Twitter Thread by Jed Shugerman

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A new thread on originalism myths:
“The Indecisions of 1789: An Originalism Cautionary Tale” documents another series of misuses of sources by originalist unitary executive theorists.
The Roberts Court relied on this myth to expand presidential power:

2/ The mythic "Decisions of 1789" is that a House majority endorsed the unitary theory of implied presidential powers.
But only 16 of 53 (30%) fit that bill.
Trying to find more votes, Prakash miscategorized many members or sources.
My paper here:
https://t.co/ulKeHTdE0m

3/ The 1st error: Thomas Hartley.
Prakash in "A New Light on the Decision of 1789," cited by Justice Thomas, claims Hartley was part of an "enigmatic" bloc of members that *could* have favored the unitary theory.
But he clearly was not a presidentialist:
https://t.co/E8u0EA3ST8

4/ Here is what Prakash claims about Hartley (TOP).

Compare that to the original Hartley letters that Prakash cited (bottom L to Coxe; bottom R to Yeates).
Prakash seems to assume that only presidentialism could be a "principle."
Why can't the other side have principles?

power theory.[218]

Hartley, also a member of the enigmatic faction, advised that persons "not *fully convinced* that the power of removal [was] vested by the constitution in the president" should vote against Benson's second amendment.[219] He admitted that he had "some doubts" about this himself, but stated that he had no doubts about granting authority to the President.[220] Hartley's comments suggest that while he clearly preferred the original language, he was not opposed to the executive-power theory.

Certainly, Hartley's previous statements support this interpretation, as they evince no hostility toward the executive-power theory. On June 17, Hartley declared that a "fair construction of the constitution" required that the President control the business of the Department of Foreign Affairs.[221] Moreover, Hartley's subsequent writings suggest that while he might have preferred the original text, he nonetheless supported the executive-power theory.[222] Evidently, Hartley's misgivings about Benson's second amendment were insubstantial,

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216 *Id.* at 1028.

217 *Cf. supra* notes 129–31 and accompanying text (outlining Madison's view of the legislative-grant theory).

218 Justice Brandeis and Corwin count Laurance among the defenders of the congressional-delegation theory. *See* Myers v. United States, 272 U.S. 52, 285 n.73 (1926) (Brandeis, J., dissenting); CORWIN, *supra* note 16, at 331–32 n.22. In fact, Laurance's comments are much more equivocal. Laurance clearly thought that in the absence of an express grant in the Constitution, Congress could delegate such authority. *See, e.g.*, The Congressional Register (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 904, 911. However, Laurance never took a firm position on the matter. At times he seemed to argue that the power of removal is lodged with the President. *See id.* at 908. At other times, he argued that the Constitution is silent on the removal issue. *See id.* at 908–09.

219 *See* The Congressional Register (June 22, 1789), *reprinted in* DEBATES, *supra* note 6, at 1028, 1035 (emphasis added).

220 *Id.*

221 *See* The Congressional Register (June 17, 1789), *reprinted in* DEBATES, *supra* note 6, at 904, 904.

222 *See* Letter from Thomas Hartley to Jasper Yeates (Aug. 1, 1789), *in* CORRESPONDENCE, *supra* note 121, at 1209, 1209 (commenting on the meaning of the House vote on removal and the Senate's reluctance to endorse the executive-power principle in the Treasury bill); *see also* Letter from Thomas Hartley to Tench Coxe (Aug. 9, 1789), *in* CORRESPONDENCE, *supra* note 121, at 1261, 1261.

5/ Hartley was in fact a leading congressionalist rallying votes against the presidentialist theory:
In the pivotal debate June 22d, Hartley advised that persons "not fully convinced that the power of removal [was] vested by the constitution in the president" should vote "no."

6/ Prakash's assumption is the unitary interpretation has a monopoly on principle.
Congressionalists and non-unitary interpretations also have principles. This is a telling error to assume the unitary theory is driven by "principle" but other views are not.
This is ideological.

7/ Hartley’s speech is here, clearly indicating his opposition to the interpretation that the constitution “vest[ed]” removal power in the president. He is asking *others* who are “not fully convinced” to join his “no” vote.
Then he explicitly invoked “legislative authority.”

belongs to the government. I apprehend a law is necessary in every instance to determine the exercise of the power. In some cases it may be proper that the president alone should have it. I am not clear in my own mind what general rule, if any, can be established on this subject. Perhaps in other cases it may be lodged with the president and senate; or it may be given to the heads of departments. But whomsoever is invested with it, it must be in consequence of a law; and the legislature have a right to vest it where they please. For my part, I am not under those serious apprehensions which gentlemen have expressed. I do not apprehend that vesting it in the president, or president and senate, will effect a change of government; but at the same time I am anxious to preserve a consistency, and that the business should be settled upon proper ground.

I said I was against the words in the committee, because I doubted if the president was the proper person to exercise this authority. The amendment adopted this morning I likewise voted against, because I do not wish that the law should imply that the power of removing officers at pleasure, is a constitutional right vested in him. Now, I would rather a law should pass vesting the power in improper hands, than that the constitution should be wrong construed. If we say the president may remove from office, it is a grant of power—and we can repeal the law, and prevent the abuse of it: but if we by law imply that it is a constitutional right vested in the president, there will be a privilege gained, which the legislature cannot affect—at least the reversion of such a solemn opinion will occasion much inconvenience, not to say confusion.

For these reasons, I shall now be against striking out the words; though I wish to have some modification of them; but the last question being carried, has left me in doubt what to propose, to be consistent with my opinions. I am precluded from adding, by and with the advice and consent of the senate; and perhaps it would be out of order to change the word remove into suspend.

Mr. HARTLEY

Was against striking out, and so would every gentleman be, he trusted, who was not fully convinced that the power of removal vested by the constitution in the president. He owned he had some doubts on that head himself; perhaps some others might be in the same predicament: but he had none with respect to the propriety of the president's exercising that prerogative, and therefore should readily consent to granting it, this might be done by retaining the words, and without going beyond the avowed limits of the legislative authority.

Mr. VINING

Acquiesced in striking out; because he was satisfied that the constitution vested the power in the president; and he thought it more likely to

8/ This is Prakash, "New Light," p. 1054.

The gymnastics of trying to turn a leading critic of Prakash's pet theory on the key day into a supporter by utterly misreading

his later letters.

Note the number of errors and misleading statements on one page:

Why italics? Misleading

Hartley, also a member of the enigmatic faction, advised that persons "not *fully convinced* that the power of removal [was] vested by the constitution in the president" should vote against Benson's second amendment.[219] He admitted that he had "some doubts" about this himself, but stated that he had no doubts about granting authority to the President.[220] Hartley's comments suggest that while he clearly preferred the original language, he was not opposed to the executive-power theory.

Hartley approved of "retaining the words [the explicit "removable" clause] and without going beyond the avowed limits of the legislative authority."

Moving Goalposts:

Certainly, Hartley's previous statements support this interpretation, as they evince no hostility toward the executive-power theory. On June 17, Hartley declared that a "fair construction of the constitution" required that the President control the business of the Department of Foreign Affairs.[221] Moreover, Hartley's subsequent writings suggest that while he might have preferred the original text, he nonetheless supported the executive-power theory.[222] Evidently, Hartley's misgivings about Benson's second amendment were insubstantial,

FALSE

If Hartley explicitly indicated the congressionalist view of "legislative authority," and doubt about presidentialist view, why is hostility necessary? And it is misquoting the letters to say he support "exec power theory"

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MISREPRESENTING THIS LETTER

222 *See* Letter from Thomas Hartley to Jasper Yeates (Aug. 1, 1789), *in* CORRESPONDENCE, *supra* note 121, at 1209, 1209 (commenting on the meaning of the House vote on removal and the Senate's reluctance to endorse the executive-power principle in the Treasury bill); *see also* Letter from Thomas Hartley to Tench Coxe (Aug. 9, 1789), *in* CORRESPONDENCE, *supra* note 121, at 1261, 1261.

FALSE

9/ Prakash's 2d set of misreadings were his effort to count Lambert Cadwalader as a presidentialist.

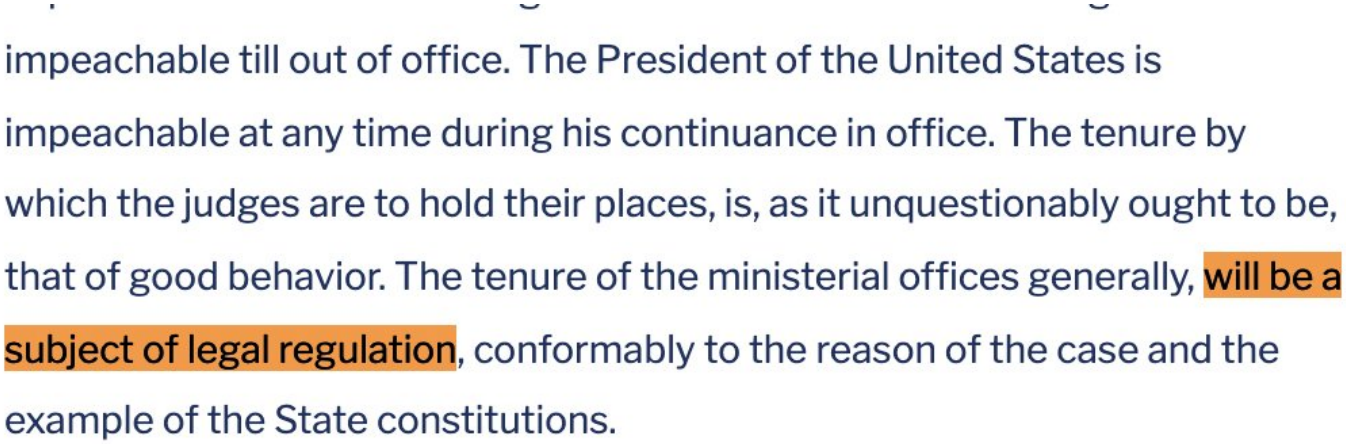
Cadwalader voted against BOTH of Madison's proposals. But Prakash misreads one of his letters to try to claim him anyway:

https://t.co/G4OkvBh3y8

10/ Prakash's 3d and 4th set of misreadings relate to John Laurance -- and James Madison himself.
Laurance's bottom line for voting against Madison:
"because he thought the legislature had the power to establish offices on what terms they pleased."
https://t.co/piING2NR0Q

11/ Laurance & Madison had a view of presidential removal so thin and functional, rather than formalist, that BOTH explicitly endorsed congressional conditions, rejecting the modern ahistorical unitary theory of "indefeasible" presidential power.
https://t.co/ulKeHTdE0m

12/ Madison, Federalist No. 39:
"Judges are to hold their places, is, as it unquestionably ought to be, that of good behavior. The tenure of the ministerial offices generally, will be a subject of legal regulation..."
"Ministerial offices" included department heads. See Marbury.


impeachable till out of office. The President of the United States is impeachable at any time during his continuance in office. The tenure by which the judges are to hold their places, is, as it unquestionably ought to be, that of good behavior. The tenure of the ministerial offices generally, will be a subject of legal regulation, conformably to the reason of the case and the example of the State constitutions.

13/ Prakash tried to argue that the “congressionalist” bloc was actually mixed and open to presidentialism…
But he relied on the *wrong* congressmen, Fisher Ames & John Vining.
His argument backfires, suggesting his bloc was strategic, not unitary:

https://t.co/zetrcEWHQP

14/ Prakash misread a letter by Rep. Peter Muhlenberg.
Muhlenberg described a presidential camp vs. a congressional camp clearly enough, but Prakash ignored context and over-read the word "confusion" to confuse or blur the 2 camps:
https://t.co/liZH4386Yr

15/ Compare Prakash vs. what Muhlenberg actually wrote:
Prakash (left) says both camps were presidentialist, divided on how clear or implicit to make the text.
M's letter (right) is clearly distinguishing a congressional (yellow) vs. a presidentialist (orange) camp:

for the former on the final vote.

Echoing Ames, Representative Peter Muhlenberg wrote that the majority had been divided over whether to make an express removal declaration.[245] Though a "Considerable Majority of The House have determined that the power of removal is vested solely in The President as The Chief Executive Magistrate," this majority was divided.[246] According to Muhlenberg, one group thought it was the "duty of the Legislature to declare by Law where this power is Lodgd, in order to prevent Confusion hereafter."[247] Presumably, these were the executive-power partisans who voted to reject Benson's second amendment. The rest of the majority thought an express declaration regarding removal "would imply a doubt, [and] that nothing more was . . . necessary than something of the Declaratory kind expressive of the sense of

NO. The letter is clearly contrasting a presidential theory vs. a congressional theory.

NO. Read the rest of the letter.

241 *See* Letter from Fisher Ames to George R. Minot (June 23, 1789), *in* CORRESPONDENCE, *supra* note 121, at 840, 840–41.

242 *Id.*

243 *Id.* at 841.

244 *Id.*

245 *See* Letter from Peter Muhlenberg to Benjamin Rush (June 25, 1789), *in* CORRESPONDENCE, *supra* note 121, at 855, 856. Though Muhlenberg's letter is dated June 25, 1789, it is unclear whether Muhlenberg wrote it before or after the vote on Benson's amendments. If, as is more likely, he wrote about the majority that voted for the original bill in the Committee of the Whole, Muhlenberg's letter confirms that this majority consisted of executive-power partisans. If, however, he wrote after the House vote on the final bill, the letter confirms that the majority on the final bill was united in believing that the President had a constitutional removal power, but divided about the best way of expressing that belief.

NO

NO

246 *Id.*

247 *Id.*

The House on the subject."[248] These members supported Benson's second amendment, which clearly implied a removal power.

In another letter, Ames suggested that an additional reason for the division in the executive power camp was a lack of "caucusing and

16/ Prakash also misread William Smith, claiming his referral to a "Presidents right of removal from office as Chief Majistrate w/o the consent of advice of the senate" was presidentialist, but it also applied to a congressional delegation of the right: https://t.co/7ioCpdv4eo

17/ Prakash's misreading or exaggeration of a VP John Adams letter. Adams was describing his own vote, which was already clear. Prakash was using Adams to claim the letter was evidence of the broader understanding of Congress's vote. https://t.co/agIYtUqZaf