the matter from a different perspective, considering the

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implications of what the First Congress did not do. Unlike prior accounts, it does not attempt to parse the views or motivations of individual congressmen or groups of congressmen. It examines what Congress actually did and didn't do in the text of Congress's 1789 enactments establishing the executive departments, not how Congress may have debated its course of action or settled on its outcomes. The Essay further contrasts these enactments with earlier actions of the Confederation Congress and with the 1789 Congress's amendment of the Northwest Ordinance.

To be sure, if drawing conclusions from what Congress did is an uncertain project, drawing conclusions from what it did not do is even more so. Nonetheless, this Essay ventures a few suggestions. Specifically, it argues that the nonactions of the First Congress, particularly in light of the context in which Congress acted, support the view that the Constitution gave the President some independent powers in foreign affairs and independent power to remove executive officers.

I. TWO QUESTIONS OF EXECUTIVE POWER

Debates over the scope of presidential power under the Constitution date to the immediate postratification period. The First Congress in 1789 argued over the President's constitutional power to remove subordinate executive officers.[1] Only a few years later, former *Federalist* coauthors Alexander Hamilton and James Madison clashed over the President's power in foreign affairs.[2] These debates have recurred throughout U.S. history and as discussed below have been rekindled in modern times in a series of articles and cases attacking and defending the President's removal and foreign affairs powers.

The Constitution does not specifically assign power to remove executive officers. From the beginning, interpreters have found removal to be a presidential power, implied by either (or both of) the vesting of "executive Power" in the President by Article II, Section 1,

1 For an engaging overview of Congress's debates in this area, see DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 36–54 (1997). The principal debates in the House are recorded in 1 ANNALS OF CONG. 368–96, 455–607 (1789) (Joseph Gales ed., 1834) (reflecting arguments for and against presidential removal power). There are two printings of the first two volumes of the *Annals of Congress* with different running heads and pagination. Marion Tinling, *Thomas Lloyd's Reports of the First Federal Congress*, 18 WM. & MARY Q. 519, 520 n.2 (1961). Citations in this Essay refer to the second printing (running head, "History of Congress").

2 *See* Alexander Hamilton, *Pacificus No. 1*, Gazette of the U.S., June 29, 1793, *reprinted in* 4 THE WORKS OF ALEXANDER HAMILTON 432 (Henry Cabot Lodge ed., 1904); James Madison, *Helvidius No. 1*, Gazette of the U.S., Aug. 24, 1793, *reprinted in* 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 611 (J.B. Lippincott & Co. 1867).

or the President's duty, established by Article II, Section 3, to take care that the laws be faithfully executed.[3] A President without removal power, and hence lacking full authority over subordinate executive officers, does not—the argument goes—have the full executive power over law enforcement indicated by these clauses. To the contrary, others object, Congress's power to establish offices includes power to say how and by whom officers may be removed from those offices.[4]

Similarly, the Constitution does not specifically assign a general power to conduct the foreign affairs of the United States. A number of key foreign affairs powers are described in the text, including declaring war, appointing and receiving ambassadors, and making treaties.[5] But these powers taken together still seem short of a complete allocation of all that the management of foreign affairs entails. In particular, the power to act as the representative of the nation in foreign affairs—through diplomatic correspondence, for example—seems not fully included. From the early postratification period, one solution has been to find the foreign affairs powers not otherwise allocated to be part of the President's executive power vested by Article II, Section 1.[6] Prior to the Constitution's drafting, it is argued, important writers such as Blackstone and Montesquieu described foreign affairs powers as part of what they termed the executive power; thus these powers should be understood as within the meaning of the Constitution's phrase "executive Power" unless

3 *See, e.g.*, 1 ANNALS OF CONG. 382 (1789) (Joseph Gales ed., 1834) (statement of Rep. Clymer); *id.* at 461–62 (statement of Rep. Madison); *id.* at 473–74 (statement of Rep. Ames); *see also* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3–4 (2008); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006); Myers v. United States, 272 U.S. 52, 112–16 (1926) (Taft, C.J.); Morrison v. Olson, 487 U.S. 654, 705–06 (1988) (Scalia, J., dissenting); Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197–207 (2020).

4 *See, e.g.*, 1 ANNALS OF CONG. 377–78 (1789) (Joseph Gales ed., 1834) (statement of Rep. Lawrence); *id.* at 380 (statement of Rep. Gerry); *see also Myers*, 272 U.S. at 286–87 (Brandeis, J., dissenting); Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935). In the 1789 debates, a number of speakers argued that the President could remove only with the advice and consent of the Senate. *See, e.g.*, 1 ANNALS OF CONG. 380 (1789) (Joseph Gales ed., 1834) (statement of Rep. Gerry).

5 U.S. CONST. art. I, § 8, cl. 11; *id.* art. II, § 2–3; *id.* § 2, cl. 2.

6 *E.g.*, *Pacificus No. 1*, *supra* note 2; *see also* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001) [hereinafter Prakash & Ramsey, *Executive Power*] (describing the association of executive power and foreign affairs power by leading members of Washington's administration); Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591 (2005) [hereinafter Prakash & Ramsey, *Jeffersonian Executive*] (same).

textually allocated elsewhere.[7] But others have argued that "executive" power's traditional meaning of law enforcement should not be expanded to the exercise of a set of powers not expressly contemplated in the text and only ambiguously (at most) present in the preratification sources.[8]

Recent scholarship has sharply renewed these longstanding controversies. Professors Jean Galbraith, Julian Davis Mortenson, and Ilan Wurman separately contest the association of executive power with foreign affairs power.[9] Professor Jed Shugerman, in a series of articles, contests the association of executive power with removal power.[10] In a recent book, Professor Michael McConnell defends both aspects of the President's constitutional powers,[11] while others defend them separately.[12]

These scholarly debates have been comprehensive and indeed a bit overwhelming. This Essay takes a different approach in focusing specifically on one piece of Founding-era evidence: the 1789 actions of the First Congress, tasked with implementing the new Constitution's provisions on executive power. Of course, the First Congress has long been part of the argument over executive power, particularly with

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7 *See* Zivotofsky v. Kerry, 576 U.S. 1, 33–40 (2015) (Thomas, J., concurring in judgment in part and dissenting in part); MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 51–74 (2007); Michael D. Ramsey, *The Textual Basis of the President's Foreign Affairs Power*, 30 HARV. J.L. & PUB. POL'Y 141, 142 (2006); Prakash & Ramsey, *Executive Power*, *supra* note 6, at 256–78; Prakash & Ramsey, *Jeffersonian Executive*, *supra* note 6, at 1618–53.

8 *E.g.*, Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004).

9 *See* Jean Galbraith, *The Runaway Presidential Power over Diplomacy*, 108 VA. L. REV. 81 (2022); Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93 (2020); Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269 (2020) [hereinafter Mortenson, *Executive Power Clause*]; Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019) [hereinafter Mortenson, *Article II*].

10 Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753 (2023) [hereinafter Shugerman, *Indecisions*]; Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479 (2022) [hereinafter Shugerman, *Vesting*]; Jed Handelsman Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J.L. & HUMANS. 125 (2022); *see also* Andrea Scoseria Katz & Noah A. Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. F. 404 (2023) (similarly disputing executive removal power on historical grounds).

11 MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 235–62, 335–41 (2020).

12 Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023) (defending presidential removal power); Wurman, *supra* note 9 (defending presidential removal power while challenging presidential foreign affairs power); Michael D. Ramsey, *The Vesting Clauses and Foreign Affairs*, 91 GEO. WASH. L. REV. (forthcoming 2023) (defending presidential foreign affairs power).

respect to removal power (and somewhat less so in regard to foreign affairs), and the records of its debates have been extensively, if inconclusively, parsed. This Essay, however, further refines the focus by addressing only the actual output of the First Congress—that is, what the Congress as a collective body did, and perhaps more importantly what it did not do, in its enactments regarding presidential powers. Such a focus can't resolve the longstanding debate, but it may promote more complete consideration of a critical part of that debate.

II. THE FIRST CONGRESS'S ACTIONS AND INACTIONS REGARDING EXECUTIVE POWER

The First Congress in 1789 passed a number of important statutes organizing the executive branch. Yet these enactments are seemingly incomplete. While they are generally familiar, having been widely discussed by courts and commentators, this Part presents a systematic overview to facilitate discussion. In addition, this Part departs from the usual approach to the 1789 Congress by focusing specifically on the text of its enactments rather than on its debates, and by focusing less on what the statutes said and more on what they did not say.

A. Foreign Affairs

The first and most frequently examined 1789 statute relating to presidential power is the Act of July 27, 1789, creating the Department of Foreign Affairs.[13] Its first section, after declaring the establishment of that Department, provided:

> [T]hat there shall be a principal officer therein, to be called the Secretary for the Department of Foreign Affairs, who shall perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President of the United States, agreeable to the Constitution, relative to correspondences, commissions or instructions to or with public ministers or consuls, from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs, as the President of the United States shall assign to the said department; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct.[14]

13 Act of July 27, 1789, ch. 4, 1 Stat. 28.

14 *Id.* § 1, 1 Stat. at 29.

Section 2 provided for an "inferior officer" called the Chief Clerk, "to be appointed by the said principal officer, and to be employed therein as he shall deem proper,"[15] with provisions for removal of the Secretary that were much debated at the time[16] and have been much debated since[17]: that the Chief Clerk would take custody of the Department's records "whenever the said principal officer shall be removed from office by the President."[18] Section 3 provided an oath of office for the Secretary and the Clerk, and Section 4 provided that the Secretary should take over the records of the Department of Foreign Affairs under the Articles of Confederation.[19] The Act had no further provisions.

Thus the Act did not provide any material duties for the Secretary, apart from duties the President might prescribe, and it made the Secretary entirely subservient to the President. It described the duties the President could give to the Secretary broadly as correspondence and instructions to U.S. diplomatic personnel, correspondence with foreigners, and "such other matters respecting foreign affairs" that the President might (consistent with the Constitution) assign.[20] Moreover, neither this Act nor any contemporaneous act expressly authorized the President to take any actions relating to foreign affairs, nor provided any congressional direction for the conduct of foreign affairs. So while the First Congress provided a Department and a Secretary to assist the President in the management of foreign affairs, it did not say anything directly about the President's power to conduct foreign affairs, while apparently assuming that the President had that power.[21]

This silence contrasts sharply with the previous Congress's establishment of the former Department of Foreign Affairs under the Articles of Confederation. There, Congress provided for a Secretary of Foreign Affairs whose duties were spelled out in detail, and who was overseen and directed by Congress,[22] including with the direction

> that letters to the ministers of the United States, or ministers of foreign powers, which have a direct reference to treaties or conventions proposed to be entered into, or instructions relative thereto, or other great national subjects, shall be submitted to

15 *Id.* § 2.

16 *See* CURRIE, *supra* note 1, at 36–41.

17 *E.g.*, Shugerman, *Indecisions*, *supra* note 10; Prakash, *supra* note 3.

18 Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29.

19 *Id.* §§ 3–4.

20 *Id.* § 1.

21 No other act passed in 1789 (or soon thereafter) provided any general foreign affairs powers to the President, the Secretary, or the Department.

22 22 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 88–91 (Gaillard Hunt ed., 1914) (Resolution of February 22, 1782).

> the inspection and receive the approbation of Congress before they shall be transmitted.[23]

Moreover, it provided that:

> All letters to sovereign powers, letters of credence, plans of treaties, conventions, manifestoes, instructions, passports, safe conducts, and other acts of Congress relative to the department of foreign affairs, when the substance thereof shall have been previously agreed to in Congress, shall be reduced to form in the office of foreign affars [sic], and submitted to the opinion of Congress, and when passed, signed and attested, sent to the office of foreign affairs to be countersigned and forwarded.[24]

The Confederation Congress further added "that [the Secretary] may acquire that intimate knowledge of the sentiments of Congress, which is necessary for his direction, he may at all times attend upon Congress, and shall [particularly attend when summoned or ordered by the President]."[25] In sum, in the 1789 Act, the new Congress omitted all of the grants of power, and all of the provisions for congressional oversight and approval, that had applied to the previous Department of Foreign Affairs; it left direction of the new Department entirely to the President.[26]

Later in 1789, Congress changed the name of the Department of Foreign Affairs to the Department of State and added some specific domestic duties for the Secretary: that the Secretary "shall" cause enacted laws to be published in major newspapers and deliver copies to members of Congress and to the States; that the Secretary "shall" keep the seal of the United States and affix it to commissions of officers of the United States; that the Secretary "shall," with the approval of the

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23 *Id.* at 88–89. The Department was first established by a resolution of January 10, 1781, which said less about powers and duties, and which was repealed by the 1782 resolution. *Id.* at 92.

24 *Id.* at 91.

25 *Id.* at 89–90 (second alteration in original).

26 Practice shifted in accordance with the shift in language. Under the Articles, Congress closely monitored and directed the Secretary of Foreign Affairs, including with specific directions on foreign correspondence. Prakash & Ramsey, *Executive Power*, *supra* note 6, at 318; *see, e.g.*, 24 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 5–6 (Gaillard Hunt ed., 1922) (directing Secretary John Jay to communicate with the French minister); 29 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 495–96 (John C. Fitzpatrick ed., 1933) (directing Jay to communicate with the Spanish minister). After the Constitution was adopted, the Articles' Secretary of Foreign Affairs, John Jay, remained in office for some time until a successor (Thomas Jefferson) took his place. But once Washington became President, Washington took over direction of Jay's duties and the general management of foreign correspondence, without objection from Congress. Prakash & Ramsey, *Executive Power*, *supra* note 6, at 298–300.

President, create a seal for the Department.[27] Thus, Congress did create statutory duties for the Secretary—just not ones relating to foreign affairs.

B. Military Affairs

Shortly after passing the Act creating the Department of Foreign Affairs, Congress enacted a similar statute creating the Department of War.[28] Closely paralleling the language of the previous Act, it created a Department and a Secretary, and said only that the Secretary must follow the directions of the President on matters relating to the military:

> [The Secretary] shall perform and execute such duties as shall from time to time be enjoined on, or entrusted to him by the President of the United States, agreeably to the Constitution, relative to military commissions, or to the land or naval forces, ships, or warlike stores of the United States, or to such other matters respecting military or naval affairs, as the President of the United States shall assign to the said department, or relative to the granting of lands to persons entitled thereto, for military services rendered to the United States, or relative to Indian affairs; and furthermore, that the said principal officer shall conduct the business of the said department in such manner, as the President of the United States shall from time to time order or instruct.[29]

Also like the Act establishing the Department of Foreign Affairs, this Act in its second section created a Chief Clerk who (like the Chief Clerk for the Department of Foreign Affairs) would take custody of the Department's records "whenever the said principal officer shall be removed from office by the President."[30] Plainly, the Act creating the War Department was simply copied over from the Act creating the Foreign Affairs Department (passed a week and a half earlier), with military matters substituted for foreign affairs matters.

And also like the new Foreign Affairs Department, the new War Department was a sharp break from the prior Department of War

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27 Act of Sept. 15, 1789, ch. 14, §§ 2, 4–5, 1 Stat. 68, 68–69. The only other 1789 act materially relating to foreign affairs was an appropriation to cover expenses of negotiating with native tribes. *See* Act of Aug. 20, 1789, ch. 10, § 1, 1 Stat. 54, 54. Congress also passed a general appropriation to cover activities of the government without specific reference to foreign affairs activities. *See* Act of Sept. 29, 1789, ch. 23, 1 Stat. 95.

28 Act of Aug. 7, 1789, ch. 7, 1 Stat. 49.

29 *Id.* § 1, 1 Stat. at 50.

30 *Id.* § 2. Sections 3 and 4 of the Act, again closely paralleling the Act creating the Foreign Affairs Department, provided an oath of office for the Secretary and the Clerk and directed that the Secretary should take custody of the records of the previous Department of War under the Articles. *Id.* §§ 3–4.

under the Articles of Confederation. By an ordinance passed in 1785, the Articles' Secretary of War (like the Articles' Secretary of Foreign Affairs) had specific duties assigned by Congress and was subject to specified oversight and direction by Congress.[31] The Secretary, for example, had

> the powers and duty . . . to carry into effect all ordinances and resolves of Congress for raising and equipping troops for the service of the United States, and for inspecting the said troops; and to direct the arrangement, destination and operation of such troops as are or may be in service, subject to the Orders of Congress.[32]

In sum, Congress's 1789 treatment of military matters closely paralleled its 1789 treatment of foreign affairs, both in what it did and what it did not do. Departing from the immediately preexisting practice under the Articles, it created a Department and a Secretary under the control of the President, with no statutory duties (apart from following the direction of the President) and no provisions for direction or approval from Congress. Similarly, the statute did not provide any powers or duties to the President (apart from directing the Department).[33]

C. The Treasury Department and the Attorney General

In addition to War and Foreign Affairs, Congress created a Treasury Department, and also created the offices of Attorney General and related legal officers (but without designating these as part of a Department).

Passed a little over a month after the Act creating the Department of Foreign Affairs, the Act creating the Treasury Department[34] was (unlike the Act creating the War Department) not a close parallel.

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31 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 21–24 (John C. Fitzpatrick ed., 1933).

32 *Id.* at 21–22.

33 Unlike in foreign affairs, the First Congress returned to military affairs in subsequent statutes in 1789 and 1790. The subsequent 1789 statute temporarily carried over regulations and pay for the troops from provisions of Congress under the Articles. *See* Act of Sept. 29, 1789, ch. 25, §§ 1–2, 4, 1 Stat. 95, 95–96. It also provided for an oath for the troops in which they swore to (among other things) "obey the orders of the President of the United States of America." *Id.* § 3, 1 Stat. at 96. This Act also authorized the President to call up the militia "for the purpose of protecting the inhabitants of the frontiers of the United States from the hostile incursions of the Indians." *Id.* § 5. It did not say anything else about the duties or powers of the President or the Secretary of War, and it did not provide any authority or direction as to how the President should or could use the regular troops (unlike its provision for the use of the militia). The 1790 Act provided somewhat more detailed directions for raising, equipping and regulating the military. *See* Act of Apr. 30, 1790, ch. 10, 1 Stat. 119.

34 Act of Sept. 2, 1789, ch. 12, 1 Stat. 65.

Instead, it prescribed statutory duties for the Secretary and other officers ("a Comptroller, an Auditor, a Treasurer, a Register, and an Assistant to the Secretary of the Treasury"[35]). For example:

> [I]t shall be the duty of the Secretary of the Treasury to digest and prepare plans for the improvement and management of the revenue, and for the support of public credit; to prepare and report estimates of the public revenue, and the public expenditures; to superintend the collection of the revenue; . . . and generally to perform all such services relative to the finances, as he shall be directed to perform.[36]

Unlike the other Secretaries, the Treasury Secretary was not specifically placed under the direction of the President as to the duties of office; rather, the use of the passive voice in the above-quoted sentence ("shall be directed to perform") leaves the source of direction somewhat ambiguous. The Act creating the Treasury Department followed the Act creating the Department of Foreign Affairs in one key respect, however: it repeated the direction that a specified officer (here, the Assistant Secretary) should have custody of the Department's records "whenever the Secretary shall be removed from office by the President of the United States, or in any other case of vacancy in the office of Secretary."[37]

Last as to the creation of executive offices, in the 1789 Act creating and organizing the federal judiciary Congress also provided for an Attorney General

> whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments.[38]

This Act also provided for an "attorney for the United States" in each judicial district, "whose duty it shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned."[39]

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35 *Id.* § 1, 1 Stat. at 65.

36 *Id.* § 2, 1 Stat. at 65–66. Each of the other named officers of the Department had specified duties as well. *See id.* § 3 (Comptroller); *id.* § 4 (Treasurer); *id.* § 5, 1 Stat. at 66–67 (Auditor); *id.* § 6, 1 Stat. at 67 (Register).

37 *Id.* § 7. The Act also omitted—one assumes inadvertently—the provision in the War and Foreign Affairs Department statutes prescribing an oath of office.

38 Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93.

39 *Id.*, 1 Stat. at 92. The Judiciary Act did not say anything about how these officers would be appointed or how they could be removed. Congress in 1789 also created a

D. Removals in the New Departments and the Northwest Territory

Finally, it is worth reviewing what the 1789 Congress did and did not enact regarding removal power. As noted (and as has been widely debated), as to the Secretaries of Foreign Affairs, War, and Treasury, the authorizing statutes somewhat ambiguously referred to actions to be taken by subordinate officers whenever the Secretaries "shall be removed from office by the President"—without specifying how and under what circumstances the President might have a power to remove.

The authorizing statutes did not say anything about how any of the other executive officers might be removed. The Judiciary Act, creating the office of Attorney General, had no provisions for removal of the Attorney General. The statutes also did not say anything about removal of the Chief Clerks of the Department of Foreign Affairs and the Department of War, any of the statutorily created subordinate officers in the Treasury Department, or the district attorneys established by the Judiciary Act.[40]

The 1789 Congress enacted one statute that—unlike the ones previously discussed—specifically gave the President removal power. In 1787, while the Constitutional Convention was meeting in Philadelphia, the Confederation Congress adopted what became known as the Northwest Ordinance, providing a governmental structure for the U.S. territory north of the Ohio River and west of the western border of Pennsylvania.[41] Among other things, the Ordinance created the office of Governor as the superior executive officer of the territory, along with a subordinate Secretary and three judges.[42] Under

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temporary office of Postmaster General, with powers "the same as they last were under the resolutions and ordinances of the late Congress" and "subject to the direction of the President of the United States in performing the duties of his office." Act of Sept. 22, 1789, ch. 16, § 1, 1 Stat. 70, 70.

40 In contrast, the authorizing ordinance of the War Department under the Articles specified that the Secretary "shall appoint and remove at pleasure all persons employed under him." 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 22 (John C. Fitzpatrick ed., 1933). For the Articles' Department of Foreign Affairs, the relevant resolution specified that the Secretary would "hold his office during the pleasure of Congress" and that he could appoint assistants, without specifying how the assistants would be removed. 22 *id.* at 88, 91.

41 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 334–43 (Roscoe R. Hill ed., 1936) (recording "An Ordinance for the government of the territory of the United States North West of the river Ohio" (1787)) [hereinafter 1787 Northwest Ordinance]; *see* PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE 58–64 (Univ. of Notre Dame Press 2019) (1987); JACK ERICSON EBLEN, THE FIRST AND SECOND UNITED STATES EMPIRES: GOVERNORS AND TERRITORIAL GOVERNMENT, 1784–1912, at 17–51 (1968).

42 1787 Northwest Ordinance, *supra* note 41, at 335–37.

the Ordinance, Congress appointed the executive officers, who held office for a fixed term unless earlier removed by Congress.[43]

In 1789, the new Congress revisited the Northwest Ordinance in an act titled "An Act to provide for the Government of the Territory North-west of the river Ohio."[44] The Act recited that "in order that the ordinance of the United States in Congress assembled, for the government of the territory north-west of the river Ohio may continue to have full effect, it is requisite that certain provisions should be made, so as to adapt the same to the present Constitution of the United States."[45] Despite its broad title, the Act made only a few specific changes: it gave the new President, with the Senate's advice and consent, authority to appoint the territorial officers, and it made the executive officers (the Governor and the Secretary) removable without limitation by the President.[46]

III. IMPLICATIONS

This Part considers some implications of the statutory action and nonaction described above. To repeat, this assessment looks at only a small piece of the picture—the text of statutes actually enacted by the First Congress—and so necessarily is only suggestive. But the statutes, and in particular what the statutes did not do, support some tentative conclusions.

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43 *Id.* at 335–36. Specifically, the Ordinance provided that "there shall be appointed from time to time by Congress a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress" and "[t]here shall be appointed from time to time by Congress a secretary, whose commission shall continue in force for four years, unless sooner revoked." *Id.* The Ordinance further provided that the Governor had authority to appoint other subordinate magistrates, and that the judges' commissions "shall continue in force during good behaviour." *Id.* at 336, 336–37.

44 Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

45 *Id.*, 1 Stat. at 50–51.

46 *Id.* § 1, 1 Stat. at 52–53. Specifically,

> the President shall nominate, and by and with the consent of the Senate, shall appoint all officers which by the said ordinance were to have been appointed by the United States in Congress assembled . . . and in all cases where the United States in Congress assembled, might, by the said ordinance, revoke any commission or remove from any office, the President is hereby declared to have the same powers of revocation and removal.

Id. § 1, 1 Stat. at 53. The Act also directed the Governor to communicate with and provide information to the President in cases where the Northwest Ordinance had previously directed that such communications and information go to Congress. *Id.* § 1, 1 Stat. at 52–53.

A. Executive Powers and Duties

First, as to military and foreign affairs power, the 1789 statutes and their omissions appear to recognize that the Constitution shifted power from Congress under the Articles to the new office of President. Congress no longer needed to give powers, duties, and direction to the War and Foreign Affairs Departments in the way it did under the Articles of Confederation. It was sufficient for Congress simply to provide officers to assist the President in military and foreign affairs matters and place those officers at the President's direction. And it was appropriate (though perhaps not required) to omit Congress's previous close oversight and direction of these matters, substituting instead the oversight and direction of the President. Thus the detailed provisions relating to powers, duties, and direction under the Articles of Confederation gave way to the 1789 Acts relating to the War and Foreign Affairs Departments—which as recounted did not say anything about powers, duties (other than a duty to follow the President's directions), or congressional direction.

For military matters, it is easy to see why Congress embraced this shift. Under the Articles, Congress had "sole and exclusive" authority over military operations, extending to "appointing all officers of the land forces[] in the service of the United States" and "directing their operations."[47] Pursuant to this power, Congress appointed the Commander in Chief of the armed forces, and also directed the deployment and use of troops. But the Constitution gave the new President the position of Commander in Chief.[48] It follows that Congress saw this as a reallocation to the President of power over matters such as direction and deployment of troops, thus accounting for Congress's limited treatment of military powers and duties in the Act creating the War Department.[49]

It's important to emphasize the limited nature of this conclusion. The silences of the War Department statute do not in themselves imply anything about the extent to which the President's military powers were understood to be exclusive. That Congress did not direct the President or the War Department in the 1789 statute doesn't show that

47 ARTICLES OF CONFEDERATION of 1781, art. IX, paras. 1, 4.

48 U.S. CONST. art. II, § 2, cl. 1.

49 Congress under the Constitution retained the powers to "raise and support Armies," to "provide and maintain a Navy" and to "make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cls. 12–14; *cf.* ARTICLES OF CONFEDERATION of 1781, art. IX (granting Congress these powers). Congress exercised these powers in the 1789 and 1790 Acts governing the military, as described above. But Congress did not think it needed to give the President or the Secretary of War general authority over military matters, since presumably after ratification that authority came directly from the Constitution.

Congress thought it couldn't do so.[50] But it does tend to show that Congress concluded it didn't need to, because the President already had military power from the Constitution.

In foreign affairs, which the 1789 Congress treated in an essentially similar manner to military affairs, the authorizing statute likewise seemed to recognize a shift in (at least some) constitutional foreign affairs powers from the Articles' Congress to the new office of President. Rather than an instrument of Congress, acting subject to the direction and approval of Congress, as under the Articles, the new Secretary of Foreign Affairs was an instrument of the President, acting subject to the direction and approval of the President. Rather than having congressionally prescribed powers and duties, as under the Articles, the Secretary had powers and duties to be given by the President (and the statute said nothing about the President's foreign affairs powers and duties).[51] As with military affairs, it seems likely that Congress thought the President had foreign affairs powers and duties (which could be passed on to the Secretary) from the Constitution itself.[52]

The constitutional basis for this shift is less clear.[53] Perhaps the President's constitutional foreign affairs powers that Congress had in

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50 *Compare* Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299 (2008) (finding very little exclusive presidential power over the military), *with* Michael D. Ramsey, *Response: Directing Military Operations*, 87 TEX. L. REV. SEE ALSO 29 (2009) (taking a somewhat broader view of exclusive presidential powers over the military), *and* Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213 (2005) (emphasizing limits on the President's exclusive military powers). The 1789 Act also didn't imply anything about the meaning of the Declare War Clause, and in particular it didn't suggest that Congress thought the President had power over war initiation. War initiation was not an issue at the time it was enacted, and the statute specifically said that the President must act "agreeably to" the Constitution. Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 50.

51 As noted, see *supra* note 26, a shift in practice had already occurred when Congress passed the 1789 Act. John Jay, the holdover Secretary of Foreign Affairs from the Confederation period, acted as a subordinate to Washington (and was treated as a subordinate by Washington) once Washington took office as President. The First Congress did not purport to direct Jay, nor did Jay seek direction from Congress, in the months prior to adoption of the 1789 Act. Thus the Act, in establishing a Secretary who acted at the President's direction as to foreign affairs, codified a relationship that Washington and Jay had already embraced as a practical matter. This context confirms that Congress and the executive branch were acting from a shared understanding of the Constitution's reallocation of foreign affairs powers.

52 *But see* Mortenson, *Executive Power Clause*, *supra* note 9, at 1334–40 (arguing that most executive actions must be authorized by the legislature); Mortenson, *Article II*, *supra* note 9, at 1234–43. Mortenson's view seems difficult to square with the First Congress's treatment of foreign affairs power.

53 See CURRIE, *supra* note 1, at 36 n.204 (quoting Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 29), noting:

mind were only those specifically listed in the Constitution—to appoint ambassadors, to receive foreign ambassadors, and to make treaties.[54] Depending on how broadly one reads those powers, they might convey considerable authority over foreign affairs.[55] But even read broadly these powers seem not to cover the full range of foreign affairs activities (and two of the three are shared with the Senate). A number of powers of the Secretary of Foreign Affairs under the Articles, as set forth in Congress's authorizing resolution, do not easily fit within the Constitution's specific presidential powers: correspondence with foreign governments, for example, and instruction of and correspondence with U.S. ambassadors.[56]

An alternative and more persuasive explanation is that Congress understood the President to have general power over foreign affairs (subject to limits elsewhere in the Constitution) as a result of the grant of the "executive Power" in Article II, Section 1. This theory of executive power has been defended and disputed at length elsewhere.[57] Assuredly the silences of the 1789 statute do not prove it. But the silences of the 1789 statute in this regard are consistent with it, and it appears to be the best explanation for them. If Article II, Section 1, gave the President powers in foreign affairs (subject to limitations elsewhere in the Constitution), Congress would not need to provide any foreign affairs powers or duties for the President or the Secretary; Congress could just say (as it did) that the Secretary should take such actions in foreign affairs as the President ("agreeable to the Constitution") might direct.[58]

> In requiring the Secretary of Foreign Affairs not only to carry on such dealing with our own and foreign ministers but also to conduct 'such other matters respecting foreign affairs' as the President should direct, the First Congress appeared to share the modern conviction that a general authority over foreign affairs was either implicit in the unpromisingly drafted specific powers or the general provision vesting executive power in the President or inherent in the office itself.

54 U.S. CONST. art. II, §§ 2–3.

55 *See* Bradley & Flaherty, *supra* note 8 (suggesting this view); Wurman, *supra* note 9 (specifically defending this view).

56 *See* MCCONNELL, *supra* note 11, at 241 (noting the difficulty of deriving broad power over foreign affairs from the President's specific powers). Perhaps one might say instead that the 1789 Act was an implicit delegation of congressional foreign affairs powers to the President—but that would raise the difficult question of how a general power over foreign affairs could be derived from Congress's enumerated powers, and it is in considerable tension with the actual language of the Act, which says nothing about presidential power.

57 *See* sources cited *supra* notes 6–9, 11–12.

58 Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 29. Congress's willingness to recognize unspecified presidential foreign affairs powers undercuts one of the principal arguments made against the theory that Article II vested these powers in the President. Professors

As with military powers, this conclusion does not necessarily suggest that the President's foreign affairs powers were exclusive, or that Congress thought they were.[59] Again, the fact that Congress chose not to direct the President or the Secretary in foreign affairs matters doesn't show that Congress thought it couldn't—just that Congress concluded that it didn't need to.

The contrast with the Treasury Department statute reinforces these suggestions. Unlike in military matters and foreign affairs, the 1789 Act organizing the Treasury Department contained specific powers and duties for the Secretary and other officers. That suggests that Congress saw the Treasury differently. And the discussion above suggests why: unlike military matters and foreign affairs, there is no constitutional basis for independent presidential power over financial matters. The President would presumably have charge of faithfully executing statutes relating to financial matters (as the President would for all statutes),[60] but absent a relevant statute the President would lack independent constitutional power. Thus Congress needed to direct the operation of the Treasury Department in a way Congress did not need to direct the operation of the War and Foreign Affairs Departments.[61]

B. Removals

As to removals, the most noticeable silence on the face of the 1789 statutes is the lack of any specified power to remove the subordinate officers—the Chief Clerks and the named officers, other than the Secretary, of the Treasury Department. The most likely explanation is that Congress assumed the President had constitutional power to remove them. As discussed, the authorizing statutes indicated that the

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Mortenson and Wurman both strongly contend that the failure of executive foreign affairs power to be contested in the ratification debates indicates that it was not widely recognized. *See* Mortenson, *Executive Power Clause*, *supra* note 9, at 1358–65; Wurman, *supra* note 9, at 132–33. Because this presidential role appears to have been uncontroversially accepted in 1789, however, there is less reason to expect that it would have been controversial in 1787–1788.

59 *Cf.* Galbraith, *supra* note 9, at 114 (contesting presidential claims of exclusivity in foreign affairs).

60 *See* Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 713; Mortenson, *Executive Power Clause*, *supra* note 9, at 1310.

61 The 1789 treatment of the Attorney General is less easily explained. Presumably the President would have power to direct the Attorney General as part of the President's law execution power. Congress may have thought that specification of the Attorney General's powers and duties was necessary to distinguish that office from the district attorneys, who had the principal power of prosecution on behalf of the United States.

President would have removal authority over the Secretaries.[62] Although the statutes might be read to implicitly give the President removal authority over the Secretaries (by mentioning that the President had this power),[63] there is no such implication regarding the subordinate officers. Yet it would be quite odd for the President to have removal authority over the superior officers but not over the subordinates. And it would be odder still if the subordinate officers (but not the Secretaries) had in effect life tenure (if the lack of a removal provision were thought to envision removal only by impeachment) or required Senate advice and consent for removal. The departmental structure and the statutes' silence as to removal power strongly suggest recognition of a constitutional power of removal by the President. And because the Constitution does not directly assign removal power, removal authority over the subordinates must have been understood as part of the President's authority over the military, foreign affairs, and (as to the Treasury) law execution.[64]

That conclusion in turn suggests that the most plausible reading of the 1789 statutes is that they recognized the President's constitutional removal authority over the Secretaries as well. If the President had constitutional removal authority over the subordinates, it's not clear why the President would not also have constitutional removal authority over their superiors. The logic supporting subordinate removal—that the power is part of the larger constitutional power the subordinates help carry into effect—applies equally to removal of the Secretaries. Thus the better reading of the statutes seems to be that they recognized a preexisting presidential removal power over the Secretaries, rather than granting a statutory removal power.[65]

Congress's 1789 Act respecting the Northwest Territory confirms this reading. As discussed, this Act—unlike the Acts organizing the

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62 As outlined above, each statute provided that the Chief Clerk (or the Assistant Secretary in the case of the Treasury Department) would take custody of the Department records when the Secretary "shall be removed by the President," and none of the statutes provided any further direction on removal. *See supra* text accompanying notes 15–19.

63 *See* CURRIE, *supra* note 1, at 40–41.

64 This reasoning indicates why Congress treated Treasury differently from the Departments of War and Foreign Affairs in creating powers and duties, but in parallel with respect to removals. Unlike war and foreign affairs, the President had no constitutional authority over financial matters. But once Congress provided powers and duties in financial matters, the President had constitutional authority over their execution, and thus had constitutional removal power over the officers tasked with their execution. This reasoning would also explain why removal of the Attorney General wasn't specified, if it was thought that removal power arose from the President's constitutional power over law execution.

65 As noted, both views were expressed in the congressional debates. *See* CURRIE, *supra* note 1, at 36–41.

executive departments—did give the President express removal power over the territorial Governor and Secretary.[66] The 1789 Act's text and context strongly indicate that Congress thought it was making a constitutionally mandated change. The Act specifically recited that it was "requisite" to enact changes "to adapt the [Northwest Ordinance] to the present Constitution of the United States."[67] The Act's other principal changes—that the President appoint territorial officers with the Senate's advice and consent and that the Governor report to the President—have obvious connections to the Constitution's changes in appointments authority and law execution authority as compared to the Articles of Confederation. Moreover, the new Congress had no evident policy motivation (apart from constitutional concerns) to reduce its control over the territorial officers, which had been established only two years earlier. And the new Constitution confirmed Congress's broad authority over the territory in Article IV.[68] Thus the Act indicates that the change in removal power, like the change in appointments power, was required by the Constitution.

That conclusion in turn indicates that Congress understood the President to have general constitutional removal authority over executive officers: nothing in the Constitution suggests that the President might have more authority over territorial officers than over other executive officers (if anything, Article IV suggests the opposite). Presumably the President's authority over territorial officers arose from the President's general Article II power over law execution (a power confirmed by the Act's shift of the Governor's reporting obligations from Congress to the President).[69] But unlike the situation of the departmental authorizing statutes discussed earlier, the Northwest Ordinance had already created the territorial offices prior to the Constitution, with removal power in Congress. As a result, bringing the Ordinance into compliance with the Constitution required an affirmative statement of presidential removal power to alter the prior structure—an imperative that did not exist with respect to the new offices.

As with powers and duties, the text of the 1789 statutes doesn't necessarily imply that removal power is an indefeasible power of the President.[70] Congress's power to limit presidential removals is not

66 *See supra* Section II.D.

67 Act of Aug. 7, 1789, 1 Stat. 50, 50–51; *see supra* Section II.D.

68 U.S. CONST. art. IV, § 3, cl. 2 (giving Congress power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States").

69 *See* Act of Aug. 7, 1789, § 1, 1 Stat. 50, 52–53.

70 *See* Shugerman, *Vesting*, *supra* note 10 (arguing that powers arising from the Vesting Clause are defeasible by Congress); Wurman, *supra* note 9 (arguing that they are not).

mentioned, and is neither affirmed nor excluded, by the statutes themselves. The statutes are nonetheless consistent with the President having an indefeasible removal power, to the extent removal is thought to arise from the President's independent constitutional powers.

CONCLUSION

In establishing the initial executive Departments of War, Foreign Affairs and Treasury in 1789, the First Congress didn't do several key things. When it created a Department of Foreign Affairs, it did not provide for any foreign affairs powers or duties of the Secretary, other than to act at the direction of the President—and it did not provide any foreign affairs powers or duties for the President. Similarly, when it created a Department of War, it did not provide for any military powers or duties of the Secretary, other than to act at the direction of the President—and it did not provide any military powers or duties for the President. Further, it did not provide for removal of the officers of these departments or of the Treasury Department.

By not doing these things, Congress departed from the departmental structure established under the Articles of Confederation. The Articles' Congress created Secretaries of War and Foreign Affairs with powers and duties specified in detail by Congress, and who acted under the direction and subject to the approval of Congress. Thus the enactments of the 1789 Congress indicated an understanding that the new Constitution had created a President with independent constitutional power in these areas (an understanding President Washington had already put into practice by taking control of the Departments and personnel carried over from the Confederation period). As to military matters, the President's power is most easily associated with the Commander-in-Chief power. As to foreign affairs, the recognition of an independent presidential power is at least consistent with (one might say is indicative of) the idea of presidential foreign affairs power arising from Article II, Section 1's vesting of executive power in the President. And as to removals, Congress's failure to grant removal power suggests that removal power was understood to be an aspect of the President's constitutional powers over foreign affairs, the military, and law execution—a point confirmed by Congress's amendment of the Northwest Ordinance to shift removal power over existing territorial officers from Congress to the President.