Tension in the Unitary Executive: How Taft Constructed the Epochal Opinion of *Myers v. United States*

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William H. Taft is the only person ever to have served as both president of the United States and as chief justice of the Supreme Court of the United States. That unique confluence of roles is evident in *Myers v. United States*, an “epoch-making” and “landmark” case that Taft considered “one of the important opinions I have ever written.”

The precise question in *Myers* was “whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate.” *Myers* was the first decision in the history of the nation to invalidate a congressional statute on the grounds that it violated an inherent Article II power of the president. It was as if fate itself had reserved *Myers* until Taft could take his seat at the center of the Court.

Frank Myers, a thirty-seven-year-old Democratic activist, was appointed to a four-year term as the first-class postmaster of Portland, Oregon, in April 1913. After an uneventful first term, Myers was reappointed in July 1917. Myers’ tenure soon became engulfed in controversy, and in January 1920 Wilson sought to fire him. At the time, the removal of first-class postmasters was governed by an 1876 statute providing that such postmasters “shall be appointed and may be removed by the President by and with the advice and consent of the Senate.” Senatorial consent was easily obtained by the nomination and approval of a successor postmaster. But for reasons that remain obscure, Wilson refused to nominate a successor or in any other way to seek the consent of the Senate. Myers therefore sued the government for the remainder of his salary, some $8,838.72. He lost in the Court of Claims in 1923 on the ground of laches.
In 1920, President Woodrow Wilson removed U.S. Postmaster Frank S. Myers of Portland, Oregon. Myers (pictured) filed suit in the Court of Claims seeking to recover his salary, claiming that his removal violated an 1876 law requiring that the president obtain Senate consent for appointing or removing postmasters.

which was a transparent attempt to evade the underlying constitutional issue whether the president could remove Myers despite contrary congressional legislation.

Myers died in December 1924, “but his widow continued the litigation in the name of his estate.”¹¹ The case was first argued on December 5, 1924.¹² James M. Beck appeared for the government as Solicitor General, but no one argued Myers’ side of the case.¹³ Beck effectively conceded that the Court of Claims had incorrectly decided the question of laches. In his brief, Beck had written that he “would be glad to accept” the Court’s judgment “and thus spare the court the necessity of deciding one of the most important constitutional questions which can arise under our form of Government,” but “candor compels me to add … that the disposition, which the Court of Claims made of the case in this respect, is not entirely convincing to me.”¹⁴ Beck added, “I do not mean to confess error, for the action of the very learned and able Court of Claims is entitled to very great respect and the Government should not waive the benefit of this decision in its favor.”¹⁵ When the case was re-argued for a second time, however, Beck would be far more explicit:

I agree with opposing counsel that, if this statute is unconstitutional, the appellant has a good cause of action….

In this case, I am frank to say, I can find no evidence of any waiver or acquiescence. I do not know what more Mr. Myers could have done in asserting his rights. The pertinacity with which he asserted his title until his commission had expired is worthy of the legendary boy on the burning deck. He stood by his guns in respect to the alleged unlawfulness of his dismissal and awaited an opportunity to serve in an office, of which he consistently asserted he had been unlawfully deprived, until his commission had expired and then within a few weeks thereafter he commenced his suit.¹⁶

Laches could not plausibly be used to sidestep the monumental constitutional issue presented by Myers.

The Court knew in December 1924 that Justice Joseph McKenna would step down from the bench in January.¹⁷ Myers was too important a case not to be heard by a full bench, and the Court therefore set it for rehearing. Two days after the first December
argument, Taft wrote Attorney General Harlan F. Stone that

[t]he Court, after Conference, authorized me to speak to Senator [Albert B.] Cummins as the head of the Judiciary Committee, and also incidentally the President of the Senate, to see whether they could not suggest some one to appear at the re-argument as an amicus curiae. I hope you will bring this matter to the attention of Beck, and possibly as Attorney General confer with Senator Cummins in respect to what can be done to facilitate a re-argument, with a proper amicus curiae.18

When Cummins concluded “that it was not practicable to ask the Senate to authorize the selection of one or more of its members to appear as an amicus curiae,”19 the Court itself designated as amicus curiae “to present the views of the legislative branch of the government”20 the distinguished Republican senator from Pennsylvania, George Wharton Pepper.21 Re-argument of Myers was set for April 13–14, 1925, a month after Stone assumed his seat on the bench.

At the beginning of argument, Taft announced that the Court “should much prefer to have” Stone sit in the case even though “he was Attorney General while the case was in the department.”22 Taft represented that Stone “took no part in the case and it did not come before him in any official capacity.”23 Both Beck and Will R. King, who argued for the Myers estate, announced that they would “be very glad to have” Stone sit in the case.24

As president, Taft had dealt extensively with the requirements of the statute of 1876. He had sought to remove at least 175 postmasters, and he had always scrupulously adhered to the statute, even when the Senate refused to consent to requested removals.25 He never once questioned the constitutionality of the statute, even though he strongly believed that presidents had the duty and authority to interpret the “extent and limitations” of executive power.26

Taft had also complied with congressional legislation forbidding removal of members of the Board of General Appraisers in the absence of a showing of “neglect of duty, malfeasance in office, or inefficiency.”27 The legislation had been enacted precisely to overrule the Court’s decision in Shurtleff v. United States,28 which had interpreted the
previous statute to permit the president to remove members of the Board at will. Taft had even commissioned a Board of Inquiry that included Felix Frankfurter to make the necessary statutory findings to support a removal.29

Strikingly, Taft had also urged Congress to put all postmasters, including first-class postmasters like Myers, “into the classified service” and thus remove “the necessity for confirmation by the Senate.”30 “Machine politics and the spoils system,” Taft explained, “are as much an enemy of a proper and efficient government system of civil service as the boll weevil is of the cotton crop.”31

After 1912, Taft was strongly criticized for his legalistic conception of the presidency. In 1913, Theodore Roosevelt proclaimed that a president ought to adopt a “stewardship” theory of executive leadership:

My view was that every executive officer, and above all every executive officer in a high position, was a steward of the people bound actively and affirmatively to do all he could for the people … I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws.32

Roosevelt contrasted his stewardship theory with the “Buchanan-Taft” school of the “power and duties of the President,” which Roosevelt believed converted the Chief Executive into “the servant of Congress rather than of the people.” A president like Taft “can do nothing, no matter how necessary it be to act, unless the Constitution explicitly commands the action.”33 Roosevelt illustrated the contrast between himself and Taft by reference to the removal power. He proclaimed that the president should form his own judgment of his subordinates without recognizing “the right of Congress to interfere … excepting by impeachment or in other Constitutional manner.”34 Taft, Roosevelt cruelly observed, had “permitted and requested Congress to pass judgment on the charges made against Mr. Ballinger as an executive officer.”35

Taft was stung by Roosevelt’s attack, and in 1916 he sought to answer it explicitly and directly.36 He thought that Roosevelt’s “ascribing an undefined residuum of power to the president is an unsafe doctrine and that it might lead under emergencies to results of an arbitrary character.”37

The true view of the Executive function is, as I conceive it, that the President can exercise no power which cannot be fairly and
reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest. Taft was nevertheless convinced that the constitutional authority of the president was quite broad enough to “give the President wide discretion and great power, and it ought to. It calls from him activity and energy to see that within his proper sphere he does what his great responsibilities and opportunities require.” Although Taft deeply believed in a “law-governed presidency,” he was nevertheless clear that the president was “no figurehead.”

Taft was quite explicit that he defied the congressional restriction “on the ground that it was my constitutional duty to submit to Congress information and recommendations and Congress could not prevent me from using my subordinates in the discharge of such a duty.”

Under the Constitution, the power to control the purse is given to the Congress. But the same paragraph which makes it the duty of the Congress to determine what expenditures shall be authorized also requires of the administration the submission of “a regular statement and account of the receipts and expenditures”—i.e., an account of stewardship. The Constitution also prescribes that the President shall “from time to time give to the Congress information of the state of the Union and recommend to their consideration such measures as he shall judge necessary and expedient.” Pursuant to these
constitutional requirements I am submitting for your consideration a concise statement of financial conditions and results as an account of stewardship as well as certain proposals with estimates of revenues and expenditures in the form of a budget. Taft had been similarly adamant about the president’s removal power. He affirmed in 1916 that

[i]t was settled, as long ago as the first Congress, at the instance of Madison, then in the Senate, and by the deciding vote of John Adams, then Vice-president, that even where the advice and consent of the Senate was necessary to the appointment of an officer, the president had the absolute power to remove him without consulting the Senate. This was on the principle that the power of removal was incident to the Executive power and must be untrammeled. Taft noted that Congress had attempted to reverse “this principle of long standing by the Tenure of Office Act in Andrew Johnson’s time,” but that this temporary aberration was caused by “partisan anger against Mr. Johnson…. It never came before the courts directly in such a way as to invoke a decision on its validity, but there are plain intimations in the opinion of the Supreme Court that Congress exceeded its legislative discretion in the act.”

It is plain, therefore, that Taft did not approach the Myers case as a blank slate. He held definite and strong preconceptions about presidential removal power, which he viewed “through executive-colored glasses.” He would bring to Myers the entire weight of his considerable presidential experience.

According to Pierce Butler’s docket book, the Court voted on Myers on April 25, 1925. Butler’s notes of the conference are cryptic, but they suggest that Taft argued that the case could not be decided on the ground of laches, and that no one in conference disagreed with him. On the constitutional question, Taft asserted that the president’s authority to remove was an “ex[ecutive] power” and could not be restrained by the Senate’s advice and consent. Oliver Wendell Holmes thought that the statute should “stand.” Willis Van Devanter voted to affirm the “exec[utive] power” of the president. James C. McReynolds was uncertain and passed. Louis D. Brandeis agreed with Holmes. Pierce Butler, George Sutherland, and Edward T. Sanford agreed with Taft. Butler records that Harlan F. Stone voted to affirm the Court of Claims, with the terse remark: “entitled to look at consequences.” Stone’s law clerk Alfred McCormack, however, later recalled that “In the Myers case Stone felt that the real issue was whether the business of the Executive could be conducted efficiently if every officer confirmed by the Senate were to have a lease on his office until the Senate approved his removal. To Stone it was clear that the position of the Executive under such a restriction would be impossible.”

Taft assigned the opinion to himself, reporting to his son the next day that because he had a “very important” case to write, he would “be fully occupied” during the subsequent “five weeks.” By May, Taft had concluded that he would need to take the entire summer to write the opinion. “Its importance justifies it.” In July, Taft reported to Van Devanter that he was “reading Webster and Madison and the speeches of some others on the subject.” “My constitutional post office case I have on my shelves up here,” he wrote in August to Sutherland from his summer home in Murray Bay, Canada, “with a lot of volumes that I brought, and I see them every day, and have been quite able, without any injury to my conscience, to look at the backs of the volumes and not examine them.” “I haven’t opened the books on the executive power case,” he confessed to Van...
Devanter four days later, “but must tackle it shortly.”

On September 1, Taft wrote his law clerk Hayden Smith asking if Smith could research “the meaning of the words ‘Executive power’ as contained in Article II, Section I.” Taft asked:

Does the executive power thus stated include the power to appoint and remove executive officers and agents, and would it do so in such a way as to exclude the right of Congress to make appointments and remove appointees, if there were no specific provision in the other sections as to how appointments shall be made? I wish you would consult Montesquieu’s “Spirit of the Laws” to see whether he makes any reference to the scope of the executive power as he understood it, and whether it includes the power to appoint and remove executive agents. The framers of the Constitution were very familiar with Montesquieu and it is quite clear that they were well read generally in matters of the structure of government. It is quite possible that you will find nothing. I have here the discussions of the question of the power of removal by Madison in the first Congress, by Webster in subsequent Congresses when the power of removal again came up and the arguments were made in the impeachment trial of Andrew Jackson. [sic] I believe there is a discussion in Pomeroy’s “Constitutional Law”, and that I have.

Smith replied on September 22. He cited scattered references and concluded that “I have deduced that executive included in its meaning the power of appointment and that sharing it with the legislative was extraordinary.” Smith had not discovered much about the power of removal. He reported that the library was still looking for W.H. Rogers, The Executive Power of Removal. Smith reported, however, that Chancellor Kent had changed his mind on the question, writing that although in 1789 he had leant toward Madison, but now (1830) because of the word “advice” must have meant more than consent to nomination, he said he had a strong suspicion that Hamilton was right in his remark in the Federalist, no.77, April 4th, 1788: “No one could fail to perceive the entire safety of the power of removal if it must thus be exercised in conjunction with the senate.”

Two weeks later, Taft wrote Butler that

The more I think it over, the stronger I am in the necessity for our reaching the conclusion that we have. I agree that in the beginning it might have been decided either way, but it was decided in favor of the view that the Constitution vested the executive power of removal in the President, with only the exceptions that appear in the instrument itself. My experience in the executive office satisfies me that it would be a great mistake to change that view and give to the Senate any greater power of hampering the President and tying him down than they have under the view we voted to recognize as the proper one.

Butler was a Democrat, and Taft took the occasion to indulge in a mea culpa about the Reconstructionist Republican party:

As I study the injustice that the radical Republicans did to Andrew Johnson, I am humiliated as a Republican. My father was a just man but I thought he sympathized with
Taft worked on his *Myers* opinion in the summer of 1925 while at his house in Murray Bay, Canada (pictured). When he returned to Washington, he invited Justices Van Devanter, Sutherland, Butler, and Sanford to his home to discuss the draft opinion on a Sunday afternoon.

Those who voted to impeach Johnson. I think the feeling against Johnson growing out of the assassination of Lincoln threw into the extremists of the Republican party a power that led to reconstruction and seriously affected to its detriment our country. I think this is usually thought to be the case, and certainly we ought not to allow such a departure from a long established constitutional construction to influence us in a wise interpretation, enforced by a Congress that was almost a part of the Constitutional Convention and whose decision lasted without any real controversy from the first Congress down to the one that was controlled by a militant, triumphant and harsh political group.68

Taft drafted a “long opinion” while on vacation at Murray Bay, but, after returning to Washington, he found that “it does not satisfy me as I read it through, and I have had to do some more reading.”69 He wrote his son that “one of the most difficult things in preparing an … opinion … is the plan or arrangement of the statement of the facts and the argument to sustain your conclusion. This takes me rather more time than other feature of a long opinion – I mean an opinion that necessarily has to be long. I have a tendency to length that I try to restrain.”70

In November, Taft asked Van Devanter, Sutherland, Butler, Sanford, and Stone to an unusual Sunday afternoon conference at his home to discuss his draft of *Myers*, “to make such suggestions as may occur before I revise it again and circulate it.”71 It was, Taft wrote Butler, “a most important matter and the opinion should be carefully considered.”72 Taft anticipated that “there will probably be some dissent.”73 “Brandeis voted no, and I think Holmes did, while McReynolds was doubtful.”74

Two days after this unusual conference, Taft sent “a revised copy of the opinion” to
Van Devanter, Sutherland, Butler, Sanford, and Stone, asking them to “read it over and make as many suggestions as you can.”

Three days later, Taft expressed “relief to get the heavy part of [the opinion] out of the way,” and he hoped he would “be able to circulate it early next week.”

At this point, the documentary record becomes far less certain and detailed. Stone’s law clerk Alfred McCormack recalls that Taft had named Stone, Butler, and Van Devaner “as a Committee to help with the majority opinion.” McCormack remembers that Stone was exasperated by the Taft’s draft, remarking, “There is nothing left to do with this opinion … except to rewrite it.”

Accordingly he directed his clerk to go through the opinion and outline the points, arranging them in a logical order. That done, and Stone having revised the outline, the next job was to take the printed proof and a pair of scissors and arrange the material according to the outline, deleting, and where necessary combining and rewriting, to remove duplications, and introducing each point by a topic or transitional sentence.

From that beginning Stone prepared and submitted to Van Devaner and Butler, a new draft of the opinion that was widely different from the original in arrangement and emphasis, with many additions, deletions and revisions of language. The Committee was pleased, and Stone was commissioned to wait upon the Chief and submit the new draft as their joint recommendation. Taft received the document with grace and promised to read it; and later he sent a warm note of thanks, praising Stone’s work and adopting the revision as a substitute for his previous draft.

In Stone’s papers, there is a November 13 memorandum to Taft, offering numerous editorial recommendations. Stone observed:

To my mind, as a mere matter of exposition of the written document, the fact that the executive power was given in general terms with specific limitations, whereas the legislative powers were specifically enumerated, gives very great importance to the fact that there was no express limit to the power of removal either in the enumerated legislative powers or the enumerated restrictions on executive power.

Stone also cautioned that Taft may have implied that the president does not have removal power over executive officials “to whom discretion is not delegated.” “It is the duty of the President to enforce the laws,” Stone wrote,

... even though little or no discretion is involved. As Chief Executive he is entitled to faithful and efficient services by subordinates charged only with administrative duties. It is for that reason that the power is conferred and the duty imposed on him to exercise the power of removal, and that, to my mind, is just as controlling in the case of officers with little or no discretion as in the case of a cabinet officer.

Perhaps sensing his audacity as a newly seated justice addressing a former president about a matter of presidential power, Stone demurred, “I hope you will realize that my suggestions ... are due to the feeling that this is one of the most important opinions of the Court in a generation at least.”

On November 22, Taft wrote his son that he had circulated a draft of his opinion and was “awaiting the result to see how many will stand by it.” There is a second memorandum from Stone to Taft dated November 24,
in which Stone appears to have numbered and rearranged the paragraphs in Taft’s draft.\(^8^6\) The surviving copy of this memorandum is in Van Devanter’s papers, and it bears a notation in Van Devanter’s hand: “C.J. sent this to me to work out ‘so far as may be advisable.’”

Apparently after Taft had circulated his draft, Stone undertook to “survey the whole opinion from the point of view of the proper emphasis,”\(^8^7\) offering basic structural suggestions for reorganization. “I have had the opinion digested paragraph by paragraph,” Stone reported. “The digest is placed in the form of an outline so that the outline of the opinion as it proceeds from the statement of the question to the final conclusion may be seen in its proper perspective.”\(^8^8\) On November 28, Taft wrote his brother to complain that the Court’s “youngest member Stone is intensely interested and is a little bit fussy and captious in respect to form of statement, and betrays in some degree a little of the legal school master – a tendency which experience in the Court is likely to moderate.”\(^8^9\)

Taft was in an ungenerous mood because “Brandeis has announced his intention of writing a dissent,” and Holmes “is likely to concur with him.”\(^9^0\) Brandeis’ intention to dissent provoked a stream of angry invective, which gradually subsided as Taft dictated a letter to his brother:

Brandeis puts himself where he naturally belongs. He is in favor evidently of the group system. He is opposed to a strong Executive. He loves the veto of the group upon effective legislation or effective administration. He loves the kicker, and is therefore in sympathy with the power of the Senate to prevent the Executive from removing obnoxious persons, because he always sympathizes with the obnoxious person. His ideals do not include effective and uniform administration unless he is the head. That of course is the attitude of the socialist till he and his fellow socialists of small number acquire absolute power, and then he believes in a unit administration with a vengeance. I suppose we ought not to be impatient with some of our colleagues who do not agree with us, because it is a question which was very earnestly discussed in the First Congress and settled there for three-quarters of a century, but it was agitated again in the time of Jackson and Webster and Calhoun and Clay, and was of course made the chief subject of discussion in Johnson’s day and in his impeachment. It is curious that the question should have remained undecided by our Court in all that time …. Brandeis is taking time to write his dissent. I don’t know when he will finish it, but he is a hard worker and I expect to get his dissent in a day or two.”\(^9^1\)

Taft did not “know what McReynolds will do. I think he is inclined to go with us, but he objects to long opinions, and he is cantankerous at any rate. He may write a concurring opinion, and he may dissent, although I think not the latter.”\(^9^2\)

Taft was frank to acknowledge that the “opinion has given me a great deal of work and a great deal of anxiety. The rest of the Court have stood by me well and have helped me in going over it and making corrections and suggestions.”\(^9^3\) “The opinion has had to be very long.” Taft observed,

because half of it is taken up in an historical review, which is most important in confirming the conclusion. I have been rearranging it some since I circulated it, and have attempted to make the steps in the reasoning more orderly, with a view of enabling the reader to follow
the argument more intelligently. I presume it will be the subject of great discussion and doubtless of much criticism.\textsuperscript{94}

The following day Taft confided to his son that the opinion “has occupied me very intensely, and has been the occasion for my losing some sleep. Those members who agree with me have helped me. When one works on a case all alone and gets very much absorbed, he is not quite sure whether he has lost his sense of proportion as to arguments in the pressure to state them all.”\textsuperscript{95}

On November 30, Taft received yet another detailed memorandum from Stone.\textsuperscript{96} Stone was worried about \textit{United States v. Perkins}, an 1886 precedent in which the Court had upheld the suit of a naval officer challenging his honorable dismissal by the Secretary of the Navy on the ground that legislation provided that “no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect.”\textsuperscript{98} The Court had explicitly adopted the language of the opinion in the Court of Claims:

Whether or not congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the president by and with the advice and consent of the senate, under the authority of the constitution, (article 2, § 2,) does not arise in this case, and need not be considered. We have no doubt that when congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as congress may enact in relation to the officers so appointed. The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of congress, and by such legislation he must be governed, not only in making appointments, but in all that is incident thereto.\textsuperscript{99}

\textit{Perkins} was the constitutional rock on which the federal civil service was erected, for it held that whenever Congress exercised its authority under Article II, Section 2, to vest the appointment of “inferior Officers” in the “Heads of Departments,” it could restrain executive discretion by regulating the terms under which such inferior officers might be removed.

Stone was “somewhat concerned” that under \textit{Perkins} Congress could “vest the appointment of all officers other than those specifically enumerated in Article 2, in the heads of departments, but with limitations on the power of removal both by the head of the department and by the President.”\textsuperscript{100} Stone was “extremely loathe to admit that congress could set such a limitation on the President’s power in the case of purely executive officers on whom he must depend for the execution of the laws.”\textsuperscript{101} He stressed, therefore, that \textit{Perkins} “said nothing as to the power of the President to remove an inferior officer appointed by the head of a department.”\textsuperscript{102} He wanted to be sure that in his draft, Taft did not inadvertently read \textit{Perkins} to imply that the president lost his “power of removal in the case of purely executive officers,” even if the president did not appoint them.\textsuperscript{103} This implication might arise because Taft’s draft had apparently reasoned that the president possessed the constitutional power of removal because he had both “the power of appointment and the executive power.”\textsuperscript{104} Stone was concerned that “we do not foreclose ourselves with respect to the power of
removal except as it is actually involved in the present case.\textsuperscript{105}

The logic of Stone’s memorandum threatened to undermine the legal architecture of the civil service. Many years later, in his biography of Stone, Alpheus Mason would claim that Stone’s memorandum had anticipated the holding of \textit{Humphrey’s Executor v. United States},\textsuperscript{106} in which the Court unanimously upheld congressional restrictions on the president’s ability to remove FTC Commissioners with fixed statutory terms.\textsuperscript{107}

At the time of \textit{Humphrey’s Executor}, Stone, according to Mason, “had the cold comfort of saying ‘I told you so.’”\textsuperscript{108} But in fact Stone’s memorandum had nothing to do with the issue presented in \textit{Humphrey’s Executor}, and in 1925 Stone seems to have been pushing for an even more pro-executive position than that eventually adopted by Taft in \textit{Myers}. Indeed, Stone’s papers contain a second long memorandum about \textit{Perkins}, probably written at the beginning of the 1926 Term,\textsuperscript{109} urging once again that Taft’s opinion be modified explicitly to hold that even when Congress sought by legislation to limit the power of removal of inferior officers appointed by heads of departments, the legislature did not acquire “the power to regulate the removal even by the President.”\textsuperscript{110}

Taft did not explicitly address Stone’s concerns in his published opinion, but instead argued that the “evil of the spoils system” concerned “inferior offices,” and insofar as appointments with regard to such offices “were vested in the heads of departments to which they belong, they could be entirely removed from politics.”\textsuperscript{111} (Taft’s notes for his oral presentation of his opinion went even further, asserting that the Civil Service System “applies only to inferior officers not appointed by the President by and with the advice and consent of the Senate, and over the removal of these officers Congress has complete control, and the maintenance or extension of the Merit System is wholly with Congress.”)\textsuperscript{112} As Taft wrote to Van Devanter, “Stone continues to tinker, but I don’t think he helps much.”\textsuperscript{113}

With his usual tact, Taft nevertheless wrote to Stone the following day:

I thank you for the trouble you have taken to help me in the Myers case opinion. I agree with you that we have not had a case in two generations of more importance. It looks now as if we would stand 6 to 3, but if were 5 to 4, I should be happy for my country that by even so small a margin we could prevent the excesses of congressional action which in view of the McCarl statute we would have to expect.

Taft was referring to John Raymond McCarl, the first Comptroller General of the United States, who had been appointed pursuant to the Budget and Accounting Act of 1921.\textsuperscript{114} \textit{Myers} clearly had important implications for the constitutionality of the Act,\textsuperscript{115} which forbade unilateral executive removal. Taft also commented to Stone:

I have adopted your suggestions generally except when Van Devanter anticipated you. There may be one or two instances in which I rather preferred my own phrases when they were equivalent… As to the President’s power to remove all executive officers whether their appointment be vested in the Courts of Law or in the Heads of Departments or not, I do not think we decide it and as it is not necessary for us to decide it, I think we should not mention it. That is Van’s judgment about it too. I’ll now … recirculate it.\textsuperscript{116}

Stone replied the next day:

Many thanks for your kind note of last evening. You know I am a team player and I should not have kicked
over the traces if you had not accepted any of my views which after all concern only incidental matters of minor importance. I have only been longing to be helpful in the way which I believe we should all be, in carrying on the difficult work of the Court—without, I hope, pride of opinion or over insistence on
anything.117

Taft then settled down to await Brandeis’s dissenting opinion.118 On December 23, Pepper filed the recently delivered decision of the Pennsylvania Supreme Court in Commonwealth ex. Rel. Woodruff v. Benn,119 which held that the governor could not unilaterally remove a member of the Pennsylvania Public Service Commission whose tenure was protected by legislation that prohibited removal without cause and that required “the consent of the Senate.”120 The Pennsylvania court reasoned that “Public Service Commissioners must be viewed as deputies of the General Assembly to perform legislative work.”121 Taft wrote to Van Devanter that Benn “is not important except to suggest that the removal of Interstate Commerce Commissioners doing legislative work may be different from members of purely executive boards and therefore not seemingly included in our decision.”122

On January 5, Brandeis circulated his dissent. “I thought mine was pretty long,” Taft wrote his brother, but his is 41 pages with an enormous number of fine print notes, and with citations from statutes without number. So far as I can make it out from a most cursory examination, his chief objection to our opinion is the merit system of the Civil Service. As Congress has complete power to give every inferior office for appointment by the head of a department, and then make provision for the removal, or absence of it, as it chooses, it is a little difficult to see how our conclusion with reference to the power of removal by the President in respect to superior officers has any real application to the question that we have to consider.123

Then Taft received news that “McReynolds thinks he has to write a dissenting opinion, and wishes to spread himself.”124 McReynolds estimated that his opinion would not be ready until March.125 “McReynolds,” Taft wrote his son, “is always inconsiderate. There is no reason why he should not have written his opinion before, because he knew that Brandeis took the last recess to prepare his.”126

McReynolds had apparently circulated his dissent by March 29, for there is yet another long memorandum on that date from Stone analyzing the opinions of McReynolds and Brandeis.127 Although Stone had “very little to suggest about” McReynolds’ dissent,128 he devoted six detailed pages to dissecting that of Brandeis.129 Stone took particular exception to Brandeis’s assertion that “Power to remove, as well as to suspend, a high political officer, might conceivably be deemed indispensable to democratic government and, hence, inherent in the president. But power to remove an inferior administrative officer appointed for a fixed term cannot conceivably be deemed an essential of government.”130 Stone commented that

It is difficult to see on what basis this distinction is based unless it be his assumption that the laws can be executed even though incompetent, disloyal, inferior officers be kept in office. Certainly President Lincoln found out differently during the Civil War and the experience of the Government in that time, and especially in the previous administration, points out the fallacy of the assumption that power of removal of inferior officers in the head of
departments, either with or without the consent of the Senate, is an adequate provision for the execution of the laws without any reserve power in the President to remove inferior officers regardless of the consent of the Senate.\textsuperscript{131}

Ignoring the obvious fact that Taft’s own opinion for the Court dedicated many pages to the discussion of past constitutional practice, Stone professed to be mystified by Brandeis’ elaborate invocation of history.

The opinion appears to be devoted principally to showing that a construction of the Constitution made by Congress in many pieces of legislation is the one which we must adopt because Congress adopted it, and incidentally because from time to time various presidents did not veto the legislation and sometimes complied with it. Of course inferring presidential acquiescence in a particular construction of the Constitution because presidents did not veto the bills involving that construction or refuse to comply with them is going rather far. Assuming, however, such assent on the part of the executive, I think nevertheless that the whole dissent proceeds on a fallacy... Congress has no power to change the Constitution. Neither have Congress and the President acting together. Therefore, no more or greater weight can be given to their acquiescence in a particular construction of the Constitution than it is entitled to by its inherent merits.

From this point of view, the value of the early legislative construction of the power of removal lies chiefly in the fact that it occurred soon after the Convention when its events were fresh in mind and the events in Congress, so far as known, developed nothing to indicate that the Congressional construction was a radical departure from the wishes of the Convention.\textsuperscript{132}

Taft recognized that the dissents were “very forcibly expressed,” and that he would “have to devote my attention to shaping up my opinion and getting it ready for delivery,” which he proposed to do “as soon as we get through the hearings” in early May.\textsuperscript{133} But in June Taft suffered a major heart attack, and he “concluded to take [the opinion] up to Murray Bay and perhaps revamp it, in view of the dissents. I hope I can do this without subjecting myself to intense labors.”\textsuperscript{134}

At first Taft found it difficult to concentrate. “I am very anxious to revamp my opinion in the Myers case before I go down to Washington, but I can not do anything about it until I feel more at liberty to use my brain in a way that really calls for the proper circulation of the blood.”\textsuperscript{135} “I have been turning it over in my mind,” he wrote to Van Devanter.

I think I shall rearrange the opinion by stating first the necessary effect of the Congressional decision of 1789 and the 74 or 75 years of acquiescence in that decision. I am well satisfied with the conclusion reached that evening that we met at my house, that it is well not to make any concession but to take the position that we have already taken—that with that decision and with the obvious abuse of the Tenure of Office Act we can make such a contrast as to make clear the wisdom of our view.\textsuperscript{136}

By August, however, Taft still had not “yet tackled the job of revamping the opinion.”\textsuperscript{137}
Taft settled down to serious editing by the end of the month, reporting to Sutherland that “I am working now a revamping of my opinion … and shall hope to be able to have it printed and submitted to the five concurring Judges for consideration and criticism before recirculating it. It is likely to be considerably longer, because the discussion in the two dissenting opinions have required some amplification and the consideration of some additional points.” Taft finished a first draft of his revisions on September 6, noting that it was “outrageously long.” Taft wrote his brother that he hoped to get back a proof of it before he leave here, so as to see what I can do in cutting it down, for I find that the putting of an opinion in print gives you a better general view of it and furnishes you more opportunity for suggestions of useful changes than if it is typewritten. It is a good method of correcting and revising opinions, although Justice McReynolds complains that most of us do not allow ourselves to be economical in this matter. But these opinions are important, and any means of making them better should not be spared.

Taft sent a second draft of the opinion to the printer on September 20, with instructions to have a revised proof ready for his arrival in Washington on the 25th so that Taft could rapidly revise it and circulate amended copies “to some of my brethren.” Taft sent out the revised print on September 28 to Van Devanter, Sutherland, Butler, Sanford, and Stone, proposing that they meet in a second rump conference to be held on October 13 to evaluate the opinion. “I hope,” Taft wrote his brother, that “this is the last stretch.” The opinion “has been a very great burden to me, a kind of nightmare, and I shall be greatly relieved when the announcement is made.” Taft recognized that the opinion was “unmercifully long, but it is made so by the fact that the question has to be treated historically as well as from a purely legal constitutional standpoint.” All went well, however, and Myers was set for announcement on October 25. The night before, Taft wrote his son with barely concealed excitement: “Tomorrow I expect to deliver the most important and critical opinion that I have written on the Court.”

It would be accurate to say that the Myers opinion was constructed through a most unusual process. There appears to be nothing even remotely analogous during the entire Taft Court era. Taft essentially constituted his majority of six into a committee that met twice at his home to discuss the holding, structure, and argument of Taft’s drafts. No doubt this was partly because Taft keenly appreciated the enormous importance of the case, which would settle a fundamental question of executive power that had remained open and controversial since the dawn of the Republic, but that “now … has been brought up by the obstinacy of Wilson and Burleson in removing a man and for two years sending no appointment to the Senate for his successor.”

Myers’ unusual process of composition also signified the great difficulty Taft experienced in summoning adequate forms of constitutional argument. In recent times, the reasoning of Myers has been claimed by no less an authority than Antonin Scalia as “a prime example of what, in current scholarly discourse, is known as the ‘originalist’ approach to constitutional interpretation.” Scalia no doubt refers to the fact that Taft, faced with a constitutional text that says nothing at all about the power to remove executive officials, spent a great deal of time and effort explicating what he called the “decision of 1789,” in which the first Congress drafted a statute in a way that presumed that the
Chief Justice Taft (seated center) convened the same rump conference (from left Sanford, Sutherland and Butler are standing; Butler is seated second from right) at his home in September 1926 after having spent the summer working on a revamped version of the burdensome and “unmercifully long” opinion.

President was empowered unconditionally to remove the Secretary for the Department of Foreign Affairs (the equivalent of the modern Secretary of State). 

Unlike a modern originalist, however, Taft was unwilling to rest his conclusion entirely on evidence of original meaning. To the contrary, Taft explained, “We have devoted much space to this discussion and decision of the question of the Presidential power of removal in the First Congress, not because a Congressional conclusion on a constitutional issue is conclusive, but … because of our agreement with the reasons upon which it was avowedly based.” To Taft, the conclusion that the president must be accorded an unimpeded constitutional right of removal was supported by “very sound and practical reasons.” One of these reasons is that “those in charge of and responsible for administering the functions of government who select their executive subordinates need in meeting their responsibility to have the power to remove those whom they appoint.” The power of removal was “an indispensable aid” for exercising “the disciplinary influence” on subordinates necessary to ensure “the effective enforcement of the law.” “The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him.” Any other interpretation, Taft asserted, “would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed.”

In a long and furious dissent, McReynolds took sharp issue with Taft’s pragmatic logic. He excoriated “the hollowness of the suggestion that a right to remove” inferior officers like postmasters “may be inferred from the President’s duty
From 1789 through 1836, the appointment of postmasters was vested in the postmaster general, not in the president. Although Congress could concededly control the terms by which such postmasters might be removed, nevertheless "the President functioned and met his duty to 'take care that the laws be faithfully executed' without the semblance of power to remove any postmaster. So I think the supposed necessity and theory of government are only vapors." "I suppose," McReynolds asserted, that "Congress may enforce its will by empowering the courts or heads of departments to appoint all officers except representatives abroad, certain judges and a few 'superior' officers-members of the cabinet. And in this event the duty to 'take care that the laws be faithfully executed' would remain notwithstanding the President's lack of control." McReynolds struck at a serious vulnerability in Taft's argument. In his internal memoranda to Taft, Stone had insisted that the functional argument be taken to its logical conclusion and that the president be accorded unrestricted removal power of all executive subordinates, superior and inferior, whether appointed by the president or by the head of a department. But Taft, as a practical politician, refused even to intimate that the Civil Service was constitutionally infirm in this way. Taft's argument was thus left curiously suspended and unsatisfying.

Taft argued that all executive power was lodged in the president by virtue of the "vesting clause" of the Constitution, which provides that "The executive Power shall be vested in a President of the United States of America." He also argued that discretionary authority to remove executive officials was an executive power necessary to ensure that the laws be faithfully executed. It is therefore baffling why Myers nevertheless authorized Congress legislatively to regulate the removal power simply by vesting the appointment of inferior executive officers in the heads of departments. Yet Taft seems quite explicit on this point:

The condition upon which the power of Congress to provide for the removal of inferior officers rests is that it shall vest the appointment in some one other than the President with the consent of the Senate. Congress may not obtain the power and provide for the removal of such officer except on that condition. If it does not choose to entrust the appointment of such inferior officers to less authority than the President with the consent of the Senate, it has no power of providing for their removal. It is true that the remedy for the evil of political executive removals of inferior offices is with Congress by a simple expedient but it includes a change of the power of appointment from the President with the consent of the Senate. Congress must determine, first, that the office is inferior; and, second, that it is willing that the office shall be filled by the appointment by some other authority than the President with the consent of the Senate.

Before becoming chief justice, Taft had himself urged that first-class postmasters like Myers be included in the civil service. But Congress's decision to vest the appointment of postmasters in the president meant "that Congress deemed appointment by the President with the consent of the Senate essential to the public welfare, and until it is willing to vest their appointment in the head of the department they will be subject to removal by the President alone, and any legislation to the contrary must fall as in conflict with the Constitution." Taft thus constructed an argument effectively ceding to Congress constitutional
authority to determine when discretionary removal power for inferior executive officers was and was not prerequisite for the president’s capacity faithfully to execute the laws. This is surely not an argument that would be embraced by contemporary advocates of a powerful “unitary executive,” who argue for “a hierarchical, unified executive department under the direct control of the President.”168 It was in fact an oddly insecure argument that received scathing reviews in the scholarly literature of the time.169

At root, the weakness of Taft’s position lay in its failure to specify the precise circumstances that required unfettered executive control. Presidential appointment is obviously only a proxy, and a rather loose proxy, for the necessity of presidential supervision. Whether Congress chooses to vest the appointment of an inferior executive officer in the head of a department is only vaguely related to the need for such supervision. The question of necessary executive supervisory authority would seemingly turn, as Edward Corwin saw immediately, on a functional analysis of “the essential character of the office involved.”170

The question cannot be analyzed without drawing a preliminary distinction. Myers importantly distinguishes between the legislative design of executive offices, which is a legislative power,171 and the authority to appoint specific persons to fill those offices or to remove specific persons from those offices, which is an executive power granted by Article II.172 On the basis of this dichotomy, Myers strongly condemns senatorial intrusion into the decision whether to remove specific persons. This intrusion is inconsistent with the basic separation of “legislative from the executive functions.”173

This narrow conclusion is sufficient to invalidate the Act of 1876, which requires Senatorial consent before removing first-class postmasters. Congress cannot “draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power,” Taft wrote. “To do this would be to … infringe the constitutional principle of the separation of governmental powers.”174 The Court has never retreated from this conclusion.175

But whether Congress can itself participate in the removal of executive officers is an entirely different question from whether Congress can regulate the procedures and criteria that the president must apply when he takes executive action to remove executive officials. It would seem at first blush that Congress’s legislative authority to fix the obligations of an office, its salary and jurisdiction, would also include authority to determine the grounds on which an officeholder might be removed.176

Whether legislative regulations of this kind infringe the Article II prerogatives of the president would appear to require a functional inquiry into the need for unrestricted executive removal power, which in turn would depend on the kinds of duties that legislation may properly impose on executive officers. Since at least 1838, it has been constitutionally accepted that “it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President.”177

Congress can impose duties on subordinate executive officers that are not merely ministerial in nature. Congress sometimes imposes discretionary duties on subordinate executive officers to insure that they apply technical administrative expertise in a manner that is free from the political control of the president, as for example in the case of members of the Federal Reserve Board. Congress sometimes imposes discretionary duties on subordinate executive officers to insure that they act with appropriate judicial judgment, as for example in the case of
judges of the Court of Claims before it
became an Article III tribunal. In instances
like these, Congress has limited the authority
of presidential removal in order to insure that
executive discretion is exercised free from the
taint of political presidential oversight. 178

Taft well understood these issues. In
*Myers*, he observed that

> Of course there may be duties so
peculiarly and specifically committed
to the discretion of a particular officer as to raise a question
whether the President may overrule or revise the officer’s interpretation
of his statutory duty in a particular instance. Then there may be duties
of a quasi judicial character imposed on executive officers and members
of executive tribunals whose decisions after hearing affect interests of individuals, the discharge
of which the President cannot in a particular case properly influence or
control. 179

The *Myers* opinion refuses, however, to
let these circumstances impair the “unity
and coordination in executive administration” that Taft deemed “essential to effective
action.” 180 Taft therefore explicitly concludes
that even though legislation may sometimes
prevent a president from substituting his judgment for that of an appointed subordinate,
the president may nevertheless “consider the decision after its rendition as a
reason for removing the officer, on the ground
that the discretion regularly entrusted to that officer by statute has not been on the whole
intelligently or wisely exercised. Otherwise
he does not discharge his own constitutional
duty of seeing that the laws be faithfully
executed.” 181

In essence, *Myers* holds that presidential
supervisory authority categorically overrides
any possible legislative determination that
removal procedures for presidentially ap-
pointed subordinate executive officers ought
to insulate them from close political supervi-
sion. Taft thus created a “paradox that, while the Constitution permitted Congress
to vest duties in executive officers in the performance of which they were to exercise
their own independent judgment, it at the same time permitted the President to guill-
lotine such officers for exercising the very discretion which Congress had the right to
require.” 182

*Myers* produced a result that can only
be described as schizophrenic. Presidential
removal power might easily be circumvented
by vesting the appointment of inferior ex-
ecutive officers in heads of departments, yet all executive officers appointed by the
president were as a matter of constitutional law “removable at the President’s will.” 183
Neither side of this dichotomy is especially
convincing or reasonable. After *Myers*, the
Court quietly undermined the first by focus-
ing constitutional attention on the functional
question of whether removal restrictions im-
posed by Congress to protect inferior officers
appointed by heads of departments “are of
such a nature that they impede the Presi-
dent’s ability to perform his constitutional
duty.” 184 And in *Humphrey’s Executor v. United States*, 185 a 1935 decision rightly
regarded as severely undercutting *Myers*, 186
a unanimous Court explicitly overturned the
second, holding that Congress can regulate
the removal of presidentially appointed exec-
utive officers, like FTC Commissioners, who
act “in part quasi legislatively and in part
quasi judicially.” 187 Indeed, in *Humphrey’s Executor* a unanimous Court, per Justice
Sutherland, dismissed *Myers* in almost dis-
respectful terms. “The narrow point actually
decided,” it said,

was only that the President had
power to remove a postmaster of the
first class, without the advice and
consent of the Senate as required by
act of Congress. In the course of
the opinion of the court, expressions
occur which tend to sustain the government’s contention, but these are beyond the point involved and, therefore, do not come within the rule of stare decisis. In so far as they are out of harmony with the views here set forth, these expressions are disapproved.\textsuperscript{188}

Taft knew that not all Article II officials appointed by a president acted in a purely executive capacity. In 1916, Taft had written that “[t]he functions of the President are both legislative and executive. Among the executive functions we shall find a gradual tendency to a division into the purely executive and the quasi-legislative and quasi-judicial duties.”\textsuperscript{189} It is all the more striking, then, that Taft was so careless in Myers in failing to define or limit the “executive officers and members of executive tribunals” to whom Myers’ conclusions applied. During the pendency of the case, Taft toyed with the thought that Myers might not apply to ICC Commissioners,\textsuperscript{190} and several days after his opinion was released, Taft expressed anger at McReynolds’ “reference to judicial offices,” which in Taft’s view had “nothing to do with the case, because we only decide the case as to an executive office and we limit our decision to that. I would be inclined to limit it so at any rate.”\textsuperscript{191}

Taft’s complaint is not entirely candid, for he deliberately wrote Myers quite broadly, seemingly to encompass all officers appointed by the president. Thus, \textit{The Nation} commented that the decision “makes it impossible for Congress to give any determined tenure to” “quasi-judicial offices,” so that “the fear of removal will henceforth operate to brow hitherto independent officials to the will of the President or of his party speaking through him.”\textsuperscript{192} We know that Taft specifically meant the opinion to apply to the many so-called independent agencies that McReynolds lists in his dissent, like the “Interstate Commerce Commission, Board of General Appraisers, Federal Reserve Board, Federal Trade Commission, Tariff Commission, Shipping Board, Federal Farm Loan Board, [and] Railroad Labor Board.”\textsuperscript{193} The officers running these agencies were appointed by the president, but they were nevertheless accorded fixed statutory terms of office that could be interrupted only for cause. Commentators immediately complained that “The most important officers menaced by the Myers decision are the members” of agencies “such as the Interstate Commerce Commission, the Federal Trade Commission and the Tariff Commission. These agencies need protection because of the semi-judicial nature of their functions; public confidence in their non-partisan character must not be impaired.”\textsuperscript{194}

Yet Taft regarded the proliferation of independent agencies as congressional efforts to fragment and undercut the executive power of the president, in much the way that Congress had sought to handicap President Andrew Johnson. Taft wrote to his friend Tom Shelton, a southern lawyer:

I am very strongly convinced that the danger to this country is in the enlargement of the powers of Congress, rather than in the maintenance in full of the executive power. Congress is getting into the habit of forming boards who really exercise executive power, and attempting to make them independent of the president after they have been appointed and confirmed. This merely makes a hydra-headed Executive, and if the terms are lengthened so as to exceed the duration of a particular Executive, a new Executive will find himself stripped of control of important functions, for which as the head of the Government he becomes responsible, but whose action he can not influence in any
way. It was exactly this which the two-thirds majority of the Republicans in the Congress after the War attempted to with the Tenure of Office Act. They attempted to provide that Cabinet officers who had been appointed by Lincoln, and who differed with Johnson as to the policy to be pursued in respect to dealing with reconstruction questions should be retained in office against his will.\textsuperscript{195}

Similarly, Taft wrote to the editor of the \textit{St. Louis Post-Democrat} that a “study of the legislation made under” the inspiration of the Johnson impeachment will show that not directly but stealthily through the creation of boards who exercised part of the executive power, it has been sought to divide that power vested in the president by the Constitution, and it would very much minimize that power if the members of those boards were made free from administrative control through the power of the removal by the president. By making their terms long so as to reach from one term through another or into another, they would strip a new president of much of his capacity to determine and carry out his legitimate policies.\textsuperscript{196}

Although Taft confessed that \textit{Myers} “was the hardest case I have had in the matter of work since I have been on the Bench,” he was also “convinced we were right .... I am hopeful that the question will not be agitated and that the decision may remain as a permanent constitutional feature of constitutional construction.”\textsuperscript{197}

It is plain that Taft was at heart an administrator who deplored “the narrow, factional selfishness of Congress.”\textsuperscript{198} Several months before the 1924 presidential election, he had complained to his wife that “Congress is unrepresentative. The Senate is at the lowest ebb in its history and the House is not much better.”\textsuperscript{199} It was precisely Coolidge’s “independence of Congress that gives him his strength,” and he therefore should “act upon legislation according to his best judgment and the people will approve even though he differs from Congress.”\textsuperscript{200} Taft expressed an analogous thought in \textit{Myers}: “The President is a representative of the people, just as the members of the Senate and of the House are, and it may be at some times, on some subjects, that the President, elected by all the people, is rather more representative of them all than are the members of either body of the Legislature, whose constituencies are local and not country wide.”\textsuperscript{201}

The extraordinary reach of \textit{Myers} expressed the priority Taft accorded to the administrative needs of a nationally elected president for control, coherence, and efficiency. Taft regarded these virtues as paramount when threatened by the bickering, petty, local, and merely political concerns of Congress. He therefore refused to credit the possibility that laws might in fact be more faithfully executed if specialized, presidentially appointed executive officers were legislatively endowed with some independence from centralized political, presidential control. The nature of the office, and of the law applied by the office, were irrelevant. What mattered was the impertinence of congressional interference with executive unity and coherence.

In an influential dissent, Brandeis offered a fundamentally different picture of the relationship between the legislative and executive branches. “The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency,” he said, “but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental
powers among three departments, to save the people from autocracy.\textsuperscript{202}

The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted….

Checks and balances were established in order that this should be ‘a government of laws and not of men.’ In order to prevent arbitrary executive action, the Constitution provided in terms that presidential appointments be made with the consent of the Senate, unless Congress should otherwise provide …. Nothing in support of the claim of uncontrollable power can be inferred from the silence of the convention of 1787 on the subject of removal. For the outstanding fact remains that every specific proposal to confer such uncontrollable power upon the President was rejected. In America, as in England, the conviction prevailed then that the people must look to representative assemblies for the protection of their liberties. And protection of the individual, even if he be an official, from the arbitrary or capricious exercise of power was then believed to be an essential of free government.\textsuperscript{203}

For Brandeis, what mattered was not the independence of the executive from the Congress; what mattered was the interdependence of the two branches. This was because Brandeis regarded unconstrained power as potentially despotic, and he believed that the only realistic constraint on such power lay in the checks and balances hardwired into the constitutional scheme. These impediments might well impair administrative efficiency, but this was a necessary cost of a constitutional design framed to hedge against tyranny.\textsuperscript{204} For Brandeis, the ultimate goal of the Constitution was to maximize the subordination of all government actors to general rules of law, which were the antithesis of presidential administrative discretion. Rules of law could legitimately emanate only from the multimember assembly of Congress, notwithstanding its incessant, inefficient, and petty squabbling.

The tension between Brandeis’ view of checks and balances and Taft’s appeal to the necessity of executive discretion and unity is still with us. Those inclined to an originalist point of view must ask which perspective more accurately reflects the fears and hopes of the framers.

Notes

1 272 U.S. 52 (1926).
4 William H. Taft (WHT) to Mrs. Frederick J. Manning (October 24, 1926) (Taft Papers).
5 272 U.S. at 106.
7 See ibid. at 1062–64.
8 Act of July 12, 1876, 19 Stat. 78, 80.
9 See Entin, The Curious Case of the Pompous Postmaster, 1066–73.
10 58 Ct. Cl. 199, 208 (1923).
11 Entin, The Curious Case of the Pompous Postmaster, 1065.
12 In the official United States Reports, the date of first argument is given as December 5, 1923, but this is an error. See Journal of the Supreme Court of the United States (October Term 1924) 99; Butler’s 1924 Term docket book, 249; WHT to Horace D. Taft (December 7, 1924) (Taft Papers); WHT to Charles P. Taft 2nd (December 7, 1924) (Taft Papers).
13 Journal of the Supreme Court of the United States (October Term 1924), 99. See WHT to Harlan Fiske Stone (HFS) (December 7, 1924) (Taft Papers).
14 Brief for the United States, at 3.
15 Id.
The argument is reproduced in Power of the President to Remove Federal Officers, S. Doc. 174, 69th Cong., 2nd Sess. (December 13, 1926), at 184.


WHT to HFS (December 7, 1924) (Taft Papers). See WHT to HFS (December 23, 1924) (Taft Papers); WHT to HFS (December 26, 1924) (Taft Papers); HFS to WHT (December 31, 1924) (Taft Papers).

Albert B. Cummins to James M. Beck (January 29, 1925) (Taft Papers).

WHT to HFS (December 23, 1924) (Taft Papers).

Journal of the Supreme Court of the United States (October Term 1924), 182; Albert B. Cummins to James M. Beck (January 29, 1925) (Taft Papers); Albert B. Cummins to WHT (January 29, 1925) (Taft Papers); James M. Beck to WHT (February 2, 1925) (Taft Papers).

Power of the President to Remove Federal Officers, at 153.

Id.


William Howard Taft, Our Chief Magistrate and His Powers, 2 (1916).


189 U.S. 311 (1903).


Taft, Our Chief Magistrate and His Powers, 59.


Ibid. at 395–96.

Id. at 396.

Id.

For an excellent discussion, see H. Jefferson Powell, Editor’s Introduction to the republication of Our Chief Magistrate and His Powers (2002).

Taft, Our Chief Magistrate and His Powers, 144.

Ibid. at 147.

Id. at 53.
57 Alfred McCormack, A Law Clerk’s Recollections, 46 COLUMBIA L. REV. 710, 714 (1946).
58 WHT to Charles P. Taft 2nd (April 26, 1925) (Taft Papers).
59 WHT to Mrs. Frederick J. Manning (May 17, 1925) (Taft Papers).
60 WHT to WVD (July 4, 1925) (Van Devanter Papers).
61 WHT to GS (August 11, 1925) (Sutherland Papers).
62 WHT to WVD (August 15, 1925) (Van Devanter Papers).
63 WHT to Hayden Smith (September 1, 1925) (Taft Papers).
64 Ibid.
65 Hayden Smith to WHT (September 22, 1925) (Taft Papers).
66 Ibid.
67 WHT to PB (September 16, 1925) (Taft Papers).
68 Ibid.
69 WHT to Charles P. Taft 2nd (November 1, 1925) (Taft Papers).
70 Ibid.
71 WHT to WVD (November 6, 1915) (Van Devanter Papers). See WHT to ETS (November 7, 1925) (Taft Papers); WHT to HFS (November 6, 1925) (Stone Papers).
72 WHT to PB (November 7, 1925) (Taft Papers).
73 WHT to Robert A. Taft (November 8, 1925) (Taft Papers).
74 WHT to Horace D. Taft (November 13, 1925) (Taft Papers).
75 WHT to WVD, GS, PB, ETS, and HFS (November 10, 1925) (Taft Papers).
76 WHT to Louis More (November 13, 1925) (Taft Papers).
77 WHT to Horace D. Taft (November 13, 1925) (Taft Papers).
78 McCormack, A Law Clerk’s Recollections, 711.
79 Ibid.
80 Id. See also THOMAS ALPHEUS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 227 (1956).
81 HFS to WHT (November 13, 1925) (Stone Papers).
82 Ibid. at 1.
83 Id.
84 Id.
85 WHT to Robert A. Taft (November 22, 1925) (Taft Papers).
86 HFS to WHT (November 24, 1925) (Van Devanter Papers).
87 Ibid. at 1.
88 Id.
89 WHT to Horace D. Taft (November 28, 1925) (Taft Papers).
90 Ibid.
91 Id.
92 Id.
93 Id.
94 Id.
95 WHT to Charles P. Taft 2nd (November 29, 1925) (Taft Papers).
96 HFS to WHT (November 30, 1925) (Stone papers).
97 116 U.S. 483 (1886).
98 116 U.S. at 484.
99 116 U.S. at 484–85.
100 HFS to WHT (November 30, 1925) (Stone Papers).
101 Ibid.
102 Id.
103 Id.
104 Id.
105 Id.
108 Ibid. See Marquis Childs, Minority of One, 214 THE SATURDAY EVENING POST 14, 15 (No. 12) (September 20, 1941).
109 This dating is based upon the fact that the memorandum refers to Myers as having docket number 2.
110 The memorandum is undated and unsigned, but all internal evidence suggests that it was written by Stone.
111 272 U.S. at 173–74.
113 WHT to WVD (December 5, 1925) (Van Devanter Papers).
115 McCarl’s Tenure Held at Stake in Supreme Court Decision, THE BALTIMORE SUN (October 27, 1926), at 2.
116 WHT to HFS (December 6, 1925) (Stone papers).
117 HFS to WHT (December 7, 1925) (Taft Papers).
118 See WHT to Robert A. Taft (December 20, 1925) (Taft Papers).
120 Id. at 426–27. George Wharton Pepper to WHT (December 23, 1925) (Taft Papers).
121 284 Pa. at 436.
122 WHT to WVD (December 30, 1925) (Van Devanter papers).
123 WHT to Horace D. Taft (January 5, 1926) (Taft Papers).
124 WHT to Horace D. Taft (January 7, 1926) (Taft Papers).
125 Ibid.
Consequences of the Myers Decision


See, e.g., Robert E. Cushman, Constitutional Law in 1926–1927, 74 (“The dissenting opinions seem clearly to have the better of the argument, both in historical accuracy and in logic.”); Thomas Reed Powell, Spinning Out the Executive Power, at 369 (“The logic is so lame, the language is so inconclusive, the history so far from compelling, that I venture to think that the mainspring of the decision and its only conceivable justification are to be found in the judgment of the majority that the result is one that ought to be reached.”); Galloway, The Consequences of the Myers Decision, at 491–92 (“The sharp dichotomy between the Chief Justice’s interpretation of the precedent of the first Congress, subsequent executive practice and legislative policy and the actual facts of history as introduced so ably and convincingly by Mr. Justice Brandeis in his margin, leaves the reader dubious of the infallibility of constitutional truths judicially revealed.”); The Supreme Court as Revolutionary, 123 The Nation 468 (No. 3201)
(November 10, 1926) (“The position of the majority judges is curious. They admit that Congress may take from the President the power of appointing inferior officers and, by vesting it in the head of some other department, restrict removals as it will, yet they hold that the moment Congress transfers that appointing power to the President it is deprived of this restrictive power. The decision is, as usual, political rather than legal. The settled habit of the court is so to interpret the Constitution as to prevent legislation which seems to disturb intrenched interests.”).


171 272 U.S. at 129.

172 Ibid. at 117–18, 126, 161.

173 Id. at 115–16.

174 272 U.S. at 161.


176 Corwin, Tenure of Office and the Removal Power Under the Constitution, 386.


178 Pub. L. No. 63-43, 38 Stat. 260 (December 23, 1913) (Setting terms for members of the Federal Reserve Board); Pub. Law No. 33-122, 10 Stat. 612 (February 24, 1913) (Setting terms for members of the Federal Reserve Board); Pub. L. No. 63-43, 38 Stat. 260 (December 23, 1913) (Setting terms for members of the Federal Reserve Board); Pub. Law No. 33-122, 10 Stat. 612 (February 24, 1855) (providing that judges of the Court of Claims will “hold their offices during good behavior”).

179 272 U.S. at 135.

180 Ibid. at 134.

181 Id. at 135.

182 Edward S. Corwin, The President as Administrator in Chief, 1 J. POLITICS 17, 50 (1939). See Taft, Our Chief Magistrate and His Powers, 126.

183 Corwin, The President as Administrator in Chief, 46.


185 295 U.S. 602 (1935).


187 295 U.S. at 628.

188 Ibid. at 626.


190 Ballard, The Administrative Theory of William Howard Taft, 71 n. 35.


192 The Supreme Court as Revolutionary, 468–69.


194 Galloway, The Consequences of the Myers Decision, 501. See A Very Serious Decision, THE NEW YORK WORLD (October 27, 1926), 16 (“If it is true, as Justice McReynolds says, that members of the Interstate Commerce Commission, the Federal Reserve, Shipping, Tariff, Trade, Farm Loan, Railroad Labor and similar quasi-judicial, quasi-executive boards can now be removed at ‘the President’s pleasure or caprice,’ then the gravity of the decision is evident.”); Thomas Reed Powell, Spinning Out the Executive Power, 369; The President’s “Right to Fire,” 91 THE LITEROARY DIGEST 5 (No. 1907) (November 6, 1926), 5; James Hart, The Bearing of Myers v. United States upon the Independence of Federal Administrative Tribunals, 659.

195 WHT to Thomas W. Shelton (November 9, 1926) (Taft Papers).

196 WHT to Casper S. Yost (November 1, 1926) (Taft Papers). For other comments to this effect, see WHT to Horace D. Taft (October 28, 1926) (Taft Papers) (Myers “curtails the power of the Senate and the power of Congress in erecting executive tribunals and boards that cut down the president’s authority, and the members of such boards of course are strongly against the exercise of this presidential power.”); WHT to Oren Britt Brown (November 19, 1926) (Taft Papers) (Myers “is the greatest constitutional case that I have had to do with, and of course in that respect it was a real opportunity. I think we have come to the right conclusion, in view of the history of the question and its early decision by Congress. I think, too, it is a wise result, in that it secures a proper equilibrium between the legislative and executive branches of the Government. The legislative branch of the Government will never lose its power. It has the whip hand of all the other departments in its law making power and is quite disposed at times to ignore the limitations of the Constitution which set boundaries between the power of Congress and the power of the other branches.”); WHT to Clarence H. Kelsey (December 2, 1926) (Taft Papers) (“[N]o one can under the current trend fail to observe that Congress pushes its power in every direction by constant legislation, relying on the others affected, especially the other branches of the Government, to enable the legislation that it passes to acquire permanency and constitutional conformity merely by lapse of time. Through the institution of boards whose members have terms that would outlast the Administration, it is possible for Congress to divide up the executive power, take it away from the President and tie his hands in many directions. This can not be done if he has the power of removal which he had uncontested for seventy-three years. I am glad to note that a majority of the press seem to favor the conclusion we reached.”).

197 WHT to William M. Hunt (May 5, 1927) (Taft Papers).
TAFT’S EPOCHAL OPINION IN _MYERS V. U.S._

198 WHT to Calvin Coolidge (June 4, 1924) (Coolidge papers).
199 WHT to Helen Herron Taft (April 20, 1924) (Taft Papers).
200 _Ibid._
201 272 U.S. at 123.
202 _Ibid._ at 293 (Brandeis, J., dissenting).

203 272 U.S. at 292–94 (Brandeis, J., dissenting).
204 The fullest expression of this organic view of separation of powers is in Justice Robert H. Jackson’s famous concurring opinion in _Youngstown Sheet & Tube Co. v. Sawyer_, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).