The Opinions Clause

By Ilan Wurman*

If the President has a removal power and can control all law execution, then, according to Justice Kagan and many academics, the Opinions Clause is superfluous. Formalists have never sufficiently responded to this criticism. Those who maintain that the President by virtue of the executive power can both control and remove principal (if not all) executive officers explain that the Opinions Clause is either confirmatory, a limitation on power, or an accident of drafting history. These responses are plausible but not fully persuasive. There is another answer, one that requires recovering a way of thinking about executive power shared by thinkers as diverse as William Wirt, Daniel Webster, and William Howard Taft. According to this lost way of thinking, Congress can insulate inferior officers from removal because they must anyway follow orders from superiors. With respect to principal officers, however, the inverse is true: the President can remove but not control, at least not directly. The Opinions Clause provides that the President can require information about how those officers are exercising their duties, so that the President can, if desired, remove them. But the President cannot, absent congressional authority, direct them to exercise their discretion in a particular way. On this account the Opinions Clause, quite the opposite of being superfluous, only makes sense if the President has a power to remove.

The evidence for this understanding abounds. To take but one example, it is consistent with the acts of the First Congress creating the great executive departments as part of the “Decision of 1789.” The same statutes that Congress intended would make clear the President had a constitutional removal power also provided that each principal officer “shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct.” Congress sought in these statutes to avoid the implication that it was granting either an appointing or a removal power, so it would be surprising if Congress implied a discretionary grant of the power to control. The most likely explanation is that while the President can remove, the President cannot, in fact, direct in the absence of congressional authorization. This understanding of executive power may seem overly formalistic, but it would allow for the existence of independent agencies whose heads are removable but nevertheless bound by law to exercise the discretion Congress has given them, and for the insulation of civil servants and adjudicators subject however to the ultimate control of the heads of department. In other words, it would allow for an independent administrative state, but over which the President has an important check. And it would make sense of the Opinions Clause.

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