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The Unitary Executive in the Modern Era, 1945-2001

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Abstract

The impeachment of President Clinton has reinvigorated the debate over Congress’s authority to employ devices such as special counsels and independent agencies to restrict the President’s control over the administration of the law. The initial debate focused on whether the Constitution rejected the “executive by committee” employed by the Articles of the Confederation in favor of a “unitary executive,” in which all administrative authority is centralized in the President. More recently, the debate has begun to turn towards historical practices. Some scholars have suggested that independent agencies and special counsels have become such established features of the constitutional landscape as to preempt arguments in favor of the unitary executive. Others, led by Bruce Ackerman, have suggested that the New Deal represented a “constitutional moment” that ratified major changes in the distribution of power within the federal government. Still others have argued that the increased policymaking functions of the modern administrative state justify permitting Congress to impose greater limits on presidential control over the execution of the law. To date, however, a complete assessment of the historical record has yet to appear.
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ABSTRACT

The impeachment of President Clinton has reinvigorated the debate over Congress’s authority to employ devices such as special counsels and independent agencies to restrict the President’s control over the administration of the law. The initial debate focused on whether the Constitution rejected the “executive by committee” employed by the Articles of the Confederation in favor of a “unitary executive,” in which all administrative authority is centralized in the President. More recently, the debate has begun to turn towards historical practices. Some scholars have suggested that independent agencies and special counsels have become such established features of the constitutional landscape as to preempt arguments in favor of the unitary executive. Others, led by Bruce Ackerman, have suggested that the New Deal represented a “constitutional moment” that ratified major changes in the distribution of power within the federal government. Still others have argued that the increased policymaking functions of the modern administrative state justify permitting Congress to impose greater limits on presidential control over the execution of the law. To date, however, a complete assessment of the historical record has yet to appear.

This Article is part of a larger project that offers a comprehensive chronicle that places the battles between the President and Congress over control of the administration of federal law in historical perspective. It reviews the period between 1945 and 2001, beginning with the Administration of Harry Truman, ending with the Administration of Bill Clinton, and paying particular attention to the Clinton Impeachment. The record reveals that these Presidents consistently defended the unitariness of the executive branch to a degree sufficient to keep the issue from being foreclosed by history. In fact, the episodes discussed provide eloquent illustrations of the legal and normative arguments supporting the unitary executive.
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INTRODUCTION

Recent years have witnessed a resurgence of interest in the separation of powers. Supreme Court decisions striking down the legislative veto,1 the line item veto,2 and congressional attempts to control federal spending through the Gramm-Rudman-Hollings Act3 triggered a wave of academic commentary on the proper roles of both Congress and the president in exercising control over the execution of federal law.4

Much of the scholarship has focused on the constitutionality of the so-called independent agencies, such as the Securities and Exchange Commission and the Federal Communications Commission, which theoretically operate outside of direct presidential control.5 But the most dramatic flash point for debates about Congress’s ability to limit presidential authority over the execution of the law has been the use of independent

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counsels. The Supreme Court upheld the constitutionality of the independent counsel statute in *Morrison v. Olson* notwithstanding Justice Scalia’s dire warnings that special prosecutors could be manipulated for political purposes. The years that followed appeared to bear out Justice Scalia’s predictions, eventually peaking during the impeachment proceedings against President Clinton. Further controversy was forestalled when the statute authorizing independent counsels was allowed to lapse in 1999.

The scholarly commentary has evolved into a debate over whether the Constitution created a “unitary executive,” in which all executive authority is centralized in the president. Participants in the debate have examined the Constitution’s text and ratification history to determine whether it rejected the plural executive employed by the Articles of the Confederation and many state constitutions in favor of a structure in

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8 Id. at 712-14, 727-30 (Scalia, J., dissenting).


10 Compare, e.g., Calabresi, supra note 4 (arguing that the Article II Vesting Clause, bolstered by other constitutional provisions, represents a substantive grant of constitutional power); Calabresi & Prakash, supra note 4 (same); and Calabresi & Rhodes, supra note 4 (same); with Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 47-55, 119 (1994) (disagreeing with Professor Calabresi’s views); and A. Michael Froomkin, *The Imperial Presidency’s New Vestments*, 88 Nw. U. L. Rev. 1346 (1994) (same).

which all administrative authority was concentrated in a single person.\textsuperscript{12} To the extent that commentators have focused on the post-ratification history with respect to this issue, they have tended to focus primarily on the practices during the presidential administrations immediately following the Founding.\textsuperscript{13}

Increasingly, commentators have looked beyond the Founding era and have begun to assess the implications of the broader sweep of history. The few historical treatments that currently exist typically suggest that, regardless of the underlying merits, arguments in favor of the unitary executive have been foreclosed by the sweep of more than two centuries of constitutional history.\textsuperscript{14} Others have offered the more limited historical claim that nonunitariness has only been an established practice since the Supreme Court’s 1935 decision in \textit{Humphrey’s Executor v. United States}.\textsuperscript{15} Some of those offering such arguments have candidly acknowledged the incompleteness of the current literature and

\begin{itemize}
  \item \textsuperscript{12} It is interesting to note that the conclusion that the Constitution of 1787 established a unitary executive has found general acceptance among courts, see \textit{Myers v. United States}, 272 U.S. 52, 110-33 (1926); Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981); among historians, see \textit{Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution} 250-53, 257-58 (1996); and even among leading critics of the unitary executive, see \textit{Strauss, supra} note 5, at 599-601; Cass R. Sunstein, \textit{Constitutionalism After the New Deal}, 101 HARV. L. REV. 421, 432-33 (1987).
  \item \textsuperscript{14} See \textit{Forrest McDonald, The American Presidency: An Intellectual History} 180 n.35 (1994). (“more than 200 years of practice under the Constitution . . . render a strict separation [or powers] impossible”); Flaherty, \textit{supra} note 11, at 1816 (suggesting that a common law constitutionalist would regard the past 200 years of practice under the Constitution “dispositive” in foreclosing the unitary vision of the executive); Tiefer, \textit{supra} note 6, at 103 (“From the creation of the government’s structure by the First Congress, through the development of the modern agency, and down to the present, the status of agencies has not been a unitary or monolithic one.”); see also Miller, \textit{supra} note 5, at 83-86 (finding past presidents’ failure to consistently oppose independent agencies problematic, but ultimately insufficient to constitute acquiescence).
\end{itemize}

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have recognized the need for a more complete assessment of the historical record of presidential control over the execution of the law.\footnote{See Lessig & Sunstein, supra note 10, at 84 n.334 (noting that “a full account of the growth of presidential power” would allow consideration of “the enormously significant and self-conscious changes in the role of the presidency from the period following Jackson through Franklin Roosevelt”).}

We have attempted to fill this void by embarking on a four-article series examining the history of the president’s ability to execute the law. In \textit{The Unitary Executive During the First Half-Century},\footnote{Steven G. Calabresi & Christopher S. Yoo, \textit{The Unitary Executive During the First Half-Century}, 47 CASE W. RES. L. REV. 1451 (1997).} we analyzed the first seven presidencies under the Constitution to determine the view of presidential power held by the incumbents between 1789 and 1837. In so doing, we paid particular attention to what is generally recognized to be the first great clash between the president and Congress over control of the administration of the law: Andrew Jackson’s removal of his Treasury Secretary during his battle with the Bank of the United States.\footnote{\textit{Id.} at 1538-59.}

Writing in 1997, when the institution of independent counsels still enjoyed broad support among both politicians and academic commentators,\footnote{See Ken Gormley, \textit{Monica Lewinsky, Impeachment, and the death of the Independent Counsel Law: What Congress Can Salvage from the Wreckage—A Minimalist View}, 60 MD. L. REV. 97, 101-02 (2001) (noting that as of the end of 1997 the independent counsel statute still enjoyed broad support and that the abruptness with which people abandoned it came as a shock).} we called for and predicted the demise of the independent counsel statute.\footnote{Calabresi & Yoo, supra note 17, at 1462.}

We continued our project in \textit{The Unitary Executive During the Second Half-Century},\footnote{Steven G. Calabresi & Christopher S. Yoo, \textit{The Unitary Executive During the Second Half-Century}, 26 HARV. J.L. & PUB. POL’Y 668 (2003).} beginning with Martin Van Buren’s presidency in 1837 up through the end of the first administration of Grover Cleveland in 1889. In the process, we offered an extended discussion of the second great conflict over the unitary executive: the
impeachment of Andrew Johnson for violating the Tenure of Office Act.\textsuperscript{22} The period closed with a series of landmark events, including the enactment of the Civil Service Act of 1883, the creation of the Interstate Commerce Commission in 1887 (the agency that would eventually become the model for all subsequent independent agencies), and the repeal of the Tenure of Office Act in 1887.\textsuperscript{23}

In \textit{The Unitary Executive During the Third Half-Century},\textsuperscript{24} we continued our survey of presidents from Benjamin Harrison through Franklin D. Roosevelt. In the process, we offered a detailed analysis of FDR’s failed attempt to implement the Brownlow Committee’s proposal to reorganize the executive branch, which is widely recognized as a watershed moment in the history of the president’s authority over the execution of the law.\textsuperscript{25} This period plays a critical role in arguments about the unitariness of the executive branch. Many constitutional theorists, led by Bruce Ackerman, regard the New Deal era to be a constitutional moment that implicitly ratified major changes in the allocation of power within the federal government.\textsuperscript{26} This period also witnessed the rise of the so-called independent agencies, which had been languishing in the aftermath of the Supreme Court’s decision in \textit{Myers v. United States}.\textsuperscript{27} We found that presidents throughout this period consistently asserted the president’s role as the ultimate repository of executive power. The anti-unitarian position did not receive any material support until

\begin{footnotesize}
\textsuperscript{22} Id. at 746-58.
\textsuperscript{23} Id. at 788-89, 795-99.
\textsuperscript{24} Christopher S. Yoo, Steven G. Calabresi, & Laurence Nee, \textit{The Unitary Executive During the Third Half-Century} (forthcoming 2004).
\end{footnotesize}
1935, when the Supreme Court reversed decades of precedent and upheld the constitutionality of congressionally imposed limitations on president’s power to remove officers charged with executing the law in *Humphrey’s Executor v. United States*.\(^\text{28}\)

Although Roosevelt was unable to undo the damage done by the Court’s ruling in *Humphrey’s Executor*, his continued efforts to resist the move toward agency independence was more than sufficient to foreclose any claims of presidential acquiescence.

We believe that our prior work has shown that each of the first thirty-two presidents—from George Washington up through Franklin D. Roosevelt—believed in a unitary executive of the kind defended by many scholars in recent years. These thirty-two presidents all asserted a broad presidential power to remove subordinate officials exercising executive policy-making power for any reason, including policy disagreements. We also showed that many of these thirty-two presidents also asserted other presidential powers of control over law execution including the issuing of binding orders to subordinates to take particular actions and the nullifying of particular actions taken by subordinates. Finally, we showed that many of these thirty-two presidents had construed the Vesting Clause of Article II to be a grant of power to the president, as Professor Calabresi has previously argued in a debate with Professors Lawrence Lessig and Cass Sunstein.\(^\text{29}\)

\(^\text{28}\) 295 U.S. 602 (1935). For our discussion of *Humphrey’s Executor*, see Yoo et al., *supra* note 24, at _.

\(^\text{29}\) Compare Calabresi, *supra* note 4, at 1378-1400, 1403-05 (arguing that the Article II Vesting Clause represents a substantive grant of constitutional power); Calabresi & Prakash, *supra* note 4, at 563-64, 570-81, 612-13 (same); Calabresi & Rhodes, *supra* note 4, at 1165-70, 1175-81, 1186-1206 (same), with Lessig & Sunstein, *supra* note 10, at 47-55, 119 (disagreeing with Professor Calabresi’s views).
We now pick up the survey where we left off in our three prior articles and examine the presidencies during the fourth half-century of our constitutional history to see the views expressed by presidents from Harry Truman to Bill Clinton regarding the scope of the president’s power to execute the law. As in our previous articles, in conducting our historical review of presidential practices, we employ the interpretive method known as “departmentalism” or “coordinate construction.” This approach holds that all three branches of the federal government have the power and duty to interpret the Constitution and that the meaning of the Constitution is determined through the dynamic interaction of all three branches.30 The relevant inquiry is whether a long-standing and unbroken practice exists to which both Congress and the presidents have acquiesced. Only if that is the case can a practice justifiably be regarded as an established part of the structure of our government.31 In this respect, our methodology is the similar to the one followed by the Supreme Court in INS v. Chadha,32 which relied on the fact that eleven of thirteen presidents from Woodrow Wilson to Ronald Reagan had refused to accede to the legislative veto in rejecting arguments that the legislative veto had become an accepted feature under the separation of powers.33

Our historical account focuses primarily on the three devices generally viewed as necessary to any theory of the unitary executive: the president’s power to remove subordinate policy-making officials at will, the president’s power to direct the manner in

30 See Calabresi & Yoo, supra note 17, at 1463-72.
31 For the classic statement of this position, see United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915). For other examples, see, e.g., Dames & Moore v. Regan, 453 U.S. 654, 668-69, 686 (1981); Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case), 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring); Pocket Veto Case, 279 U.S. 655, 679-83 (1929); Myers v. United States, 272 U.S. 52, 170-76 (1926); and Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803).
33 Id. at 942 n.13.
which subordinate officials exercise discretionary executive power, and the president’s power to veto or nullify such officials’ exercises of discretionary executive power.  

Where appropriate, we also discuss presidential exercises of the foreign affairs power, which derives largely from the Article II Vesting Clause, the same constitutional foundation as the president’s power to execute the law.  

We do not claim that there is consensus among all three branches of government as to the president’s control of the removal power and of the powers to direct and nullify.  Rather, we claim only that there is no consistent, three-branch custom, tradition, or practice to which presidents have acquiesced permitting congressionally imposed derogations of the president’s sole authority to execute the law.  

As a result, we reject claims that arguments regarding the proper balance of power between the legislative and the executive branches have been effectively foreclosed by history.  Instead, we contend that such arguments must be resolved on the basis of their legal and normative merits.

The years between from 1945 to 2001 represents a particularly interesting period in the constitutional history of presidential power.  The executive branch that emerges during the second half of the twentieth century is a mammoth operation that dwarfs the scale of administration during the time of George Washington.  Indeed, the size of the modern federal bureaucracy far exceeds even the burgeoning administrative state that had emerged by the end of the New Deal.

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34  Id. at 1458.


36  Calabresi & Yoo, supra note 17, at 1458.
In addition, the modern presidency wields far more power and plays a far larger role in setting and coordinating federal policy than in previous periods. The scope of presidential power is perhaps demonstrated most dramatically by the fact that Harry S. Truman’s accession to the presidency in 1945, which commences the period covered by this installment of our series of articles, coincides with the beginning of the Atomic Age. Ever since 1945, the fact that the president has possessed the power to deploy nuclear weapons on a global scale if the circumstances call for it provides simply the most dramatic demonstration of the increasing importance of the office.

Indeed, the presidency now far surpasses any other governmental institution in terms of political leadership. Chief executives typically establish a direct relationship with the American people and became the embodiment and the focal point of the national will. Thus, presidents like Harry Truman, Dwight D. Eisenhower, and Ronald Reagan wielded more power and were more central to the life of the nation than were such predecessors as Franklin Pierce or Benjamin Harrison. For better or worse, we have an imperial presidency now.37

As a result, many non-formalist theories of constitutional interpretation contend that the presidency of Franklin Roosevelt represents a turning point in the history of the separation of powers in which the polity effectively sanctioned a fundamental redistribution of power among the three branches. Interestingly, different scholars draw starkly different normative inferences from this fact. Some scholars, such as Peter Strauss, Abner Greene, and Martin Flaherty, have argued that the increased policymaking functions of the modern administrative state justify permitting Congress to place greater

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limits on presidential control over the execution of the law.38 Others, including most notably Lawrence Lessig and Cass Sunstein, have drawn the opposite conclusion, arguing that the increase in discretionary, policymaking authority wielded by administrative agencies has strengthened the case in favor of the unitary executive.39

We take issue with both approaches. Contrary to the prognosis of Ackerman and Flaherty, presidents throughout the post-World War II era consistently asserted their sole authority to execute the laws, often with the support of the judiciary. Indeed, the reaffirmations of the unitariness of the executive branch that we discuss are part of a seamless position that presidents have consistently advanced since the Founding. Thus, from the standpoint of constitutional law, what we find singular is not the supposed fundamental discontinuity that drives the constitutional moment envisioned by Ackerman,40 but rather the consistency with which the executive branch has asserted its vision of the proper scope of presidential power. From the standpoint of three-branch constitutional interpretation, the conduct of presidents throughout the period running from 1945 to 2001 stands as a strong reaffirmation of the unitariness of the executive branch that is more than sufficient to vitiate any inference that the executive branch has acquiesced to any encroachments upon its prerogatives.

We begin in Parts I through X below with a discussion of the eleven presidencies between 1945 and 2001. In Part XI, below, we pay particularly close attention to the rise and fall of the Ethics in Government Act, which created so-called independent counsels to prosecute wrongdoing by senior executive branch officials. We shall see that the

38 See Flaherty, supra note 11, at 1816-21, 1823-24; Greene, supra note 11, at 153-95; Strauss, supra note 5.
39 See Lessig & Sunstein, supra note 10, at 93-106.
40 See supra note 26 and accompanying text.
history of the Ethics in Government Act is strikingly similar to the history of the so-called Tenure of Office Act and would end in the Act’s demise, just as we predicted in 1997.41

I. HARRY S. TRUMAN

Harry S. Truman succeeded Franklin Roosevelt as president at a time when the whole world was consumed by war. With no time to prepare for his awesome responsibilities, Truman would have to complete the Second World War, manage the transition from a wartime to a peacetime economy, and formulate a new foreign policy to contain Soviet communism. Truman’s biographer, Donald R. McCoy, observes:

Of elected presidents, only Abraham Lincoln and Franklin D. Roosevelt had assumed office under such pressure and with such complications. They had been elected to their high estate, however; had had some time to prepare to assume it; and were not obligated to carry on the policies of their predecessors. Truman did not have the time, the prestige, the mental preparation, or the luxury of concentrating on only one crisis. He had, in fact, two major crises to resolve simultaneously—winning the war and securing the peace—and the one complicated the other. And waiting in the wings for him were the challenges of domestic and world reconstruction.42

Fortunately, Truman’s character “enabled him to make much of his on-the-job training as president. He was brisk, decisive, direct, industrious, practical, and tough.”43 Truman “exercised command vigorously”44 and on August 6, 1945, he dropped the first atomic bomb on Hiroshima thus bringing World War II to an end.45 In general, Truman

41 Calabresi & Yoo, supra note 17, at 1462.
43 Id. at 15.
44 Id. at 22.
45 Id. at 39.
gets high marks as “a supremely tough, decisive leader”\textsuperscript{46} who was completely in control from the start of his entire administration.

Truman immediately announced that he would continue FDR’s policies and that he would “prosecute the war on both fronts, east and west, with all the vigor we possess to a successful conclusion.”\textsuperscript{47} Despite his initial determination to continue Roosevelt’s policies, he soon realized “there could be no Truman administration unless he had his own people in office”\textsuperscript{48} and had a Cabinet that was “in entire sympathy with what I wanted to do”\textsuperscript{49} Truman therefore acted swiftly to assemble his own White House staff. Six months into his presidency Truman was left “with only three of the ten cabinet members whom he had inherited.”\textsuperscript{50}

Truman relied “more heavily on his top subordinates than had Roosevelt,”\textsuperscript{51} and he “had daily meetings with his chief White House aides and at least weekly meetings with cabinet members.”\textsuperscript{52} It would be a mistake to infer from Truman’s more deliberative style that he exerted any less control over the execution of the law than did Roosevelt. Truman’s determination to take full responsibility for the entirety of his administration is evident in the rules he laid down for his cabinet on May 18, 1945. Cabinet members were to help the president carry out policies of the government; in many instances the Cabinet could be of tremendous help to the President by offering advice whether he liked it or not but when [the] president [gave] an order they should carry it out. I told them I expected to have a Cabinet I could depend on and take in my

\begin{thebibliography}{99}
\bibitem{46} Id. at 65.
\bibitem{47} Id. at 16.
\bibitem{48} Id. at 17.
\bibitem{49} Id. at 18.
\bibitem{50} Id. at 19.
\bibitem{51} Id.
\bibitem{52} Id.
\end{thebibliography}
confidence and if this confidence was not well placed I would get a Cabinet in which I could place confidence.53

And when cabinet members did not execute the law in accordance with Truman’s wishes, he did not hesitate to remove them or force them to resign. For example, Secretary of Defense Johnson was told to resign because of his “conflicts with other officials, his verbal indiscretions, his chumminess with Republicans, and his slowness in conforming to new policies during a war.”54 Even more dramatic was the forced resignation of Attorney General J. Howard McGrath. The sequence of events that led to McGrath’s undoing began on February 1, 1952, when he appointed Newbold Morris as a special prosecutor to investigate alleged corruption in the Bureau of Internal Revenue and the Department of Justice’s Tax Division, only the fifth occasion in history in which a special prosecutor had been named. After Morris attempted to identify senior Justice Department officials who might be taking bribes by preparing a lengthy questionnaire intended to identify those officials’ whose lifestyles outstripped their salaries, McGrath ordered that the questionnaires not to be distributed. When Morris then sought access to McGrath’s official and personal records, McGrath fired Morris, which in turn prompted Truman to fire McGrath later that same day.55 The investigation was then completed by Judge James P. McGranery, who succeeded McGrath as Attorney General.

Truman’s willingness to remove McGrath for his attempt to interfere with the activities of the special prosecutor illustrates the strength of Truman’s belief in his authority over the execution of federal law. This is not to suggest that Truman thought

53 Id. Quoting Harry S. Truman.
54 Id. at 236.
that he had any less right to control the conduct of the special prosecutor than he had over the Attorney General. The manner in which the special prosecutor conducted his investigation revealed that he was completely subject to presidential direction. For example, after meeting with Truman, Morris declared that he did not need the subpoena power “because if I want something and can't get it, I can go to the President for it.”

The fact that Morris was himself removed by McGrath, who was himself then removed, further confirms that the Truman Administration did not regard the special prosecutor as independent of the executive branch or as anything less than completely accountable to the president. Truman disagreed with McGrath’s actions as a matter of *policy*; at no point, however, did Truman suggest that McGrath lacked the *authority* to dismiss Morris.

As befitting a person with a plate on his desk proclaiming “The buck stops here,” Truman also exerted direct supervisory control over other aspects of his administration as well. Truman listened to and relied upon his White House staff and the Bureau of the Budget, but it was always “clear he was the boss, the person on whose desk ‘the buck stops’. For all their influence, they were advisors, not executives or policy makers.” Truman also “created the institution of the presidency” by refining the structure of the White House staff and making increasing use of the Bureau of the Budget, the Council of Economic Advisors, and the National Security Council. The

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56 *Quoted in id.* at 2331.
58 M COOY, supra note 42, at 315.
59 *Id.* at 147.
60 *Id.* at 164.
development of efficient means of using the White House staff to police the executive branch greatly enhances the unitary executive.

Military and foreign policy matters continued to occupy a substantial part of Truman’s time in his second term. Truman repeatedly asserted himself over the armed forces, and he kept military expenses down. Truman “never let anyone forget who was the commander in chief.”61 In addition, “[t]he Americans had developed and tested the hydrogen bomb by November 1952” and had “begun work on atomic-powered submarines and aircraft, as well as on guided missiles.”62

By the summer of 1950, Truman found himself being drawn into a major undeclared war in Korea.63 This was a major exercise of executive power, and Truman was to proceed on his own authority. It would also lead to one of the most dramatic removals ever in American history when Truman relieved General Douglas MacArthur of his command of U.S. troops in Korea for being insubordinate and for openly intervening in the political arena. Truman believed that MacArthur’s action posed “a danger to the fundamental principle of civilian supremacy over the military.”64 This very high visibility removal illustrates dramatically why the removal power is so important for the president if he is to be in charge of the executive branch.

Not only was Truman willing to exercise the removal power; he also vigorously defended it against congressional attempts to place limits on its exercise, as evinced by his continuation of the defense of the removal power in connection with the case of

61 Id. at 140.
62 Id. at 194-95.
63 Id. at 226-27.
United States v. Lovett,65 begun during the Roosevelt Administration.66 The Lovett case arose when Congress attached a rider to an appropriations bill specifying that no federal funds could be used to pay Lovett and two other named executive branch employees suspected of holding subversive views. In essence, the issue in Lovett was whether Congress could use its spending power to in effect remove executive branch employees whom the president wanted to retain. Although the Court of Claims had decided in favor of the Administration’s position, it failed to provide the strong endorsement of the removal power that the Administration sought. Dissatisfied with the Court of Claims’ disposal of the case on nonconstitutional grounds, the Attorney General successfully petitioned for certiorari in early 1946.67

The Truman Administration’s brief on the merits primarily attacked the rider as an impermissible infringement on the President’s power to remove,68 as did its presentation during oral argument.69 The administration’s brief specifically said that

If the President is to perform his constitutional obligation to execute the laws, he must have power to control the subordinate officers through whom the executive function is administered. The principal control which the President has over executive officers is his power to remove them, and it has been said that he is . . . Chief of the Executive only through his power of removing appointees who are recalcitrant and unwilling to follow his wishes. Any exercise of the removal power by the legislative

65 66 F. Supp. 142, 146 (Ct. Cl. 1945), aff’d, 328 U.S. 303 (1946).
66 See Yoo et al., supra note 24, at .
67 John Hart Ely, United States v. Lovett: Litigating the Separation of Powers, 10 HARV. C.R.-C.L. L. REV. 1, 23-25 (1975). The Attorney General’s decision to seek Supreme Court review is telling because the outcome he desired had prevailed in the Court of Claims. Therefore the Attorney General petitioned for certiorari not to change the result in the judgment below, but rather to change its rationale.
68 The Administration’s brief devoted some forty-seven pages to its removal argument, spending the remaining fifteen pages challenging the rider as a bill of attainder. Id. at 28-29 (citing Brief for the Petitioner, United States v. Lovett (Nos. 809 to 811)).
69 Id. at 30 & n.86 (citations and internal quotation marks omitted).

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branch necessarily interferes with the executive power and tends to subject
the executive branch to the control and domination of Congress.\textsuperscript{70}

The Truman Administration’s brief goes on to claim that in England the “power to
remove executive officers was vested in the Crown”\textsuperscript{71} and the brief specifically cites the
Vesting Clause of Article II as the source of the President’s removal power.\textsuperscript{72} The brief
concludes its argument against a congressional power to remove Lovett by showing that
the consistent practice from 1789 up through the 1940’s was of presidential not
congressional power to remove.\textsuperscript{73}

Although the Supreme Court did reach the constitutional questions avoided by the
Court of Claims, it upheld the Administration’s position on the grounds that the statute
represented a bill of attainder without reaching the removal issue.\textsuperscript{74} As a result, none of
the arguments on the removal power in the administration’s brief found its way into the
Supreme Court’s opinion. For the purposes of this Article, however, it is of no
consequence that the Supreme Court chose not to base its resolution of the case on the
removal power. The fact that the Truman Administration strongly opposed congressional
infringement upon the removal power is sufficient to show that Truman did not acquiesce
to this deviation from the unitary executive.

Having failed in its attempt to use its control over appropriations to remove
certain executive officers, Congress tried to remove Commissioner of the Bureau of
Reclamation Michael W. Straus and Regional Reclamation Director Richard L. Boke by

\textsuperscript{70} Brief for the Petitioner at 15, \textit{United States v. Lovett} (Nos. 809 to 811).
\textsuperscript{71} \textit{Id.} at 19.
\textsuperscript{72} \textit{Id.} at 21.
\textsuperscript{73} \textit{Id.} at 32-48.
\textsuperscript{74} 328 U.S. at 307. The House considered refusing to allocate the money to pay Watson,
Dodd, and Lovett, but in the end voted 99 to 98 to appropriate the necessary funds. 93 CONG. REC. 2973-
75, 2977, 2987-91 (1947); see also Ely, \textit{supra} note 67, at 10 n.32, 31 n.93.
arbitrarily changing the qualifications for their positions.\textsuperscript{75} Truman complained that this provision, designed as it was to “effect the removal of two men now holding such positions,” was “contrary to the spirit, if not the letter of those provisions of the Constitution which guarantee the separation of legislative and executive functions.”\textsuperscript{76} However, because Congress had already adjourned, Truman felt that he “had no choice” but to sign the bill. Truman indicated, however, that “had it been possible to veto this bill without bringing the vital work of the Department to a standstill,” he would have done so.\textsuperscript{77} Congress persisted the following year, attaching a provision to a continuing resolution prohibiting the use of appropriated funds for paying Straus’s or Boke’s salaries.\textsuperscript{78} Again Truman objected in much the same terms.\textsuperscript{79} Perhaps chastened by their defeat in \textit{Lovett}, Congress finally backed down the following month when it deleted the changes in these offices’ qualifications without having forced Straus or Boke out of their posts.\textsuperscript{80}

That said, there were occasions on which Truman did not consistently support the unitariness of the executive branch. Truman’s position was somewhat equivocal regarding the President’s power to direct and overrule subordinate executive officials’ exercises of discretion, as evidenced by the attitude of his administration during the consideration of the Reorganization Act of 1945. Although Truman’s initial proposal would have included all of the independent agencies within the President’s reorganization

\begin{thebibliography}{80}
\bibitem{75} Interior Department Appropriation Act, Pub. L. No. 80-841, 62 Stat. 1112, 1126 (1948).\bibitem{76} Harry S. Truman, Statement by the President on the Interior Department Appropriation Act (June 30, 1948), \textit{in} 1948 \textit{PUB. PAPERS} 390, 390.\bibitem{77} \textit{Id.}\bibitem{78} Temporary Appropriations Act of 1949, ch. 101, 63 Stat. 67.\bibitem{79} Harry S. Truman, Statement by the President Upon Signing the Temporary Appropriations Bill (May 12, 1949), \textit{in} 1949 \textit{PUB. PAPERS} 250.\bibitem{80} Act of Oct. 12, 1949, ch. 680, § _, 63 Stat. 765,_; see also Note, 1949 \textit{PUB. PAPERS} 250.
\end{thebibliography}
authority, Congress refused to comply and instead followed the pattern established in the Reorganization Act of 1939 by specifically exempting certain specified agencies from the Act altogether and by strictly limiting the degree to which certain other agencies could be reorganized. Truman also implicitly condoned another deviation from the unitariness of the executive branch when recommended that Congress incorporate the legislative veto provision of the 1939 reorganization statute into the 1945 version. Congress of course took Truman at his word and included a two-house legislative veto into the 1945 Act. Truman also tolerated the enactment of other legislative vetoes throughout his first term.

Truman began to offer greater resistance to such intrusions after he won reelection in his own right. Building on the recommendations of the First Hoover Commission,

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82 See Yoo et al., supra note 24, at _.
84 Truman noted that under that arrangement, “necessary control is reserved to the Congress since it may, by simple majority vote of the two Houses, nullify any action of the President which does not meet with its approval.” Letter from President Truman to the Congress of the United States (May 24, 1945), reprinted in H.R. REP. NO. 971, 79th Cong., 1st Sess. 1, 2 (1945).
85 § 6(a), 59 Stat. at 616. The Senate even dallied with shifting to a one-house legislative veto, S. REP. No. 638, supra note 84, at 3, but in the end it backed down and retained the two-house veto. Robert W. Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 HARV. L. REV. 569, 581 n.46 (1953) (citing 91 CONG. REC. 10269-74, 10714 (1945)).
87 The Commission called for a “clear line of control from the President to these department and agency heads and from him to their subordinates.” COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, GENERAL MANAGEMENT OF THE EXECUTIVE BRANCH: A REPORT TO THE CONGRESS 1 (1949) [hereinafter FIRST HOOVER COMM’N REP. ON EXEC. BRANCH]. The Commission elaborated:

Responsibility and accountability are impossible without authority— the power to direct. The exercise of authority is impossible without a clear line of command from the top to
Truman recommended in 1949 that Congress make the President’s authority to reorganize the government permanent and extend it to cover all governmental agencies, including the independent regulatory commissions. In Truman’s eyes, “the new reorganization act should be comprehensive in scope; no agency or function of the executive branch should be exempted from its operation.” Truman’s growing support for the unitariness of the executive branch, however, was still incomplete: his recommendation continued to condone the legislative veto procedure contained in the Reorganization Acts of 1939 and 1945 “whereby a reorganization plan submitted to the Congress by the President becomes effective in 60 days unless rejected by both Houses of Congress.”

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Id. at 4; see also Letter from Herbert Hoover to Kenneth McKellar (Jan. 13 1949), reprinted in S. REP. NO. 232, 81st Cong., 1st Sess. 2-3 (1949) (“[W]e must reorganize the executive branch to give it the simplicity of structure, the unity of purpose, and the clear line of executive authority that was originally intended under the Constitution.”). Therefore, the Commission recommended that all agencies be placed within executive departments and that all independent authorities granted to subordinate executive officials by statute or appropriations rider be eliminated. FIRST HOOVER COMM’N REP. ON EXEC. BRANCH, supra, at 32, 34. The Commission also recommended that Congress not exempt any agencies from the President’s reorganization authority, including in particular the independent regulatory commissions. Furthermore Congress should not place any limitations based on an agency’s “independent exercise of quasi-legislative or quasi-judicial functions.” Such phrases are too “vague and of uncertain meaning” and would only inhibit the President’s proper control over the executive branch. Id. at x,-i.

Message from President Harry S. Truman to the Congress (Jan. 17, 1949), reprinted in S. REP. NO. 232, supra note 87, at 4, 5. In support of this proposal, the Attorney General’s Office issued a memorandum repudiating Attorney General Mitchell’s formalist critique of the legislative veto. The memorandum...
Congress accepted the gist of Truman’s proposal and removed all of the exemptions except for those governing the Comptroller General and the General Accounting Office. Congress did exact a price for surrendering its ability to protect specific agencies that were of special interest to its members: it added the requirement that all proposed changes to certain agencies be contained in a single reorganization plan unmingleed with reorganizations affecting other agencies and broadened the two-house legislative veto into a one-house legislative veto.90

Truman immediately used this authority to assert greater Presidential control over the independent agencies. Again building off of the recommendations of the First Hoover Commission,91 Truman submitted a reorganization plan on June 20, 1949, reasoned that legislative vetoes did not represent “an improper legislative encroachment upon the Executive in the performance of functions delegated to him by the Congress. . . . [T]he authority given to the President to reorganize the Government is legally and adequately vested in the President when the Congress takes the initial step of passing a reorganization act.” Thus Congress simply reserved “the right to disapprove action taken by the President under the statutory grant of authority.” Letter and Memorandum from Peyton Ford, Assistant to the Attorney General, to John L. McClellan, Chairman of the Senate Committee on Expenditures (Mar. 17, 1949), reprinted in S. REP. NO. 232, supra note 87, at 18, 20.

In fact, the memorandum did not regard the legislative veto as being any more sinister than a provision requiring that the executive branch report its intended actions to Congress and then wait for a specified period of time:

It cannot be questioned that the President in carrying out his Executive functions may consult with whom he pleases. . . . There would appear to be no reason why the Executive may not be given express statutory authority to communicate to the Congress his intention to perform a given Executive function unless the Congress by some stated means indicates its disapproval.

Id. at 20.
90 Reorganization Act of 1949, ch. 226, § 6(a), 63 Stat. 203, 205. See generally Ginnane, supra note 85, at 581-82; Watson, supra note 86, at 1014 n.143.
91 Although the Commission stopped short of the Brownlow Committee’s challenge to the independent agencies’ constitutionality, it still leveled several criticisms at their structure. First, it complained that the independent agencies’ exercise of executive authority was cumbersome and badly coordinated with the rest of the executive branch. Therefore, the Commission recommended that “all administrative responsibility be vested in the chairman of the commission,” THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REGULATORY COMMISSIONS: A REPORT TO THE CONGRESS 5 (1949), and that a number of executive functions be transferred to Cabinet Departments, id. at 12-13. Finally, the Commission’s task force recommended that the President be given the authority to designate and remove at will which of the particular commissioners would serve as
making sweeping changes to bring the United States Maritime Commission under more
direct control of the executive branch.92 The following year, Truman submitted a similar
series of plans proposing that the executive and administrative functions of all of the
independent agencies be centralized in the Chairman and that the Chairman be made
appointable and removable at will by the President.93 Congress’s response demonstrated
the legislative veto’s effectiveness in interfering with the proper functioning of the
executive branch: Even though Congress had dropped the specific exemptions for the
independent agencies from the Reorganization Act of 1949, it was still able to frustrate
Truman’s efforts to assert greater control over the ICC, FCC, and NLRB by exercising its
legislative veto over the plans to reorganize those agencies.94

Perhaps in response to the mischief caused by these legislative vetoes, Truman
began objecting to the legislative veto as an improper interference with the independence
of the executive branch. Truman’s first such protest arose when Congress revived the
provision that had drawn the wrath of both Presidents Wilson and Hoover several

Chairman. Task Force Report on Regulatory Commissions [Appendix N] Prepared for the
Commission on Organization of the Executive Branch of the Government viii, 13-14, 31-33
(1949). For similar views, see Robert E. Cushman, The Independent Regulatory Commissions 683-
84(1941).

abolished the United States Maritime Commission and transferred its functions in part to the Secretary of
Commerce and in part to the newly constituted, semi-independent Federal Maritime Board within the
Commerce Department. Reorg. Plan No. 21 of 1950, 3 C.F.R. 1012 (1948-1953 compilation); see also

Reorg. Plan No. 8 of 1950, 3 C.F.R. 1005 (1948-1953 compilation) (FTC); Reorg. Plan No. 9 of 1950, 3
compilation) (SEC); Reorg. Plan No. 11 of 1950, H.R. Doc. No. 515, 81st Cong., 2d Sess. (1950) (FCC);
of 1950, 3 C.F.R. 1006 (1948-1953 compilation) (Civil Aeronautics Board).

94 ; see also Angel M. Moreno, Presidential Coordination of the Independent Regulatory
Independent Commission 134-37 (1955)).

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decades earlier requiring that government publications be subject to the prior approval of the Joint Committee on Printing. Truman signed this legislation, but objected to it as an “invasion of the rights of the Executive branch by a legislative committee.”

Although Truman acknowledged Congress’s right to establish printing policies and to place limits on the printing activities of the executive branch, “restrictions imposed by the Congress should be left to the executive agencies to administer.” Although Truman did propose substitute legislation to eliminate this problem, Congress took no action on it.

Truman offered even stronger resistance to subsequent congressional efforts to control executive discretion. In 1951, when Congress attempted to enact a provision similar to one that Roosevelt had previously tolerated requiring that all significant military real estate projects be approved in advance by the Armed Services Committees, Truman drew the line. Concerned by Congress’s increasing tendency to attempt to influence the execution and administration of the laws, Truman vetoed the legislation. As Truman reasoned, “Under our system of government it is contemplated that the Congress will enact the laws and will leave their administration and execution to the executive branch.” The House voted 312 to 68 to override the veto. The Senate, however, took no action, and the veto stood. Four months later, however, Congress was

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95 See Yoo et al., supra note 24, at _.
97 Harry S. Truman, Statement by the President on Government Printing and Binding (July 5, 1949), in 1949 PUB. PAPERS 346, 347.
98 Id.
99 Watson, supra note 86, at 1019 (citing JOSEPH P. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 218 (1964)).
100 See Yoo et al., supra note 24, at _.
102 97 CONG. REC. 5445 (1951).
able to frustrate Truman’s efforts to oppose the legislative veto by attaching an almost identical provision to the Military Construction Act of 1951.103 Because of the urgent need for the legislation, the President had no choice but to sign it.104

Truman continued his opposition to legislative vetoes the following year when he pocket vetoed a bill which would have required the Postmaster General to “come into agreement” with the Public Works Committees before consummating lease-purchase contracts for the construction of post offices. Truman objected because the bill “contain[ed] a provision which would infringe upon the functions of the executive branch to such an extent that I feel I cannot give my approval.”105 According to Truman, it was improper to “giv[e] committees veto power over executive functions authorized by the Congress to be carried out by executive agencies.”106 Thus, by the end of his term, Truman’s metamorphosis into a steadfast opponent of the legislative veto was complete.

Truman’s vigor as president was further illustrated by the frequency of his vetoes. McCoy describes the veto as “a significant weapon in Truman’s arsenal” and says “he was among the presidents who used this weapon most often.”107 He “employed the veto twenty-one times in 1945 and thirty-three times in 1946,” and “Congress did not override any of these vetoes.”108 In the tradition of that great Democratic president, Andrew Jackson, Truman liked to portray himself as “the tribune of the people” and as “the

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104 See Fisher, Legislative Veto, supra note 86, at 282-83; Ginnane, supra note 85, at 603-04; Watson, supra note 86, at 1019-20 (citing HARRIS, supra note 99, at 222).
105 Harry S. Truman, Memorandum of Disapproval of Bill Authorizing the Postmaster General to Lease Quarter for Post Office Purposes (July 19, 1952), in 1952-53 PUB. PAPERS 488, 488.
106 Id.; see also Watson, supra note 86, at 1020; Fisher, Interpretation Outside the Courts, supra note 86, at 80; Fisher, Legislative Veto, supra note 86, at 283.
107 Id.
108 McCoy, supra note 42, at 62.
people’s president.”109 Truman cast himself as the people’s champion against the special interest groups that held such sway with Congress. In the 1948 campaign, he saw the contest as being between “Truman—the world class champion of peace, prosperity, democracy, and the people—fighting against special interests at home and authoritarianism abroad.”110 As Truman said explicitly on September 18, 1948 at a campaign stop: “The issue is the people against the special interests.”111

Another major exercise of the executive power occurred when Truman invoked the authority vested in him “by the Constitution and the laws of the United States” and issued a pair executive orders directing all cabinet secretaries to institute programs to ensure nondiscrimination in federal employment112 and in the military.113 That these orders were based on the president’s inherent authority appears to have been no accident, as evidenced by the fact that Truman invoked specific statutory authority when issuing a similar executive order mandating nondiscrimination in government contracting.114 McCoy reports that “by the time Truman left office, the work of this committee would lead to substantial racial integration in the military and to fairer procedures for promotion

109 Id. at 104, 106.
110 Id. at 159.
111 Id. at 161.
113 Exec. Order 9981, 3 C.F.R. 722 (1943-48 compilation). In this second order, Truman also invoked his authority as Commander in Chief. Id.
114 Exec. Order 10308, 3 C.F.R. 837 (1949-53 compilation); see also Note, Executive Order 11,246 and Reverse Discrimination Challenges: Presidential Authority to Require Affirmative Action, 54 N.Y.U. L. Rev. 376, 382-83, 387 (1979) (concluding that Truman’s order was issued under his the “presidential war powers” and “national defense powers” rather than under any statutory authority); United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 466 (5th Cir. 1977) (concluding that Truman issued these orders pursuant to his “war powers”); Contractors Ass’n v. Sec’y of Labor, 442 F.2d 159, 169 (3d Cir. 1971) (concluding that Truman issued these orders pursuant to his “national defense powers,” while referencing several statutory bases). But see Andrée Kahn Blumstein, Note, Doing Good the Wrong Way: The Case for Delimiting Presidential Power Under Executive Order No. 11,246, 33 VAND. L. REV. 921, 924 (1980) (suggesting that Truman based the executive orders on statutory grounds).
and training."\textsuperscript{115} Black Americans saw these executive orders as “unprecedented since the time of Lincoln.”\textsuperscript{116} “By the end of the Truman administration, the air force, the army, and the navy were largely integrated racially and opportunities for equal treatment had been very much enhanced.”\textsuperscript{117} One of the Truman administration’s final actions as it left office was to file in December of 1952 an amicus brief in \textit{Brown v. Board of Education}.\textsuperscript{118}

One of the most famous controversies of the Truman Administration came over the President’s decision to seize the steel mills with led to the U.S. Supreme Court’s famous \textit{Steel Seizure} decision—a decision which limits executive power but in a way that is wholly consistent with the theory of the unitary executive. The steel crisis “had been brewing since late 1951”\textsuperscript{119} when it became clear the United Steelworkers wanted a large wage increase. On April 8, 1952, Truman directed his Commerce Secretary Charles Sawyer “to take over and continue the operation of the steel mills, because a ‘work stoppage would immediately jeopardize and imperil our national defense.’”\textsuperscript{120} Resolutions calling for “Truman’s impeachment were introduced in the House, and attempts were made in the Senate to restrict the use of federal funds for operating the steel mills. Most significant, court suits were initiated to resolve the situation legally.”\textsuperscript{121}

\begin{footnotes}
\item[115] McCoy, \textit{supra} note 42, at 109.
\item[116] \textit{Id.}
\item[117] \textit{Id.} at 170.
\item[118] \textit{Id.} at 307.
\item[119] \textit{Id.} at 290.
\item[120] \textit{Id.} at 291.
\item[121] \textit{Id.} at 292.
\end{footnotes}
The district court issued an order enjoining the seizure on April 29th, and the government took the case directly up to the Supreme Court for its resolution.\textsuperscript{122}

In its brief in the \textit{Steel Seizure} case, the Truman administration vigorously pressed the view that the Vesting Clause of Article II is a generalized grant of power to the President. The administration’s brief explicitly said:

Section 1 of Article II provides that “the executive Power shall be vested in a President of the United States of America.” In our view, this clause constitutes a grant of all the executive powers of which the government is capable. Remembering that we do not have a parliamentary form of Government but rather a tripartite system which contemplates a vigorous executive, it seems plain that Clause 1 of Article II cannot be read as a mere restricted definition which would leave the Chief Executive without ready power to deal with emergencies.\textsuperscript{123}

The brief also pointed to the Take Care Clause as construed in \textit{Cunningham v. Neagle}\textsuperscript{124} and in \textit{In re Debs}\textsuperscript{125} as justifying President Truman’s seizure of the steel mills.\textsuperscript{126} The brief went on to note numerous actions by Presidents where property was taken in wartime beginning with the War of 1812 and continuing “during the administrations of Presidents Lincoln, Wilson, and Franklin Roosevelt.”\textsuperscript{127} And, it also cited \textit{Inland Waterways Corp. v. Young}\textsuperscript{128} and \textit{United States v. Midwest Oil Co.}\textsuperscript{129} for the

\begin{footnotesize}
\textsuperscript{124} 135 U.S. 1 (1890). For our review of the \textit{Neagle} case, see Yoo et al., supra note 24, at _.
\textsuperscript{125} 158 U.S. 564 (1895). For our review of the \textit{Debs} case, see Yoo et al., supra note 24, at _. Brief for Petitioner at 98, \textit{Youngstown} (Nos. 744 and 745).
\textsuperscript{126} \textit{Id.} at 103-05.
\textsuperscript{128} 236 U.S. 459, 472-73 (1915).
\end{footnotesize}
proposition that constitutional power “when the text is doubtful, may be established by usage.”130

The Steel Seizure case involved a far more sweeping claim of executive power than we assert when we say the Vesting and Take Care Clauses give the president power over removals and law execution. Thus, for our purposes the fact the Truman Administration also claimed those clauses enabled it to seize the steel mills means only that Truman is another in a long line of presidents to read the Article II Vesting Clause as a grant of power to the president. The Supreme Court, of course, rebuffed the Truman Administration in the Steel Seizure case and, most damagingly of all, Justice Robert Jackson explicitly said in his famous concurrence that the Article II Vesting Clause is a mere designation of the title of the President and is not an affirmative grant of the executive power.131 Other justices did not follow Jackson on this point, with Justice Felix Frankfurter in his concurrence accepting the notion that long-established custom or usage could be a “gloss on the executive power” filling in its meaning.132 Obviously, this series of articles is premised on the notion that presidential construction of the Vesting and Take Care Clauses as authorizing a presidential power over removal and law execution is supported by a tradition of executive branch construction over the last 215 years.

We agree with the Court’s ruling in Youngstown that the president’s executive power did not authorize a seizure of the steel plants on the facts presented in that case. We think this does not change the fact, however, that the Vesting Clause of Article II is a sweeping grant of power to the president as the Truman administration argued it was.

130 Brief for Petitioner at 121, Youngstown (Nos. 744 and 745).
131 343 U.S. at 640-41 (Jackson, J., concurring in the judgment).
132 Id. at 610-11 (Frankfurter, J., concurring).
Nonetheless, as McCoy observes, “Seldom had the Supreme Court so soundly rebuffed a president.”\textsuperscript{133} Truman “had gambled badly, and he had lost badly.”\textsuperscript{134} Truman “did not, however, defy the Supreme Court, for the government immediately relinquished control of the steel mills.”\textsuperscript{135}

Truman’s foreign policy was led Secretary of State George C. Marshall who had been army chief of staff during World War II.\textsuperscript{136} Truman and Marshall announced a program known as the Truman Doctrine under which the United States committed itself to intervene with aid to assist peoples such as those in Greece and Turkey who were resisting communist subversion. We saw in our earlier articles that major statements of foreign policy such as Washington’s Neutrality Proclamation or the Monroe Doctrine were treated as exercises of “the executive Power.” The Truman Doctrine was another such exercise of power, and it was widely recognized” as representing “a major reorientation of United States foreign policy.”\textsuperscript{137} As 1936 Republican presidential nominee Alf Landon said, “We are in European power politics up to our necks, and in it to stay.”\textsuperscript{138} The Truman Doctrine was followed up by the Marshall Plan to aid the war ravaged countries of Western Europe so that they would not fall to communism.\textsuperscript{139} The plan was fully backed by Truman but its identification with the “soldier-secretary of state” made it easier to sell in a bipartisan manner on Capital Hill.\textsuperscript{140} The Truman Doctrine and Marshall Plan marked “the end of the Pax Britannica, and the establishment

\textsuperscript{133} M CCOY, supra note 42, at 293.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id. at 115.
\textsuperscript{137} Id. at 123.
\textsuperscript{138} Id. at 125.
\textsuperscript{139} Id. at 127.
instead of the *Pax Americana* over what was coming to be known as the ‘Free World.’”\(^{141}\)

Thus, by the end of his tenure in the White House, Truman had adopted a position largely consistent with the unitary executive, strongly defending the President’s removal power, using his reorganization powers to assert his control over the independent agencies, and objecting to the legislative veto as an unconstitutional infringement on the President’s power to execute the laws. Truman stopped short of condemning the independent agencies as unconstitutional and did permit the enactment of a few additional legislative vetoes without registering any objection.\(^{142}\) Yet Truman’s level of opposition to congressional infringements on the unitary executive on constitutional grounds was probably sufficient to preclude the inference that Truman acquiesced in them for the purposes of coordinate construction.

**II. Dwight D. Eisenhower**

In sharp contrast to his immediate predecessors, Dwight D. Eisenhower did not aspire to be an activist President. As a career soldier, he considered it his duty to remain above politics, and he consistently strove to remain behind the scenes when guiding national policy. As his biographers, Chester J. Pach, Jr., and Elmo Richardson, observe, “At a time of widespread discontent with the ‘imperial presidency,’ restraint in the exercise of presidential power looked far more attractive than it had a decade earlier.”\(^{143}\)

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\(^{141}\) *Id.* at 129.


The general consensus of historians, however, is that Eisenhower “only appeared to be a passive chief executive. He actually used his power vigorously and deftly, but often behind the scenes, to achieve his goals.” One of the reasons why people believed Eisenhower was not in control of his administration was because he would sometimes deliberately duck questions at press conferences by pretending to garble his syntax. Pach and Richardson note, “Critics seized upon such responses as evidence that the president did not know what was going on in his own administration. Usually, he did, but his spontaneous oral statements seemed to suggest otherwise.” Eisenhower’s penchant for behind the scenes management of his administration has led political scientist Fred I. Greenstein to label “this method of governing ‘hidden-hand leadership.’” Eisenhower made the critical policy decisions, but he carefully muffled his responsibility. Pach and Richardson note that a cost of hidden-hand leadership is that “it created the appearance that Eisenhower was not in charge of his own administration” even when he was in fact highly skilled politically.

Another reason Eisenhower was not perceived as being actively in charge of his administration was his penchant for delegation. Eisenhower’s leadership style was very much the product of his prior career as a general. Pach and Richardson report:

As supreme Allied commander and army chief of staff, Eisenhower became highly experienced in managing large organizations, reconciling divergent factions, choosing subordinates who could act responsibly, and making decisions on the most vital issues. From his military career, Eisenhower derived a set of beliefs—the importance of teamwork, the
need for clear lines of authority, an abhorrence of partisanship—that shaped his presidency.\footnote{148}

Eisenhower ran his Administration in much the same manner.

Rather than grapple with matters that puzzled or bored him, he acted as any general would—he delegated the task to a subordinate. John Foster Dulles thus handled foreign affairs; George M. Humphrey shaped economic policy; Sherman Adams took responsibility for a host of domestic matters. . . . The president presided over his administration, but he did not run it.\footnote{149}

Eisenhower also relied heavily upon his Attorney General designate, Herbert Brownell, Jr., and on his longtime friend and associate, Gen. Lucius D. Clay, in picking the other members of his cabinet.\footnote{150} He was also the first president to “accord[] cabinet status to the director of the Bureau of the Budget, Joseph M. Dodge”\footnote{151}—an office created under the Harding administration and moved to the White House by FDR.\footnote{152}

Eisenhower’s willingness to delegate responsibility should not be confused with a lack of willingness to assert control over the conduct of his administration:

Contemporaries often misunderstood Eisenhower’s style of leadership; they mistook, for example, his delegation of authority for his abdication of it. Despite these misapprehensions, Eisenhower was in control of his presidency from its inception. Indeed during the months between his election and inauguration, he carefully organized an administration that reflected his style of leadership and his assessment of the needs of the nation.\footnote{153}

Eisenhower took several steps to enhance and assert his authority to direct and review the actions of his subordinates. When Congress included a provision in the Defense Reorganization Act of 1958 requiring the Secretary of Defense to submit his

\footnote{148} \textit{Id.} at 29. \footnote{149} \textit{Id.} at xi. \footnote{150} \textit{Id.} at 34. \footnote{151} \textit{id.} at 37. \footnote{152} See Yoo et al., \textit{supra} note 24, at _ (detailing the creation of the Bureau of the Budget under Harding and FDR). \footnote{153} \textit{Id.} at 29.
reorganization plans directly to Congress without presidential oversight,\(^{154}\) Eisenhower ignored the absence of such a provision and flatly instructed the Secretary to submit any such plans to him before transmitting them to Congress.\(^ {155}\) Eisenhower also unsuccessfully backed the Second Hoover Commission’s recommendation that all federal legal services be consolidated in the Department of Justice.\(^ {156}\) Even without such centralization, Eisenhower did not hesitate to intervene in the legal affairs of the federal government, at one point even personally drafting part of the brief in Brown v. Board of Education.\(^ {157}\)

Indeed, Brown set the stage for one of the most courageous examples of presidential determination to enforce the law in our nation’s history. After the Court handed down its landmark opinion in Brown, Eisenhower made it clear that his duty as president and citizen was compliance with the Supreme Court’s order: “The Supreme Court has spoken and I am sworn to uphold the constitutional processes in this country; and I will obey.”\(^ {158}\) Pach and Richardson note, “Indeed only a day after the decision,


\(^{155}\) Watson, supra note 86, at 1014 n.143 (citing HARRIS, supra note 99, at 210).

\(^{156}\) The Second Hoover Commission believed that such consolidation of legal services was required to promote efficiency and policy coordination. UNITED STATES COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURES 6 (1955). Other aspects of the Commission’s report, such as their recommendation that lawyers be covered by a separate civil service system in order to insulate them from politicians and career civil servants, were less favorable to the unitary executive. Id. at 7-9. Even with such protections, Congress rejected the proposal because of its concerns that the centralization of legal services would limit their ability to oversee agencies. Neal Devins, Unitariness and Independence: Solicitor General Control over Independent Agency Litigation, 82 CAL. L. REV. 255, 265 (1994); James R. Harvey III, Note, Loyalty in Government Litigation: Department of Justice Representation of Agency Clients, 37 WM. & MARY. L. REV. 1569, 1582 (1996) (citing JAMES M. STRINE, THE OFFICE OF LEGAL COUNSEL: LEGAL PROFESSIONALS IN A POLITICAL SYSTEM 71 (1992).


Eisenhower asked the Board of Commissioners of the District of Columbia to set an example of peaceful desegregation.\textsuperscript{159}

In September of 1957, Little Rock, Arkansas, erupted in violent opposition to court-ordered school integration. Eisenhower denounced the “mob of extremists” and pledged to use “whatever force may be necessary . . . to carry out the orders of the Federal Court.”\textsuperscript{160} Hours later, Eisenhower ordered “Gen. Maxwell D. Taylor, the army chief of staff, to dispatch 1,000 paratroopers from the 101st Airborne Division to Little Rock” and federalized the Arkansas National Guard.\textsuperscript{161} Eisenhower felt a critical sense of duty “to protect the Constitution and uphold federal law. Despite his own reservations about the Brown decision, he could not turn his back on a mob that tried to substitute its will for that of a federal judge. ‘If the day comes when we can obey orders of our Courts only when we personally approve of them,’ he reminded Swede Hazlett, ‘the end of the American system, as we know it, will not be far off.’”\textsuperscript{162}

It was for this reason, that Dwight D. Eisenhower became the first president since Ulysses S. Grant to send troops to the South to the civil rights of African Americans.\textsuperscript{163} The sending of U.S. troops to Little Rock “served notice that riotous obstruction of federal court orders might provoke the armed intervention of the national government, a possibility that had been unthinkable for eighty years.”\textsuperscript{164} Eisenhower further opposed racial discrimination by renewing and extending the executive orders first initiated during

\begin{flushright}
\textsuperscript{159} Id.
\textsuperscript{160} Id. at 153.
\textsuperscript{161} Id.
\textsuperscript{162} Id. at 154.
\textsuperscript{163} Id.
\textsuperscript{164} Id. at 157.
\end{flushright}
the FDR and Truman Administrations\textsuperscript{165} prohibiting discrimination in federal contracting and employment. Unlike his predecessors, Eisenhower explicitly based his orders on statutory rather than constitutional grounds.\textsuperscript{166}

The Eisenhower Administration also preserved the unitariness of the executive branch through his policies with respect to the civil service system. As of the 1950s, the civil service laws did not impose any substantive limits on the president’s removal power.\textsuperscript{167} The governing statute provided that officials could be removed from the civil service “only for such cause as will promote the efficiency of said service.”\textsuperscript{168} Although on its face this language would appear to give federal officials covered by the civil service laws substantive protections against dismissal, both the executive branch and the courts had repeatedly construed this language as not placing any limits on the executive branch’s unlimited discretion in determining what constitutes adequate cause for removal.\textsuperscript{169} Congress had enacted the Veterans’ Preference Act of 1944 giving veterans certain procedural protections, providing them with written notice of removals, the right to submit a reply, and the right to appeal adverse disciplinary actions to the Civil Service Commission.\textsuperscript{170} The 1944 legislation did not alter the substantive standards governing removal, and courts continued to construe it as not placing any restrictions on the

\textsuperscript{165} See supra notes 112-114 and accompanying text; Yoo et al., supra note 24, at ___.


\textsuperscript{169} See Yoo et al., supra note 24, at ___.

\textsuperscript{170} Veterans’ Preference Act of 1944, ch. 359, § 14, 58 Stat. 387, 390.
exercise of the president’s removal authority.\textsuperscript{171} For example, in \textit{Bailey v. Richardson},\textsuperscript{172} the D.C. Circuit reviewed what it regarded as an unbroken 160-year history of judicial noninterference in removals and concluded, “No function is more completely internal to a branch of government than the selection and retention or dismissal of its employees.”\textsuperscript{173} The Civil Service Commission was thus limited to conducting informal investigations to ensure compliance with procedural requirements,\textsuperscript{174} even decisions with respect to procedural compliance were not made binding on agencies until 1948.\textsuperscript{175}

The Supreme Court would acknowledge one narrow restriction on the president’s removal power by protecting federal employees against dismissal for exercising constitutionally protected activity.\textsuperscript{176} Such a limitation was conceded quite narrow\textsuperscript{177} and was also consistent with the provisions of the Civil Service Act of 1883 preventing supervisors from requiring federal employees to pay political assessments or engage in political activity in order to keep their jobs.\textsuperscript{178} Most importantly, the Court would subsequently make clear that the doctrine prohibiting removals for the exercise of


\textsuperscript{172} 182 F.2d 46 (D.C. Cir. 1950).

\textsuperscript{173} \textit{Id.} at 58.


\textsuperscript{177} \textit{See Yoo et al., supra note 24, at.}
constitutionally protected activity did not apply to removals related to job performance.\textsuperscript{179} This would be demonstrated most eloquently by the Court’s decision in \textit{Cafeteria and Restaurant Workers Local 473 v. McElroy},\textsuperscript{180} in which the Court “summarily denied” the existence of limits on the removal power in cases involving “the Federal Government’s dispatch of its own affairs.”\textsuperscript{181} The Court indicated that the executive branch had the unfettered discretion to deny a security clearance to an employee of a government contractor whose garrulousness posed a security risk.\textsuperscript{182}

At times, the Civil Service Commission did seek a greater role in reviewing the substance of agency removal decisions.\textsuperscript{183} This recommendation was effectively quashed by the harsh criticism of it leveled by the Second Hoover Commission. As the Commission noted:

\begin{quote}
A judicial proceeding . . . leads to the worst kind of supervisor-employee relations because it requires the building of a written record and the accumulation of formal evidence sufficient to stand up as a support for the supervisor’s action. It relieves the employee of any necessity for demonstrating his competence and usefulness to his department, and in effect, guarantees him a job unless his supervisor can prove in a formal proceeding that he is incompetent. This leads to working situations which are intolerable. If the supervisor acts on his best judgment, he normally disciplines or separates an employee as soon as the misconduct occurs or the incompetence is evident. Bu, if he does o, he may be unable to substantiate his action judicially because he has not waited to accumulate documentary evidence.\textsuperscript{184}
\end{quote}

The Eisenhower Administration also strongly asserted the unitariness of the executive branch by exerting control over the independent agencies. Drawing again upon

\begin{itemize}
\item Pickering, 391 U.S. at 573 n.5; Slochower, 350 U.S. at 559.
\item 367 U.S. 886 (1961).
\item \textit{Id.} at 896.
\item \textit{Id.} at 899.
\item See 48 U.S. CIV. SERV. COMM’N ANN. REP. 41 (1934); Guttman, \textit{supra} note 174, at 332.
\end{itemize}
the recommendations of the Second Hoover Commission\textsuperscript{185} and a report by Professor Emmette Redford requested by the president towards the end of his administration, which emphasized the need for greater presidential control over the independent agencies in order to insure proper leadership and guidance in policy development,\textsuperscript{186} Eisenhower employed a wide variety of means to influence the independent agencies, by conducting policy studies on specific areas of agency jurisdiction; jawboning individual commissioners; issuing policy statements and suggestions; and notifying the commissions about his budgetary and legislative priorities.\textsuperscript{187} Eisenhower even tried to turn the commission chairmen into executive officers by giving them second hats as special assistants to the President. However, this “practice was soon eliminated because of the jealousy of other agency members and opposition in Congress.”\textsuperscript{188} Although the Eisenhower Administration did not completely ignore the agencies supposed independence,\textsuperscript{189} there can be little question that it asserted sufficient control over them to

\textsuperscript{185} The Second Hoover Commission called for greater coordination of government operations and recommended the transfer of all of the adjudicative functions of the independent regulatory commissions to a newly created Administrative Court. \textit{\textsuperscript{185}} see also Moreno, supra note 94, at 487 (citing HERBERT EMMERICH, FEDERAL ORGANIZATION AND ADMINISTRATIVE MANAGEMENT 101-28 (1971)).

\textsuperscript{186} EMMETTE S. REDFORD, THE PRESIDENT AND THE REGULATORY COMMISSIONS (Nov. 17, 1960) (unpublished report). Redford later published a modified version of this study, in which he concluded, “The President should have responsibility for leadership and guidance of the commissions in the development of policies to implement the objectives embodied in law.” Emlette S. Redford, \textit{The President and the Regulatory Commissions}, 44 TEX. L. REV. 288, 307-08 (1965). Only when authority of over the commissions was returned to the President could the President fulfill the “constitutional and statutory responsibilities which separately and cumulatively require his attention to many policy aspects of regulation” as well as “the expectancy of people that the President will supply unity and leadership in the execution of the laws.” \textit{Id.} at _. Therefore, Redford recommended that the President be given the authority to issue policy guidance to the commissions, to designate and remove the chairmen of all of the commissions at pleasure, and to have greater latitude to dismiss commissioners. \textit{Id.} at _.

\textsuperscript{187} See Redford, supra note 186, at 303-04


\textsuperscript{189} One of Eisenhower’s Solicitors General observed that he knew of no case in which the Administration “had” precluded an independent agency from presenting its position,” even when that position conflicted with that of the Administration. Devins, supra note 156, at 289 (quoting Robert L. Stern, \textit{The Solicitor General’s Office and Administrative Agency Litigation}, 46 A.B.A. J. 154, 157 (1960)).
foreclose any suggestion that Eisenhower acceded to this form of interference with the unitariness of the executive branch.

The issue of presidential control over the independent agencies came to a head when Eisenhower removed Myron Wiener and Georgia Lusk after they refused to resign from the War Claims Commission, a body created to provide compensation to persons injured by the enemy during World War II. Eisenhower based his actions solely on the importance of presidential superintendence over the execution of federal law, noting that he “regard[ed] it as in the national interest to complete the administration of the War Claims Act of 1948, as amended, with personnel of my own selection.”

Wiener brought suit in the Court of Claims challenging his removal, and the case eventually reached the Supreme Court. In its brief, the Eisenhower Administration defended its actions primarily on unitariness grounds. The brief began its summary of argument section by stating:

A constitutional usage which goes back to the very first year in which the Constitution became effective establishes that the President has the unlimited power to remove all the “officers of the United States” appointed by him, subject only to constitutional or statutory restrictions with respect to non-executive officers.

The President’s removal power rests essentially on three considerations: first, the canon of construction well known to the Founding Fathers that the power to appoint carries with it the power to remove; second, the President’s constitutional duty to take care that the laws be faithfully executed—a duty which cannot be performed if the President is unable to control the officers who carry out the laws; and

191 Wiener brought an action in the Court of Claims to recover the salary he would have been paid had he not been removed. The Court of Claims dismissed this action on the grounds that Congress had not intended to impose any restrictions on the removal of War Claims Commissioners. Wiener v. United States, 142 F. Supp. 910 (Ct. Cl. 1956), rev’d, 357 U.S. 349 (1958) (citing Shurtleff v. United States, 189 U.S. 311, 315-16 (1903)).
192 Brief for the United States at 21-68, Wiener v. United States (No. 52).
third, the postulate of executive unity—i.e., that the President is the head of the entire executive branch. 193

The brief went on to argue two clearly correct propositions, both of which were destined to be rejected by the Supreme Court. First, the brief argued that Wiener was a core executive employee and that he was thus outside the ambit of Humphrey’s Executor v. United States, 194 which sanctioned congressionally imposed limitations on the president’s removal power of quasi-legislative and quasi-judicial officers. Second, the brief argued that even if Wiener were seen as being a quasi-judicial employee, the case was still outside the ambit of Humphrey’s Executor because Congress had been utterly silent about removal in the statute setting up the War Claims Commission. In Shurtleff v. United States, 195 the Supreme Court had previously imposed a clear statement rule, holding that it would not construe any statute as limiting the president’s removal power unless Congress employed “very clear and explicit language” indicating that such was its intent. 196 Statutory language merely stating that an officer may be removed for “inefficiency, neglect, or malfeasance in office” was not sufficient. 197 As the Court of Claims had noted, 198 the statute at issue in Wiener was completely silent as to removal, providing only that the Commission wind up its affairs no later than three years after the last claim was filed. 199 Under Shurtleff, the government argued, the relevant statute

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193 Id. at 15-16.
195 189 U.S. 311 (1903). For our review of the Shurtleff case, see Yoo et al., supra note 24, at _.
196 189 U.S. at 315.
197 Id. at 315-18.
198 Wiener, 142 F. Supp. at 914.
should not be construed as limiting the president’s unfettered authority to remove Wiener.

In a remarkably brief and thinly reasoned opinion by Justice Frankfurter, the Supreme Court unanimously concluded that Eisenhower lacked the power to remove Wiener even though, as the Court twice noted, the statute did not purport to place any limits on the removal power. Instead, the Court inferred Congress’s desire to impose such limits from the fact that War Claims Commissioners were quasi-judicial officers. In so holding, the Court took the remarkable step of implicitly reversing the presumption acknowledged in *Shurtleff* against construing statutes as limiting the removal power, at least when quasi-judicial officers were involved. To do so without any significant analysis of the considerations that led the *Shurtleff* Court to erect the presumption in the first place was quite unfortunate.

From the standpoint of politics, *Wiener* can be regarded as the converse of *Humphrey’s Executor*. While *Humphrey’s Executor* represented an attempt by a largely conservative Supreme Court to snub a president who was considerably more progressive, *Wiener* represented a decision by a mostly New Deal Supreme Court that rebuked a president seeking to take the administration of federal law in a different direction. For purposes of this article, it matters little that the Eisenhower Administration’s arguments in *Wiener* ultimately proved unsuccessful. What matters

200 *Wiener*, 357 U.S. at 350, 352.
201 *Id.* at 353-54.
202 Yoo et al., *supra* note 24, at _.
is that the Eisenhower Administration’s defense of the removal power effectively
undercuts any inference of acquiescence by Eisenhower to a non-unitary executive under
the principles of coordinate construction regardless of whether the other branches
eventually accepted Eisenhower’s position.

Just as Eisenhower was content to assume more of a background, supervisory role
in the conduct of executive affairs, Eisenhower was similarly measured in his direct
dealings with Congress, insisting that FDR and Truman “had upset the constitutional
equilibrium between the White House and Capitol Hill and promis[ing] to exercise
restraint in order to restore the balance.”204 His desire to rebalance the relationship
between the presidency and Congress should not be taken as reluctance to defend against
attempts to infringe upon the unitariness of the executive branch. As we shall see,
Eisenhower resolutely defended presidential prerogatives

Most notably Eisenhower exceeded the efforts of the Truman Administration in
opposing the legislative veto as an improper infringement on the president’s prerogative
to execute the law.205 Eisenhower’s first such objection appeared in his May 25, 1954,
veto of a bill that would have required the Secretary of the Army to “come into
agreement” with both the House and Senate Armed Services Committees before
transferring the Camp Blanding Military Reservation to the State of Florida. Eisenhower
vetoed the bill because “plac[ing] the power to make such agreement jointly in the
Secretary of the Army and the members of the Committees on Armed Services,” the bill
“violate[d] the fundamental constitutional principle of separation of powers prescribed in

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204 Id. at 50.
205 Watson, supra note 86, at 1021.

articles I and II of the Constitution which place the legislative power in the Congress and the executive power in the executive branch.” Eisenhower supported this conclusion with a forceful exposition against placing executive functions outside of the executive branch:

The making of such a contract or agreement on behalf of the United States is a purely executive or administrative function, like the negotiation and execution of government contracts generally. Thus, while congress may enact legislation governing the making of Government contracts, it may not delegate to its members or committees the power to make such contracts, either directly or by giving them a power to approve or disapprove a contract which an executive officer proposes to make.

Echoing Hamilton’s pronouncements in The Federalist No. 70, Eisenhower concluded that “such a procedure destroys the clear lines of responsibility for results which the Constitution provides.”

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207 Id.
208 Id.; see also Fisher, Legislative Veto, supra note 86, at 283; Watson, supra note 86, at 1021. Other members of the Eisenhower Administration had already voiced their opposition to the legislative veto during the debates on a proposal similar to the one pocket vetoed by Truman, see supra notes 105-106 and accompanying text, that would have required the Administrator of General Services or the Postmaster General to come into agreement with the Committees on Public Works before acquiring property for the construction of post offices. H.R. 6342, 83d Cong., 2d Sess. (1954). The Justice Department issued a memorandum objecting that such a provision would violate Article II of the Constitution, which “vests the Executive power in the President and directs that he shall take care that the laws be faithfully executed.” Memorandum from J. Lee Rankin to Senator Knowland (Apr. 8, 1954), reprinted in 100 CONG. REC. 4879 (1954). Although Congress could overturn a particular executive action through formal legislation, “Congress may not through its committees administer or share in the administration of a statute.” Id. Allowing Congress to interfere in this matter would represent “a departure from our constitutional practice which, if systemically pursued, could result in a radical change in the distribution of the powers of the Federal Government.” Id. After the Senate declined to delete this provision by a vote of 60 to 8, 100 CONG. REC. 10017 (1954), the Justice Department transmitted an even more detailed memorandum to the Chairman of the House Committee on Public Works. In response to these objections and Eisenhower’s veto of the Camp Blanding legislation, the Conference Committee struck the committee veto provision and replaced with a requirement directed at Congress prohibiting the appropriation of any funds without prior approval had been given by the Public Works Committee. Act of July 22, 1954, ch. 560, § 411, 68 Stat. 518, 519; see also Watershed Protection and Flood Prevention Act of 1954, ch. 676, § 2, 68 Stat. 666, 666 (applying similar provision to “works of improvement”). Since this restriction was directed at Congress and not the executive, Attorney General Brownell advised Eisenhower to sign the bill. See generally 41 Op. Att’y Gen. 300, 305 (1957); Fisher, Legislative Veto, supra note 86, at 284; Watson, supra note 86, at 1023 (HARRIS, supra note 99, at 231).
Eisenhower continued his opposition to the legislative veto the following year in a signing statement accompanying the Defense Appropriations Act of 1956.\textsuperscript{209} In an attempt to thwart Eisenhower’s attempt to privatize many of the Department of Defense’s functions, Congressmen whose districts contained military facilities likely to be adversely affected attached a rider requiring that the Administration justify to the House and Senate Appropriations Committees that the “discontinuance is economically sound and the work is capable of performance by a contractor without danger to the national security” before transferring of work to a contractor and by subjecting all such transfers to a committee veto.\textsuperscript{210} Eisenhower signed the bill even though he believed that the justification and committee veto provisions were unconstitutional. In language reminiscent of his objections to the Camp Blanding bill, Eisenhower acknowledged that “Congress has the power and the right to grant or to deny an appropriation.”\textsuperscript{211} However, “once an appropriation is made the appropriation must, under the Constitution be administered by the executive branch of the Government alone, and the Congress has no right to confer upon its committees the power to veto Executive action or to prevent Executive action from becoming effective.”\textsuperscript{212} In so observing, Eisenhower embraced a strongly formalist vision of the separation of powers: “The Constitution of the United States divides the

\begin{itemize}
\item \textsuperscript{209} Defense Appropriations Act of 1956, ch. 157, 69 Stat. 301.
\item \textsuperscript{210} \$ 638, 69 Stat. at 321.
\item \textsuperscript{211} Dwight D. Eisenhower, Special Message to the Congress upon Signing the Department of Defense Appropriation Act (July 13, 1955), in 1955 PUB. PAPERS 688, 689 [hereinafter Eisenhower, Defense Authorization Signing Statement]. In issuing this signing statement, Eisenhower relied upon an opinion offered by Attorney General Herbert Brownell, Jr., concluding that the legislative veto provision violated Article II of the Constitution by “usurp[ing] power confided to the executive branch” and by intruding into the authority “to engage in the administration and execution of the law” which “by constitutional warrant, has been the responsibility and right of the executive branch since the founding of our constitutional form of government.” 41 Op. At’y Gen. 230, 231 (1955). Brownell also anticipated the Supreme Court’s decision in \textit{Chadha} by noting that the provision raised problems under Article I as well. \textit{Id.} See generally Fisher, Legislative Veto, supra note 86, at 283-84.
\item \textsuperscript{212} Eisenhower, Defense Authorization Signing Statement, supra note 211, at 689.
\end{itemize}
functions of the Government into three departments—the legislative, the executive, and the judicial—and establishes the principle that they shall be kept separate. Neither may exercise functions belonging to the others.”

Accordingly, Eisenhower felt “bound to insist that Executive functions be maintained unimpaired by legislative encroachment” and refused “[t]o acquiesce in a provision that seeks to encroach upon the proper authority of the Executive.” Therefore, Eisenhower insisted that “to the extent that this section seeks to give to the Appropriations Committees of the Senate and House of Representatives authority to veto or prevent Executive action, such section will be regarded as invalid by the executive branch of the Government . . . unless otherwise determined by a court of competent jurisdiction.”

Eisenhower’s announced refusal to enforce the provision touched off a confrontation between the President and the Comptroller General. Recognizing his role as “the agent of the Congress,” the Comptroller General informed Congress that he would enforce the law and disallow any covered expenditure which did not gain committee approval. Facing personal liability for issuing checks without the Comptroller General’s approval, the Defense Department personnel ignored the President’s wishes and complied with the committee veto provision. Further conflict was averted when the provision was dropped the following year.

213 Id. at 688-89.
214 Id. at 689.
215 Id.
217 The withdrawal of this provision did not signal any acquiescence to the President’s position by Congress. Congress intended to shift the committee veto from the Appropriations Committees to the Armed Services Committees. However, the bill transferring the committee veto died in the Senate. See generally Watson, supra note 86, at 1022-23 (citing Harris, supra note 99, at 229-30).
Three days after signing the Defense Appropriations Act, Eisenhower vetoed yet another bill because it contained two legislative veto provisions.\textsuperscript{218} As before, Eisenhower indicated that such committee vetoes “would destroy the clear lines of responsibility which the Constitution provides.”\textsuperscript{219} In response to the veto, Congress changed the veto into a “report and wait” provision, which afforded executive action the force of law, but delayed its effective date for a fixed amount of time so that Congress could decide whether to enact formal legislation revoking the action.\textsuperscript{220} Because “report and wait” provisions do not purport to give Congress the authority to effect a change in the law without having to comply with the constitutionally required process for enacting legislation, this amendment eliminated Eisenhower’s constitutional concerns. Congress later returned to the legislative veto by enacting a provision requiring that all contracts authorized by the Small Reclamation Projects Act of 1956 be approved by a

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\textsuperscript{218} Dwight D. Eisenhower, Veto of Bill Authorizing Certain Construction at Military Installations (July 16, 1956), in 1956 PUB. PAPERS 596 (vetoing H.R. 9893, 84th Cong., 2d Sess. 1956)). Section 301 of the bill made the authorizations for the Talos missile program contingent upon an agreement between the Secretary of Defense and the Armed Services Committees of each House. Section 419 imposed a similar requirement on contracts for the construction and acquisition of housing for military families. \textit{Id.} at 596-97.

\textsuperscript{219} \textit{Id.} at 597. Eisenhower further noted:

\begin{quote}
While the Congress may enact legislation governing the making of Government contracts, it may not constitutionally delegate to its Members or committees the power to make such contracts, either directly or by giving them the authority to approve or disapprove a contract which an executive officer proposes to make.

Two years ago I returned, without my approval, a bill . . . containing similar provisions. At that time I stated that such provisions violate the fundamental constitutional principle of separation of powers prescribed in articles I and II of the Constitution which place the legislative power in the Congress and the executive power in the executive branch.

Once again, I must object to such a serious departure from the separation of powers as provided by the Constitution. Any such departure from constitutional procedures must be avoided.
\end{quote}

\textit{Id.} Again anticipating \textit{Chadha}, Eisenhower also challenged it as a violation of the bicameralism and presentment requirements of Article I, section 7, of the Constitution. \textit{Id.}

\textsuperscript{220} Act of Aug. 3, 1956, ch. 939, § 419, 70 Stat. 991, 1018-19; see also Watson, \textit{supra} note 86, at 1021 n.190.
congressional committee. \(^{221}\) Eisenhower again registered his constitutional objections.

To the extent that committee vetoes could be regarded as an executive act, it constituted an “an unconstitutional infringement of the separation of powers prescribed in Articles I and II of the Constitution.” \(^{222}\) As Eisenhower further explained:

> I do not believe that the Congress can validly delegate to one of its committees the power to prevent executive actions taken pursuant to law. To do so in this case would be to divide the responsibility for administering the program between the Secretary of the Interior. Such a procedure would be a clear violation of the separation of powers within the Government and would destroy the lines of responsibility which the Constitution provides. \(^{223}\)

The Committee veto also violated Article II by itself. As Eisenhower noted:

> [T]he negotiation and execution of a contract is a purely executive function. Although the Congress may prescribe the standards and conditions under which executive officials may enter into contracts, it may not lodge in its committees or members the power to make such contracts, either by giving them the power to approve or disapprove a contract which an executive officer proposes to make. \(^{224}\)

Eisenhower nonetheless “approved this bill only because the Congress is not in session to receive and act upon a veto message and because I have been assured that the committees which handled the bill in the Congress will take action to correct its deficiencies early in the next session.” \(^{225}\) In the meantime, the President directed the Secretary of the Interior to initiate the programs covered by the Act in the expectation that Congress would

\(^{221}\) Small Reclamation Projects Act of 1956, ch. 7, § 4(c), 70 Stat. 1044, 1045.


\(^{223}\) Id. at 649-50. Alternatively, to the extent to which the committee veto exercised a legislative function, “the section is open to the objection that it involves an unlawful delegation by the Congress to its committees of a legislative function which the constitution contemplates the Congress itself, as an entity, should exercise.” Id. at 649. See generally John R. Bolton, The Legislative Veto: Unseparating the Powers 11-12 (1977).

\(^{224}\) Id. at 649. See generally John R. Bolton, The Legislative Veto: Unseparating the Powers 11-12 (1977).

\(^{225}\) Id. at 649.
remove or revise the objectionable section.\textsuperscript{226} As Eisenhower predicted, Congress replaced the committee veto with a “no appropriation” provision the next session.\textsuperscript{227}

Although Eisenhower did accede without objection to a few legislative vetoes,\textsuperscript{228} Eisenhower subsequently objected to a provision providing a two-house legislative veto over TVA power projects,\textsuperscript{229} successfully called for the repeal of the provision enacted during the Truman Administration giving a legislative veto to a single member of Congress,\textsuperscript{230} and questioned the constitutionality of a provision subjecting the Attorney General’s decisions to parole certain refugees into the United States to a legislative veto\textsuperscript{231} that would eventually give rise to the decision in \textit{INS v. Chadha}\textsuperscript{232}

But Eisenhower’s most sustained opposition to the legislative veto was his attempt to overturn the committee veto in the Military Construction Act of 1951 (to

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{226} \textit{Id.} at 650.
\item \textsuperscript{227} Act of June 5, 1957, Pub. L. No. 85-47, § _, 71 Stat. 48, 49; see also Watson, supra note 86, at 1024.
\item \textsuperscript{230} \textit{See Watson, supra} note 86, at 1020 (citing HARRIS, \textit{supra} note 99, at 1020).
\item Eisenhower noted:
\begin{quote}
The Attorney General has advised me that there is a serious question as to whether this provision is constitutional. Nevertheless, in view of the short period for which this power is given and the improbability that the issue will arise, it is believed that it would be better to defer a determination of the effect of such possible action until it is taken.
\end{quote}
\begin{footnotesize}
\begin{enumerate}
\item Dwight D. Eisenhower, Statement by the President upon Signing Bill Providing for the Admission of Refugees (July 14, 1960), 1960 PAPERS 579, 579. As the \textit{Chadha} decision attests, Eisenhower was wrong in his estimates both of the act’s limited duration and of the likelihood of conflict arising under it. 462 U.S. 919 (1983).
\end{enumerate}
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which Truman had acceded\(^{233}\) subjecting all major military real estate transactions to the approval of the Armed Services Committees.\(^{234}\) Bolstered by the recommendations of the second Hoover Commission\(^{235}\) and the criticism of other Administration officials,\(^{236}\) Eisenhower’s 1961 Budget Message directed the Secretary of Defense to “disregard the section unless a court of competent jurisdiction determines otherwise.”\(^{237}\) Finally Congress relented and converted the committee veto into a constitutionally permissible “report and wait” requirement.\(^{238}\)

Eisenhower took a number of other steps to defend the president’s sole authority to execute the law. Eisenhower quietly opposed an amendment to the U.S. Constitution proposed by Senator John Bricker designed to curb presidential power over foreign affairs by barring the use of executive agreements and prohibiting the negotiation of any treaty that abridged constitutional rights or affected “any other matters essentially within

\(^{233}\) See supra notes 103-104 and accompanying text.


\(^{235}\) “The commission . . . questions the appropriateness of congressional committee participation in the executive function of operation on the ground that it is an invasion of the executive by the legislative branch.” COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REAL PROPERTY MANAGEMENT 35-36 (1955); see also COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON REAL PROPERTY MANAGEMENT 92-94, 99 (1955).

\(^{236}\) 41 Op. Att’y Gen. 300 (1957); Letter from _ to Senator McClellan (Apr. 27, 1956), _.


\(^{238}\) Act of June 8, 1960, Pub. L. No. 86-500, § 2662, 74 Stat. 166, 186-87; H.R. REP. NO. 1307, 86th Cong., 2d Sess. 43-45 (1960). It was no coincidence that the vast majority of the legislative veto provisions that Eisenhower blocked were aimed at the acquisition and disposition of military facilities. See Watson, supra note 86, at 1023-25. As Professor Calabresi has noted, the incentives that members of Congress face leave them little choice but to try to protect the interests of their local constituencies even when those actions would be ill advised as a matter of national policy. See Calabresi, Some Normative Arguments, supra note 9, at 34-35, 58-70. Thus it is unsurprising that Congress has most strenuously attempted to inject itself into the execution of the laws in those situations where the consequences for local constituencies were the greatest. As Professor Joseph Harris noted, “The requirement of advance approval by congressional subcommittees enables members of Congress to resist the closing of military installations in their districts, and it cannot be doubted that the effect is to force the retention that in the interest of economy should be closed.” HARRIS, supra note 99, at 223.
the domestic jurisdiction of the United States."

Eisenhower steadfastly opposed the amendment on the grounds that it would “cripple the Executive power to the point that we [would] become helpless in world affairs.”

On the issue of executive privilege, Eisenhower dealt Senator Joe McCarthy a “stunning blow by invoking executive privilege to prevent congressional interrogation of members of the executive branch.”

Pach and Richardson call this “the boldest assertion of executive privilege in the history of the republic.”

Like Harry Truman and James Monroe before him, Eisenhower also became known for a major foreign policy position—the so-called Eisenhower Doctrine. Under this Doctrine Eisenhower sought foreign aid money and was willing to deploy troops in the general area of the Middle East to deter the forces of “International Communism.”

“This program, which soon became known as the Eisenhower Doctrine, would ‘give courage and confidence to those who are dedicated to freedom and thus prevent a chain of events which would gravely endanger all of the free world.’

The president, over the reservations of democratic senators, pushed a resolution through Congress indicating that the U.S. was willing at the president’s behest to use its armed forces to protect any Middle Eastern nation in repelling Communist aggression.

Thus, by the end of his Administration, Eisenhower had defended the removal power, had asserted his control over the executive branch and the independent agencies,

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239 97 Cong. Rec. 8258, 8265 (1951).
240 Id. at 60.
241 Id. at 70.
242 Id.
243 Pach & Richardson, supra note 158, at 161.
244 Id.; Id.
245 Id.
had resisted congressional attempts to interfere with the execution of the laws through the legislative veto, and had taken other actions to assert the unitariness of the executive branch. Although he did waver at times in his opposition, these minor variations cannot be said to have been sufficient to constitute acquiescence to a non-unitary vision of the executive branch.

III. JOHN F. KENNEDY

John F. Kennedy became the youngest elected president ever in American history. Kennedy viewed his presidency as being “in the Democratic tradition of Woodrow Wilson, Franklin Roosevelt, and Harry Truman.” Like those individuals, “[h]e sought to be a strong, active president.” His splendid inaugural address immediately demonstrated his talent for using the bully pulpit of the presidency. His call for national service—“Ask not what you country can do for you, ask what you can do for your country”—helped to inspire a generation of Americans to commit themselves to anticommunism abroad and the protection of civil rights at home. It also marked a return to vision of the presidency as a leader and shaper of public opinion. James Giglio, Kennedy’s biographer, reports:

John Kennedy was one of the most image-conscious presidents of his century. The imagery sharpened during the presidential years. As president he could better shape favorable symbols, realizing that personal style could counter political frustration, mask ineptness, and create popularity in a media oriented society. Much of the imagery centered on family life.

247 Id.
Like Teddy Roosevelt, whose family and athletic prowess added greatly to his political appeal, Kennedy created an image of athletic youthfulness that contrasted sadly with the almost constant physical pain caused by his back problems throughout his presidency.

From the outset of his administration, Kennedy was determined to exercise full control over the executive branch, illustrated most dramatically illustrated by his decision to appoint his brother, Robert, to be Attorney General. Although the decision drew significant criticism, the President “knew that in Robert Kennedy he had his most trusted associate on board.”\textsuperscript{250} It would be hard for a president to do more to retain control over the law execution function than by appointing his closest sibling and former campaign manager to run his Justice Department.

In structuring his cabinet and White House staff, Kennedy was critical of the extent to which Eisenhower had relied upon cabinet government. He saw this as “a ponderous bureaucratic system, resulting in group or corporate decisions.”\textsuperscript{251} Giglio notes, “Kennedy specifically objected to the extent to which Eisenhower had shared power with the cabinet (which met weekly); the chief of staff, Sherman Adams; and the National Security Council (NSC), created in 1947 to advise the president on foreign and domestic policy.”\textsuperscript{252} Giglio reports, “As president, Kennedy proved less willing to delegate power outside the Oval Office. His staff, far smaller than Eisenhower’s or Johnson’s, consisted for the most part of loyalists from the Senate or his campaign staff,
many of them still in their thirties. They remained completely devoted to Kennedy and knew exactly what he wanted.”

Kennedy was reluctant to meet regularly with the cabinet, “preferr[ing] to communicate in less direct ways.” He received weekly written summaries from cabinet department heads about their most significant activities, and he followed these up with requests for additional information and by communicating with cabinet members through his White House staff. Kennedy met frequently with certain favored cabinet members, particularly his brother, Robert, who was his “lightning rod for untested ideas and [his closest] personal adviser.” The most prominent removal during the Kennedy Administration was Chester Bowles, the undersecretary of state, where “[i]deology and personal displeasure” both played a role. Bowles was summarily handed a press release indicating that George Ball would replace him.

Kennedy’s dynamism made it all but inevitable that he would exert his authority over the execution of the federal laws to its fullest. For example, Kennedy asserted his authority to control the administration of federal law by following the practice adopted by FDR, Truman, and Eisenhower of issuing executive orders requiring all federal officers and government contractors not to discriminate on the basis of race, creed, color, or national origin, now enforced by the newly created President’s Committee on Equal Opportunity. These orders exceeded the scope of previous orders by requiring that all

253 Id.
254 Id. at 34.
255 Id.
256 Id. at _.
257 Id. at 92.
258 Id. at 93.
government contractors undertake “affirmative action to ensure that . . . employees are treated during their employment, without regard to their race, creed, color, or national origin.” In issuing these orders, Kennedy returned to the practice followed by FDR and Truman and based the orders on “the authority vested in [the president] by the Constitution and the statutes.” The Comptroller General acknowledged, “In this instance the Executive order is not based on any Congressional directive. The authority to issue the order must, therefore, stem from the general executive power under Article II of the Constitution.” The Attorney General concurred, arguing that Congress’s failure to object to this longstanding practice represented legislative acquiescence to the president’s authority to issue nondiscrimination orders. Kennedy also opposed racial discrimination by taking a leading role in helping two blacks register at the University of Alabama over the opposition of Alabama’s segregationist governor, George Wallace.

Order No. 11,114, 3 C.F.R. 774 (1959-63 compilation).

Exec. Order No. 10,925, §§ __, 3 C.F.R. at __; Exec. Order No. 11,114, § __, 3 C.F.R. at __.

Exec. Order No. 10,925, pmbl., 3 C.F.R. at pmbl; Exec. Order No. 11,114, pmbl., 3

40 Comp. Gen. 592, 593 (1961); see also Note, supra note 114, at 391 (suggesting that the nondiscrimination orders might fall within the president’s implied authority to act in the absence of a contrary statute (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

“Kennedy federalized the Alabama National Guard, signaling Wallace that he intended to enforce the court order militarily if necessary.”

The Kennedy Administration also issued an executive order making procedural changes to the civil service laws. As noted earlier, the applicable statutes did not provide federal employees with any substantive protections against dismissal. Although some lower court decisions offered some halting moves towards limits on the removal power, such protections would not emerge in Supreme Court cases until the 1970s. Indeed, decisions from this era continued to reaffirm that a supervisor’s lack of confidence in a subordinate was sufficient grounds for removal. Veterans, who comprised roughly half of the federal workforce, did enjoy a greater degree of procedural protection than nonveterans. This Kennedy eliminated this discrepancy by issuing an executive order extending the procedural protections similar to those provided by the Veterans Preference Act of 1944 to nonveterans as well by requiring that each agency establish a system for hearings and appeals. Although this change did not

264 Id. at 179-80.
265 See supra notes 167-184 and accompanying text.
266 See Deak v. Pace, 185 F.2d 997 (D.C. Cir. 1950); Murphy v. Kelly, 259 F. Supp. 914, 917 (D. Mass.) (inquiring whether removal was arbitrary or capricious), aff’d mem., 388 F.2d 232 (1st Cir. 1966); Greenway v. United States, 163 Ct. Cl. 72, 81 (1963) (ruling that removed employee is entitled to “honest consideration based on the merits”); Gadsden v. United States, 78 F. Supp. 126, 127-28 (Ct. Cl. 1948) (indicating that a removed employee has the right to the “honest judgment” of the removing officer and that the decision must not be “arbitrary or capricious” or rendered in “bad faith”). But see Vigil; Coledanchise v. Macy, 265 F. Supp. 154, 162 (D.S.C. 1967).
267 See Frug, supra note 177, at 970-89; see also Charturvedi, supra note 167, at 330 (noting that as of 1968 substantive limits on the removal power had “yet to gain reversal recognition” and that many courts continue to follow the doctrine Hennen and Eberlein).
270 See supra notes 170-171 and accompanying text.
place any substantive limits on the president’s authority to remove,272 it did attest to
Kennedy’s issuance belief in his authority to exercise control over the entirety of the
federal bureaucracy.

Kennedy also made clear that he believed his authority to control the executive
branch extended to the independent agencies when he included them in his executive
order imposing ethical standards on conflict of interest and ex parte communications.273
That Kennedy believed that he possessed the authority to direct the independent agencies
should have come as no surprise. After he was elected but before he had been sworn in,
Kennedy asked Professor James Landis prepare a report specifically on the independent
agencies. Landis concluded, among other things, that the lack of effective inter-agency
coordination was inhibiting federal policy development and required that the President
possess greater influence over all agencies, including the independent agencies.274

Calling the distinction between independent and executive agencies “meaningless,”275

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272 Kathleen V. Buffon, Comment, Removal for Cause from the Civil Service: The Problem of Disproportionate Discipline, 28 AM. U. L. REV. 207, 212 (1979) (noting that the Civil Service Commission did not exercise its authority under the executive order in a way that placed substantive restrictions on the removal power).

273 Exec. Order No. 10939, 3 C.F.R. _ (1959-63 compilation); see also Redford, supra note 186, at 316.


275 Id. at 4; see also id. at 30 (noting that there was “not too great a difference between the allegedly ‘independent’ agencies and those technically a part of some Executive Department”). Landis also concluded that “[t]he relationship of the agencies to the Congress generally speaking is that of any statutory branch of the Executive to the Congress, with certain exceptions.” Id. at 33. The so-called exceptions to which Landis pointed were not that exceptional. First, Landis stated that Congress should oversee the independent agencies, except that they should not attempt to influence their decisions in particular adjudicatory matters. Id. at 33-34. This caveat, however, applied with equal force to executive agencies. Second, Landis opined that the independent regulatory agencies were responsible
to the Congress rather than solely to the Executive. The policies that they are supposed
to pursue are those that have been delineated by the Congress not by the Executive.
Departure from these policies or the failure to make them effective or their subordination
of legislative goals to the directions of the Executive is thus a matter of necessary
Landis recognized that the President’s “constitutional duty to see that the laws are faithfully executed” was “applicable to the execution of laws entrusted to regulatory agencies, whether technically ‘independent’ or not.” Therefore, Landis recommended that the informal controls that the President possessed over the independent agencies should be strengthened. That Landis would come to such a conclusion is nothing short of remarkable. One of the primary architects of the New Deal, Landis had believed that the simple tripartite form of government, wherein power is “divided neatly between legislative concern.

Id. at 34. However, all agencies, whether executive or independent, are obligated to follow the policies established by Congress and exceed their authority whenever their actions contravene legislative goals. In particular, “[t]he patent failure of the Federal Power Commission to execute the laws relating to natural gas production” was “rightly a matter of constitutional concern to him,” as was “[t]he congestion of the dockets of the agencies, the delays incident to the disposition of cases, [and] the failure to evolve policies pursuant to basic statutory requirements.” Id. at 32-33. As Landis later noted, “Presidential concern, with the work of the agencies, is important . . . from the standpoint of the President’s duty to see that the laws are faithfully executed.” Id. at 82.

The President could influence the independent regulatory commissions’ execution of the law through appointments and removals (although statutes often provided that commissioners could only be removed “for cause”); Bureau of the Budget clearance of commission budget proposals legislative proposals; and the President’s power to appoint the chairman of all the commissions except the ICC and perhaps the FPC. Id. at 30-31. The President could also influence commissions through less formal means, either by engaging outside consultants to conduct surveys of their affairs or by consulting with commissioners directly. Id. at 31-32.

Specifically, Landis recommended that the President be permitted to use his reorganization powers to give the chairmen of the commissions authority over all administrative matters and to make them removable at will. Id. at 65-66, 85; see also id. at 37-38 (ICC), 44 (CAB), 48 (SEC & FTC), 58 (FPC). The administrative matters would include the preparation and review of budget estimates, the distribution of appropriated funds, the appointment of personnel, and control over the commission’s internal organization. Id. at 37-38, 85. Thus Landis returned to the vision that Truman had pursued in 1950, only to see it shot down by the legislative veto.

Also, recognizing that policy development required “a close and intimate relationship to the President,” id. at 77, 80, Landis recommended the President create separate offices within the Executive Office of the President to coordinate and develop transportation, communications, and energy policy as well as an Office for the Oversight of Regulatory Agencies charged with preparing reorganization plans specifically for the Federal Power Commission, Interstate Commerce Commission, Civil Aeronautics Board, and Federal Communications Commission, id. at 85-87. See generally Moreno, supra note 94, at 587; Redford, supra note 186, at 312-14; Morton Rosenberg, Congress’s Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration’s Theory of the Unitary Executive, 57 GEO. WASH. L. REV. 627, 697 (1989).
legislative, executive and judicial,” was inadequate to deal with modern problems and must give way to the exigencies of modern governance.279

Armed with these reports, Kennedy strongly asserted his control over the independent agencies. The chairmen of all of the commissions except the Federal Reserve Board submitted their resignations, and Kennedy replaced all of them except the chairman of the Federal Maritime Board.280 Kennedy also sent a message to Congress on “Regulatory Agencies” calling for greater presidential oversight of the commissions.281 Kennedy backed up his rhetoric by impressing upon his nominees the importance of national policy coordination and expressed his hope that they would follow the declared policies of his Administration, by conducting, numerous policy studies and conferences to guide commission decisionmaking, and by requiring that the commissions send him monthly reports.282 Moreover, Solicitor General Archibald Cox refused to let the FTC present its own views to the Supreme Court.283 Clearly, Kennedy did not acquiesce to the supposed “independence” of the independent agencies.

Kennedy, however, did show more tolerance of the legislative veto than did Truman or Eisenhower,284 even going so far as to propose that an agricultural quota and

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280 The omission of the Federal Maritime Board turned out to be insignificant since he replaced the entire membership of the Federal Maritime Board with his own appointees when he reorganized it into the Federal Maritime Commission. The plan also provided that “[e]ach Commissioner shall be removable by the President for inefficiency, neglect of duty, or malfeasance in office.” Reorg. Plan No. 7 of 1961, § 102(a), 3 C.F.R. 876, (1959-63 compilation).
282 See Redford, supra note 186, at 314-18.
income support program be subject to a committee veto.\textsuperscript{285} As his presidency progressed, Kennedy began to show increasing opposition to the legislative veto. Acting on the advice of the Attorney General, Kennedy challenged the constitutionality of a provision in the Foreign Aid and Related Agencies Appropriation Act of 1963 subjecting changes in economic assistance funds administered by the Agency for International Development (AID) to a committee veto.\textsuperscript{286} Kennedy charged that “this provision is unconstitutional either as a delegation to Congressional committees of powers which reside only in the Congress as a whole or as an attempt to confer executive powers on the Committee in violation of the principle of separation of powers prescribed in Articles I and II of the Constitution.”\textsuperscript{287} In signing the bill despite these objections, Kennedy relied upon similar practices undertaken by Presidents Roosevelt, Truman, and Eisenhower.\textsuperscript{288} Accordingly, Kennedy directed the Administrator of the Agency for International Development “to treat this provision as a request for information.”\textsuperscript{289} Kennedy’s subsequent opposition to requiring for “consultation” before executive action, Act of Oct. 11, 1962, Pub. L. No. 87-796, 76 Stat. 904. Kennedy also did not register any objection to a provision requiring that the President appoint members of Congress as delegates to certain trade negotiations. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 243, 76 Stat. 872, 878. \textit{See generally} Watson, \textit{supra} note 86, at 1010 n.115, 1026.

\textsuperscript{286} John F. Kennedy, Special Message to the Congress on Agriculture (Mar. 16, 1961), in \textit{1961 PUB. PAPERS} 192, 196. Even more remarkably, Kennedy endorsed private control of executive action by proposing that the agricultural controls not to into effect until approved by a two-thirds majority of authorized farmers. \textit{Id.} at 195. Congress did not enact the proposal. Watson, \textit{supra} note 86, at 988 n.12, 1026 (citing \textit{HARRIS, supra} note 99, at 205).


\textsuperscript{288} John F. Kennedy, Memorandum on Informing Congressional Committees of Changes Involving Foreign Economic Assistance Funds (Jan. 8, 1963), in \textit{1963 PUB. PAPERS} 6.

\textsuperscript{289} \textit{Id.} Curiously, the Administrator did not carry out the President’s request because “the Comptroller General gave an opinion that it was in the act, unconstitutional or not, and we had to abide by it as long as it was in the act.” Foreign Assistance and Related Agencies Appropriations For 1964: \textit{Hearings on H.R. 9499 Before the Sen. Comm. on Appropriations, 88th Cong., 1st Sess.} 312-13 (1963). \textit{See generally} Christopher N. May, \textit{Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative,} 21 \textit{HASTINGS CONST. L.Q.} 865, 944 (1994); Watson, \textit{supra} note 86, at 1026.
the legislative veto critically weakens the precedential weight of his earlier concessions for the purposes of coordinate construction.

Kennedy’s foreign policy record was dominated by crises over Cuba and over the freedom of West Berlin. Kennedy’s role in the famous Cuban Missile Crisis is too well known to require much discussion here. Suffice it to say it was the most famous reassertion of the Monroe Doctrine in modern times, successfully banishing the former Soviet Union from its efforts to deploy nuclear missiles targeted in Cuba. In Berlin, Kennedy was to make one of his most famous statements from the bully pulpit of the presidency, when he challenged those who denied there was a difference between the free and Communist worlds to come to Berlin and to look at the Wall that the Soviets had built there. He added that in the free world of his day the proudest boast a man could make was “Ich bin ein Berliner.”

Kennedy’s foreign policy was tainted by his support for attempts to assassinate or overthrow foreign leaders including, of course, Fidel Castro of Cuba, and President Diem of South Vietnam. While perhaps foolish and misguided as a matter of policy, neither episode signaled any lack of willingness on Kennedy’s part to assert his authority over the execution of the law. Aside from those events, Kennedy’s presidency was “remarkably free of notable scandal and incompetence. Not since the New Deal was the national government uniformly served so well.” Although evidence would later surfaced regarding the personal indiscretions of the president and his brother with respect
to their private sex lives, such matters have more to do with Kennedy’s place in history and have essentially no larger implications for the separation of powers.

Despite its brevity, the Kennedy Administration emerges as a steady defender of presidential prerogatives. His dominance over his cabinet, his executive orders on civil rights, his claims of supervisory authority over the independent agencies, his aggressive use of foreign policy to oppose communism, and his eventual determination to oppose the legislative veto nonetheless place him squarely in the unitary executive camp. In fact, the president and his brother waged a war on organized crime that was so effective that some have speculated that it lead to the president’s assassination in Dallas on November 22, 1963. It is thus clear that there was no significant acquiescence in any diminution of the unitary executive on John Kennedy’s watch.

IV. LYNDON B. JOHNSON

Anyone familiar with Lyndon Johnson’s legendary personality would have little doubt that he would emerge as a strong chief executive. That said, Johnson ascended to the presidency under extraordinarily difficult conditions, having to succeed a charismatic leader who, after having captured the imagination of the country, had died under tragic circumstances. Having sworn to continue Kennedy’s vision, Johnson inherited a fully staffed executive branch to which he could not make significant changes without seeming to abandon Kennedy’s legacy. Johnson was respectfully slow to make significant


changes to the administration. It would be a mistake to construe his reticence to change personnel as any hesitancy to exert full control over the workings of the executive branch. When Adlai Stevenson complained that he really wanted to be Secretary of State rather than an errand boy, Walter Lippman quipped, “If you are Lyndon Johnson’s secretary of state, you’ll be an errand boy.” 296 Clearly, Johnson was confident that he and he alone would determine the direction of his administration.

Johnson also strongly resisted attempts by Congress to limit his authority to administer the laws. For example, Congress submitted legislation in 1966 that purported to restrict the President’s authority to propose a financial plan for agricultural research for fiscal year 1968. 297 Johnson indicated that he would ignore the provision as an improper infringement upon executive power. Johnson indicated:

The provision thus clearly intrudes upon the Executive function of preparing the annual budget. In developing the budget for fiscal 1968, I will give careful consideration to the view of Congress expressed in this act—but I will propose an agricultural research program designed and finance to make the best possible use of the resources available to us. 298

Two months later, after the Secretary of Commerce exercised his authority under the Export Control Act of 1961 299 to impose export controls on leather and cattle hides, Congress attached a rider to the Commerce Department’s appropriations bill prohibiting the Department from using of any appropriated funds to enforce the export controls. 300 Johnson complained that “in this rider . . . Congress attempts to control the manner in

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296 Id. at 25.
298 Lyndon B. Johnson, Statement by the President Upon Signing the Department of Agriculture and Related Agencies Appropriation Bill (Sept. 8, 1966), in 1966 PUB. PAPERS 980, 981 (Department of Agriculture and Related Agencies Appropriation Act, Pub. L. No. 89-556, 80 Stat. 689).
299 _ Pub. L. No. 89-797, § 304, 80 Stat. 1479, 1497
300 __
which the Export Control Act is to be administered.” These objections notwithstanding, Johnson signed the bill; foreign demand for hides had fallen to the point where the Secretary was planning on dropping the controls anyway. However, since conditions might again require the imposition of export controls on leather, Johnson directed the Secretary of Commerce and the Director of the Budget to submit legislation removing this restriction.

The following year, Johnson objected that three provisions of the Military Construction Authorization Act of 1968 were “inconsistent with the sound management of America’s military establishment and raise questions concerning the constitutional separation of powers.” First, the Act prohibited Johnson from closing the Naval Academy’s dairy farm. Second, the Act froze the present geographic boundaries and headquarters of the eleven Naval Districts. Third, the Act prohibited the Department of the Army from closing a particular installation in Hawaii. Johnson’s signing statement dripped with sarcasm when he quipped, “Thus the Congress, which has given the Navy Department authority over the world’s most powerful fleet, has withdrawn the Department’s authority over 380 cows.” In the end, however, the dairy remained open.
Johnson also issued more general directives to the executive officers, for example ordering them to continue the antidiscrimination and affirmative action programs begun during the Kennedy Administration. Like Kennedy, Johnson did not rely upon his defense or procurement powers as the basis for his actions, nor did he rely upon the newly enacted Civil Rights Act of 1964. Instead, Johnson followed Kennedy’s example and simply invoked “the authority vested in [him] as President of the United States by the Constitution and statutes of the United States.”

935.

309 May, supra note 289, at 943-44.

310 This order expanded the Kennedy Administration’s program in two significant ways. First it applied the antidiscrimination prohibitions to all of a contractor’s activities during the performance of the contract, not just those activities connected with the contract. Second, it expanded the program to include sex discrimination as well. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65 compilation). See generally Moeller, supra note 263, at 456-61.


Regardless of how this controversy is resolved, the fact remains that Johnson’s actions clearly indicate that he believed he had the authority to direct the manner in which the subordinate executive officers executed of the laws.
struggled to determine whether Johnson issued the order pursuant to statutory authority or under his implied powers as president.  

Johnson also pioneered what would emerge as a critical device in allowing the president to control the execution of the law when he began using the oversight responsibilities of the Bureau of the Budget to influence the development of important agency regulations. Thus Johnson plainly had little doubt about his authority to control the execution of the laws.

Johnson exerted his influence over the independent agencies as well. When he met with the heads of the commissions shortly after taking office, his remarks indicated a broad view of presidential responsibility and left little doubt that presidential intervention would be forthcoming if and when the commissions failed to discharge their responsibilities in a manner consistent with the President’s policies. Consistent with this vision, Johnson directed the heads of three commissions involved in the regulation of transportation to begin intra-agency consultations on their problems. A Bureau of the

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312 Compare Contractors Ass’n v. Sec’y of Labor, 442 F.2d 159, 171 (3d Cir. 1971) (holding that even if not statutorily authorized, Executive Order No. 11246 falls within the president’s implied authority to act in the absence of a contrary statute); with United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459 466-68 & n.8 (5th Cir. 1977) (holding that that the order was authorized by statute); see also Note, supra note 114, at 388-91 (arguing that the order could be upheld either as being authorized by statute or as falling within the president’s implied authority to act in the absence of a contrary statute). But see Cramer v. Va. Commonwealth Univ., 415 F. Supp. 673, 680 (E.D. Va. 1976 (holding the order foreclosed by statute); Blumstein, supra note 114, at 927-32, 939-49 (arguing that the order is not justified either by the Constitution or by statute); Moeller, supra note 263, at 479-87 (same); Schuwerk, supra note 263 (same).


Budget circular also established guidelines on the responsibilities of the FPC and other executive agencies in the acquisition of water data.\textsuperscript{315}

Furthermore, Johnson ardently opposed the legislative veto as an unconstitutional infringement on the unitary executive. Rather than vetoing legislation, Johnson tended to use signing statements to construe the legislation in a manner that preserved its constitutionality. For example, within the first few weeks of his Administration, Johnson criticized a provision of the Public Works Appropriation Act that prohibited the Panama Canal Company from disposing of any real property without obtaining prior approval of congressional committees.\textsuperscript{316} Condemning the committee veto as either “an unconstitutional delegation to Congressional committees of powers which reside only in the Congress as a whole, or an attempt to confer executive powers on the committees in violation of the principle of separation of powers set forth in the Constitution,” Johnson directed the Secretary of the Army to treat the provision as a request for information rather than a formal committee veto.\textsuperscript{317} Similar signing statements followed.\textsuperscript{318}

\begin{footnotesize}
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\item \textsuperscript{317} Lyndon B. Johnson, Statement by the President Upon Approving the Public Works Appropriations Act (Dec. 31, 1963), in 1963-64 PUB. PAPERS 104, 104 & note.
\item \textsuperscript{318} In signing the Agricultural Trade Development and Assistance Act of 1964, Pub. L. No. 88-638, 78 Stat. 1035, Johnson objected to two legislative veto provisions. One provision “seeks to give either the House Committee on Agriculture and Forestry a veto power over certain proposed dispositions of foreign currencies accruing from sales under Public Law 480. The other seeks to prevent the President from making certain loans at interest rates below a specified level unless he has concurrence of an advisory committee composed in part of Members of Congress and in apart of his own executive appointees.” Since “[b]oth such provisions represented a clear violation of the constitutional principle of separation of powers,” Johnson directed executive officials to keep Congress informed and consult with them on all aspects of the law.” Lyndon B. Johnson, Statement by the President Upon Signing Bill Extending the Agricultural Trade and Assistance Act (Oct. 8, 1964), in 1963-64 PUB. PAPERS 1249, 1250.
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So strong was Johnson’s opposition to legislative vetoes that he refused to accept provisions first enacted during the Eisenhower Administration prohibiting Congress from appropriating funds for particular uses unless a particular committee had given its prior approval on the grounds that they were the functional equivalents of legislative vetoes.\textsuperscript{319} When confronted with such a provision in the Water Resources Research Act of 1964,\textsuperscript{320} Johnson directed the Secretary of the Interior not to request any funds under the act. Although Johnson acknowledged that such provisions were technically constitutional, he still objected to them in principle and refused to implement the act until Congress eventually amended the legislation to remove the committee approval provision.\textsuperscript{321} Johnson later went so far as to veto legislation containing such a provision, concluding that such committee approval “seriously violates the spirit of the division of powers between the legislative and executive branches” and “infringes upon the responsibilities of the executive branch.”\textsuperscript{322} As Johnson reasoned, “The executive branch is given, by the Constitution, the responsibility to implement all laws—a specific and exclusive responsibility which cannot be shared with a committee of Congress.” Johnson accordingly withheld his approval from the bill until the offending provision was

\textsuperscript{319} Since Congress is of course free to establish its own rules of procedure and these provisions only served to limit the discretion of Congress before it enacted legislation and did not limit the discretion of the executive branch after legislation had been enacted, Eisenhower had accepted such provisions as constitutional.


\textsuperscript{322} Lyndon B. Johnson, _ (June 5, 1965), in 1965 PUB. PAPERS _
removed. Johnson entered similar objections throughout the balance of his Administration.

Finally, Johnson even objected to the one type of provision that every previous President had agreed was constitutional: the “report and wait” provision. Although Johnson indicated that he would accept “reasonable 30-day period of notification” to congressional committees, the proposed Military Construction Act required that the Administration wait 120 days. Although again not technically unconstitutional, Johnson nonetheless vetoed the bill, condemning it as “repugnant to the Constitution” and “a fundamental encroachment on one of the great principles of the American Constitutional system—the separation of powers between the Legislative and Executive branches.”

Johnson continued, “By the Constitution, the executive power is vested in the President. . . . The President cannot sign into law a bill which substantially inhibits him from

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323 Id. at _.
324 Four months later, Johnson objected to a committee approval provision in the Omnibus Rivers and Harbors Act, Pub. L. No. 89-298, 79 Stat 1073, _; concluding that acceding to such a provision “would make the President a partner in the abdication of a fundamental principle of our Government—the separation of powers prescribed by the United States Constitution” that “would dilute and diminish the authority and powers of the Presidency.” Lyndon B. Johnson, Statement by the President Upon Signing the Omnibus Rivers and Harbors Act (Oct. 26, 1965), in 1965 PUB. PAPERS 1082, 1082. Unlike the previous provision, the provision contained in this legislation was optional rather than obligatory. Because nothing in the Act prevented Johnson from signing it and then directing his Administration not to exercise of the authority provided by the Act until the provision was removed, Johnson concluded that the better course would be to sign the bill so that the remaining legislative provisions could be enacted. Id. at 1083. See generally May, supra note 289, at 939; Watson, supra note 86, at 1027-28.

The following year, Johnson criticized a provision that prohibited Congress from appropriating funds for rural renewal loans unless that loan had been approved by the Agriculture Committees. Act of Nov. 8, 1966, Pub. L. No. 89-796, 80 Stat. 1478 (1966) (amending Food and Agriculture Act of 1962, Pub. L. No. 87-703, § 102(c), 76 Stat. 605, 608). Johnson called such provisions “repugnant to the Constitution. They represent an improper encroachment by the Congress and its committees upon Executive responsibilities, and dilute and diminish the authority and powers of the Presidency.” Therefore, Johnson directed the appropriate Departments to submit corrective legislation and ordered his Administration not to approve any loans which would require committee approval. Lyndon B. Johnson, Statement by the President Upon Signing Bill Amending the Bankhead-Jones Farm Tenant Act (Nov. 8, 1966), in 1966 PUB. PAPERS 1354, 1354.

performing his duty.”326 As a result, Johnson concluded that “[t]he limitations upon . . .
the executive branch of the government here sought to be imposed are a clear violation of
separation of powers. . . . The Congress enacts the laws. Their execution must be left to
the President.”327 It is “the President [who] is responsible . . . for the faithful execution of
the laws enacted by Congress.”328 Johnson supported his conclusion by quoting James
Madison’s statement during the Decision of 1789 and by noting that “Attorneys General
in unbroken succession since at least the time of President Wilson” had opposed the use
of such legislative vetoes.329 Johnson eventually signed corresponding legislation
containing a more modest, thirty-day waiting period.330 However, Johnson again
objected when Congress attempted to extend the waiting period to thirty days of
continuous congressional session.331 Johnson expressed his doubts as to whether such a
waiting period was reasonable and warned that his “responsibilities as President and
Commander in Chief will require [him] to seek prompt revision of the restriction if future
circumstances prove it to be inimical to the national interest.”332

Thus Johnson strongly opposed the legislative veto more vehemently than any
other previous President. When this opposition is combined with Johnson’s consistent
objections to congressional efforts to encroach upon his authority as well as the resolute
manner in which he asserted his control over all parts of the executive branch, the

326 Id.
327 Id.
328 Id. at 908.
329 Id.
19; Lyndon B. Johnson, Statement by the President Upon Signing the Military Construction Authorization
Act (Sept. 16, 1965), in 1965 PUB. PAPERS 1003. See generally Watson, supra note 86, at 1028.
332 Lyndon B. Johnson, Statement by the President Upon Signing the Military Construction

http://law.bepress.com/nwwps-plltp/art12
conclusion that Johnson did not in any way acquiesce to a non-unitary vision of the executive branch becomes inescapable.

V. RICHARD M. NIXON

Notwithstanding the troubles that would eventually engulf his Administration, Richard M. Nixon proved to be a stalwart defender of the President’s authority to execute the laws. For example, Nixon protected the President’s removal power when he successfully resisted Congress’s attempt to remove two executive officials by abolishing their positions and reestablishing them subject to Senate confirmation. Nixon complained that “[t]his legislation would require the forced removal by an unconstitutional procedure of two officers now serving in the executive branch.” The President’s “power and authority to remove, or retain, executive officers” was “deeply rooted in our system of government.” Although Nixon did “not dispute Congressional authority to abolish an office or to specify appropriate standards by which the officers may serve,” Nixon vetoed the bill because “the power of the Congress to terminate an office cannot be used as a back-door method of circumventing the President’s power to remove.” Nixon eventually prevailed in his defense of the removal power when, after

333 See Geoffrey P. Miller, From Compromise to Confrontation: Separation of Powers in the Reagan Era, 57 GEO. WASH. L. REV. 401, 401 (1989) (“The Nixon years were characterized by aggressive assertions of presidential power vis-à-vis Congress . . .”).

334 The officials involved were Office of Management and Budget Director Roy Ash and Deputy Director Frederick Malek. Congress’s efforts were similar to the efforts during the Truman Administration to remove to officials in the Bureau of Reclamation by changing the qualifications for their offices. See supra notes 75-80 and accompanying text.

335 Richard M. Nixon, Veto of a Bill Requiring Senate Confirmation of the Director and Deputy Director of the Office of Management and Budget (May 18, 1973), in 1973 PUB. PAPERS 539, 539.

336 Id.

337 Id. Nixon closed by quoting James Madison’s ringing endorsement of the separation of powers from the Decision of 1789. Id. at 540 (quoting 1 ANNALS OF CONG. 581 (1789)).
failing to override Nixon’s veto, Congress amended the legislation the next year to require Senate confirmation only of future OMB Directors and Deputy Directors.

Nixon extended the policy initiated by Kennedy of extending the civil service protection enjoyed by veterans to all federal employees. A pair of executive orders giving nonveterans the right to appeal adverse employment actions to the Civil Service Commission and revoking the agency review process established by Kennedy in favor of exclusive review by the Civil Service Commission in effect extended the procedural protections Veterans’ Preference Act of 1944 to all federal employees, veterans and nonveterans alike. This action is fully consistent with the unitary executive. As we have noted, the procedural protections were not construed as placing any limits on the president’s unfettered power to remove. In addition, the fact that the president had the power to remove Civil Service Commissioners at will rendered any authority wielded by Commission unproblematic from the standpoint of the unitary executive.

That said, we acknowledge that the Nixon Administration did bear witness to the emergence of the first effective limits to the removal power. Interestingly, the impetus behind these limits came not from Congress, but rather from the courts. The Supreme Court began to recognize that the civil service laws gave federal employees a sufficient property interest in their jobs to give them the benefit of procedural due process.
protections.\textsuperscript{344} And even then, such noted commentators as Gerald Frug criticized the Court’s decisions as starkly ahistorical and inconsistent with the longstanding, judicially-recognized tradition of unfettered presidential removal.\textsuperscript{345} In any event, contrary to popular belief, the idea that the civil service laws limit the president’s power to remove is of fairly recent vintage. Given the Court’s acknowledgement in \textit{INS v. Chadha}\textsuperscript{346} that the fact that presidents since the Wilson Administration had consistently opposed a particular practice was sufficient to keep a question open as a constitutional matter, it is hard to see how this development could turn the civil service laws into an established derogation of the unitariness of the executive branch.

Nixon also asserted his authority to direct federal officials’ execution of the laws in a wide variety of ways. For instance, Nixon continued the program initiated by Johnson’s executive order requiring that government contractors institute affirmative action plans.\textsuperscript{347} After a series of opinions issued by the Comptroller General had suggested that the order was unenforceable because it did not spell out the minimum requirements of a satisfactory affirmative action program,\textsuperscript{348} Secretary of Labor George Shultz issued a revised version known as the Philadelphia Plan that providing more specific guidance on what was required.\textsuperscript{349} After the Comptroller General ruled that the additional guidance provided by the Philadelphia Plan imposed quotas in violation of


\textsuperscript{345} Frug, supra note 177, at 977-89. As Professor Frug notes, both \textit{Roth} and \textit{Sinderman} involved teachers who alleged that they were removed for their exercise of their constitutional rights to free speech. As a result, they could have been resolved under \textit{Wieman} and \textit{Pickering} without having to resort to judicial innovation. \textit{Id.} at 977-78.

\textsuperscript{346} 462 U.S. 919, 942 n.13 (1983).

\textsuperscript{347} \textit{See supra} note 310 and accompanying text.

\textsuperscript{348} \textit{Id.}

\textsuperscript{349}
Title VII of the Civil Rights Act of 1964, Attorney General John Mitchell issued an opinion clarifying that the Plan involved mere goals, not quotas, and Shultz accepted that construction. Finally, after a complicated series of legislative maneuvers, Congress ended future questions about the Philadelphia Plan’s legitimacy in 1972 by unequivocally approving the President’s authority to mandate affirmative action programs. But until that point, Nixon, like Kennedy and Johnson before him, had derived the authority to require such programs directly from his authority to control the execution of federal law.

Nixon also asserted his control over the executive branch by expanding the program of White House oversight of regulatory policy begun during the Johnson Administration. Nixon’s program was initially restricted to the Environmental Protection Agency (EPA), which Nixon created by executive order in 1970, and began on May 21, 1971, when OMB Director George Shultz sent a memorandum to EPA Administrator William Ruckelshaus requiring OMB clearance for all EPA decisions that

353 See Schuwerk, supra note 263, at 757. For a discussion of the maneuvering that led up to the 1972 vote, see id at 747-57.
354 See supra note 313 and accompanying text.
were expected to have a significant impact on the policies of other agencies, impose significant costs on non-federal sectors, or created additional demands on the federal budget.\textsuperscript{356} Nixon later expanded this initiative into a larger program into termed “Quality of Life” review,\textsuperscript{357} which required agencies to submit covered regulations thirty days before draft publication, along with an analysis of the rule’s objectives, alternatives, and expected costs and benefits. OMB then solicited comments from other agencies, which were then forwarded to the agency proposing the rule. A similar process, focusing on public comments and new issues raised during the rulemaking, was required twenty days before the publication of final rules. Although the program was nominally extended to all federal policy proposals involving consumer protection, public health and safety, and occupational health and safety, in practice EPA remained the only agency routinely required to submit its proposals to OMB.\textsuperscript{358} In addition, OMB theoretically only facilitated inter-agency comments and mediated inter-agency conflicts; the issuing agency ostensibly retained control over the final decision. In practice, OMB was able to use Quality of Life review to effect significant changes in EPA policy.\textsuperscript{359} Nixon further

\begin{footnotesize}
\textsuperscript{356} Memorandum from George Shultz to William Ruckelshaus (May 21, 1971), quoted in 2 NATIONAL ACADEMY OF SCIENCES, DECISION MAKING IN THE ENVIRONMENTAL PROTECTION AGENCY 91 (1977).


\textsuperscript{358} But see Harold H. Bruff, Presidential Power and Administrative Rulemaking, 88 YALE L.J. 451, 466 (1978) (describing OMB intervention in NHTSA rulemaking).

\end{footnotesize}
strengthened his control over regulatory policy on July 31, 1972, when OMB Circular A-19 required that agencies submit all proposed testimony, reports, and legislation for OMB approval prior to their transmission to Congress.\textsuperscript{360} The extent to which Nixon centralized administrative control in OMB is underscored by the fact that leading EPA administrators were unable to obtain written assurances that they retained independent decisional authority.\textsuperscript{361} It is true that these administrators sometimes threatened to resign over their inability to obtain assurances that they would have the final say over EPA regulations.\textsuperscript{362} Such threats are properly regarded as being consistent with the unitary executive, rather than evidence of agency independence as some of suggested,\textsuperscript{363} since resignation or removal is the natural outcome under our theory when an executive official finds himself or herself out of step with administration policy.

Nixon also undertook efforts to dominate the independent agencies. Nixon’s efforts were based on the conclusion of the Advisory Council on Executive Organization (commonly known as the “Ash Council” after its Chairman, OMB Director Roy Ash) that the commissions were “an anomaly in government structure.”\textsuperscript{364} Originally intended to shield the regulatory process from partisanship of the executive branch, independence had rendered “not sufficiently accountable to either Congress or the executive branch.”\textsuperscript{365}

\textsuperscript{360} See Percival, supra note 357, at 137.
\textsuperscript{361} \textit{Id.} at 989 n.154 (citing JOHN QUARLES, CLEANING UP AMERICA: AN INSIDER’S VIEW OF THE ENVIRONMENTAL PROTECTION AGENCY 119 (1976)).
\textsuperscript{362} See Percival, supra note 359, at 988-89 (citing Implementation of the Clean Air At Amendment of 1970—Part I: Hearings Before the Subcomm. on Air and Water Pollution of the Sen. Comm. on Public Works, 92d Cong. 325 (1927) (statement of EPA Administrator William Ruckelshaus); and QUARLES, supra note 361, at 119).
\textsuperscript{363} See id.
\textsuperscript{364} PRESIDENT’S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES 13 (1971) [hereinafter ASH COUNCIL REPORT]. See generally Moreno, supra note 94, at 487-88.
\textsuperscript{365} ASH COUNCIL REPORT, supra note 364, at 14. The report elaborated:
Therefore, the Council concluded, “[i]f regulation is to be more responsive to the public interest and coordinated with national programs, it must first be brought within the ambit of elective government, with accountability to those officials to whom the public and the regulated industries alike look for fair and constructive application of national policy.”

To accomplish these goals, the Ash Council recommended that most independent agencies be abolished and that their functions be transferred to newly created executive agencies headed by single administrators serving the President’s pleasure. The adjudicative-type review previously performed by the commissions would be conducted by the Administrative Court of the United States. Only in that way could the President fulfill his constitutional duty to “take care that the laws be faithfully executed” and his

Congress has conceived of these commissions as independent of executive branch control, but in fact the commissions are almost as independent of Congress itself. Apart from appropriations approval, periodic program review, and the intermittent interest of one or several of its members, Congress does not exercise the degree of oversight with respect to regulatory commissions that it does for executive departments and other agencies of the executive branch. Congress has sought to preserve the independence of the regulatory commissions, even as their activities increasingly affect the implementation of national policy. The executive branch, responsible for carrying out national policy, has been reluctant to support reforms needed to integrate regulatory activities with executive programs because the President does not have sufficient responsibility for commission direction.


_id_. at 16. The Ash Council later noted:

Accountability is an essential element of democratic government. The Congress and the President are accountable to the people for the performance of government. In turn, agencies of government headed by appointed officials should be response and responsible to the Congress, to the Executive, and through them, ultimately to the public.

. . .

Without clear accountability for performance to either Congress or the President, it is not surprising that the agencies receive inadequate attention.

_id_. at 40-41; see also id. at 15 (“Independence, and the resulting absence of regulatory accountability, has transferred to a generally shielded arena those questions which should be settled in a more open forum.”).

_id_. at 4-5, 20.

_id_. at 6, 22.

The Ash Council noted, “The President is responsible under article I[1] of the
role as the person to whom the American public “looks to . . . for leadership in pursuing national policy goals, including those affected by the regulatory process.”

Bolstered by these proposals, Nixon proposed a massive reorganization in which all executive functions would have been consolidated into four new superagencies, although this proposal was eventually engulfed by the Watergate scandal. Congress defended its ability to control the independent agencies by considering a proposal to make the commissions even more independent of presidential control by permitting them to transmit their budget requests directly to Congress. Although this proposal eventually failed, Congress did subsequently enact legislation authorizing a few agencies to submit their budgets directly to Congress and granting independent litigating authority to the FTC.

Congress even considered a proposal to turn the Department of Justice into an independent agency. The Administration challenged the constitutionality this proposal through the testimony of Assistant Attorney General Robert G. Dixon, Jr. As Dixon noted, the Article II Vesting Clause and the Take Care Clause compelled two conclusions: “First, the enforcement of the laws is an inherently executive function, and

Constitution to ‘take care that the laws be faithfully executed. That duty extends to the activities of the regulatory agencies to assure that the laws enacted by Congress are carried out effectively and fairly.’ Id. at 16. The Ash Council also contended that the fact that previous Presidents had offered similar regulatory reform proposals demonstrated that “these Presidents presumably felt that such recommendations were part of their responsibility to oversee faithful execution of the laws.” Id. Furthermore, the inclusion the independent regulatory commissions in the President’s reorganization power demonstrated that Congress also “recognized the President’s role in the regulatory scheme.” Id.

Percival, supra note 357, at 133 & n.28.
See FISHER, CONSTITUTIONAL CONFLICTS, supra note 339, at 191-92.

Under this proposal, the Attorney General, Deputy Attorney General, and Solicitor General would serve six-year terms and would be removable by the President only for “neglect of duty or malfeasance of office.” S. 2803, 93d Cong., 1st Sess. (1973).
second, the executive branch has the exclusive constitutional authority to enforce laws.\textsuperscript{375} Dixon also argued that making the Department of Justice independent was ill advised as a matter of democratic political theory. As Hamilton recognized in The Federalist No. 70, and the Landis Report and the Ash Council had recently reaffirmed, a plural executive would tend “to conceal faults, and destroy responsibility.”\textsuperscript{376} Finally, Dixon argued that “an ‘independent’ Department of Justice would be a constitutional anomaly fundamentally inconsistent with the whole theory of a tripartite government envisioned by the Founding Fathers and specified in the first three articles of the Constitution.”\textsuperscript{377} Former Attorney General Nicholas Katzenbach agreed, arguing that the president “is responsible for the administration of the law and should be, and can be, held accountable for that stewardship.”\textsuperscript{378} Even Archibald Cox opposed the notion that the Attorney General should be made independent of presidential control: “I believe in focusing individual responsibility. There is no substitute for that responsibility. No president should be relived of it—or of the consequences of default.”\textsuperscript{379} Indeed, any attempt to insulate the Attorney General from presidential direction would have the effect of erecting the “presumption that our Attorneys General cannot be trusted. The presumption should be the other way, and they should be held responsible when they were proved incompetent or unfaithful.”\textsuperscript{380}

\textsuperscript{375} Removing Politics from the Administration of Justice: Hearings Before the Subcomm. on Separation of Powers of the Senate Committee on the Judiciary on S. 2803 and S. 2978, 93d Cong., 2d Sess. 84 (1974) (testimony of Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel).

\textsuperscript{376} Id.

\textsuperscript{377} Id.

\textsuperscript{378} Id. at 152-53.

\textsuperscript{379} Id. at 209.

\textsuperscript{380} Id. at 211.
Furthermore, Nixon also opposed congressional attempts to interfere with the President’s execution of the laws through the legislative veto. Although he did not continue Johnson’s opposition to “report and wait provisions” as well as committee approval requirements directed at Congress, Nixon offered numerous objections to provisions more properly regarded as legislative vetoes. For example, Nixon objected that a provision of the Second Supplemental Appropriations Act of 1972 that subjected approval of three building projects to a committee veto. Such committee vetoes “infring[ed] on the fundamental principle of the separation of legislative and executive powers.” After Congress persisted in its efforts to include a committee veto, Nixon announced that he would disregard it.

The following months Nixon objected that a committee veto contained in the Public Buildings Amendments of 1972 by “conditioning of the authority of the executive branch upon an action by committees of the Congress,” was an unconstitutional "infring[ement] upon the fundamental principle of the separation of legislative and executive powers." Early in his Administration, President Nixon announced that “this Administration will interpose no objection to the procedures involved in the accomplishment of watershed projects under” the Omnibus Rivers and Harbors Act and released the funds impounded by President Johnson. See generally Watson, supra note 86, at 1028, 1029; Louis Fisher, The Politics of Impounded Funds, 15 ADMIN. SCI. Q. 361, 374 (1970). Nixon subsequently approved a similar provision in the Public Buildings Amendments of 1972, noting that “[t]he Congress regards this ‘no appropriation may be made’ provision as internal Congressional rulemaking which does not affect the executive branch. This Administration has acquiesced in that construction.” Richard M. Nixon, Statement About Signing the Public Buildings Amendments of 1972 (June 17, 1972), in 1972 PUB. PAPERS 686, 687 (approving of Public Buildings Amendments of 1972, Pub. L. 92-313, § 7(a), 86 Stat. 216, 221); see also Richard M. Nixon, Second Supplemental Appropriation Act, 1972 (May 28, 1972), in 1972 PUB. PAPERS 627, 627 (“The Congress regards this ‘no appropriation may be made’ provision, I understand, as internal Congressional rule-making not affecting the executive branch, and this Administration has acquiesced in that construction.”). Nixon thereafter signed numerous such provisions into law without comment. See generally Fisher, Legislative Veto, supra note 86, at 284; Watson, supra note 86, at 1029.


executive powers.” Consequently, President Nixon directed the General Services Administration to disregard those provisions and submit remedial legislation.\(^{387}\) Nixon similarly vetoed the War Powers Resolution in part because of the legislative veto provision it contained.\(^{388}\) Although Nixon did subsequently sign several legislative veto provisions into law without comment,\(^{389}\) his previous objections were doubtlessly sufficient to preserve his constitutional challenge for the purposes of coordinate construction.

And perhaps most dramatically, Nixon asserted his right to control the execution of the laws throughout the Watergate scandal. The issue first arose during the hearings concerning Elliott Richardson’s confirmation as Attorney General. Richardson agreed in principle that a special prosecutor should be appointed, but insisted on the importance “that the Attorney General retain[] ultimate responsibility” for the special prosecutor’s work.\(^{390}\) Alternatively, the special prosecutor could be responsible only to the chief executive, since “executive power is vested in the President [by the Constitution] and since it has been ruled by the Supreme Court that the conduct of investigations and


prosecutions as defined by the law are executive branch functions.” Richardson insisted, “I know of no way constitutionally whereby any individual who has been vested with prosecutorial responsibility can be removed from responsibility to a superior within the executive branch.”

Nixon’s belief in his sole authority to control the execution of the law was demonstrated most dramatically by the “Saturday Night Massacre,” in which he directed Attorney General Richardson and Deputy Attorney General William Ruckelshaus to remove Archibald Cox as Watergate special prosecutor notwithstanding the Justice Department order granting Cox the “greatest degree of independence that is consistent with the Attorney General’s statutory authority” and providing that Cox would not be removed “except for extraordinary improprieties on his part.” After Richardson resigned and Ruckelshaus was removed over their refusal to fire Cox, the task fell to Solicitor General Robert Bork. Although regrettable, the Saturday Night Massacre remains a vivid, if controversial, assertion of Nixon’s belief in his authority to control the execution of the law.

The Nixon Administration continued to press its belief in the impropriety of insulating executive functions from presidential control when opposing the welter of bills seeking to authorize the appointment of temporary special prosecutors under the control of the courts. In Senate hearings on the legislation, Acting Attorney General Bork testified, “The executive alone has the duty and the power to enforce the laws by
prosecutions brought before the courts.” Bork offered a similar observation in his testimony before a House subcommittee, arguing that “[t]o suppose that Congress can take that duty from the Executive and lodge in either in itself or in the courts is to suppose that Congress may by mere legislation alter the fundamental distribution of powers dictate by the Constitution.”

Over time, many leading figures have begun to question the conventional wisdom that the Saturday Night Massacre demonstrated the need for a prosecutorial institution operating independently of presidential control. The political uproar following Cox’s dismissal forced Nixon to appoint another special prosecutor, Leon Jaworski, who completed the Watergate investigation and drove Nixon out of office. The episode demonstrates how political constraints can ensure the effectiveness of investigations of high-level government misconduct without resort to constitutionally problematic institutional arrangements. From this perspective, it is Jaworski’s successful completion of the Watergate prosecution rather than Cox’s removal that represents the central lesson with respect to the separation of powers. Regardless of where one comes down in this debate, the fact remains that Cox’s removal and the administration’s opposition to congressional attempts to authorize special prosecutors operating independently of

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395 Id.
397 Senate Committee Hearings, supra note 704, at 29 (testimony of former Attorney General Griffin B. Bell), 57 (testimony of former Independent Counsel Joseph E. diGenova), 148 (testimony of Clinton counsel Robert S. Bennett), 245 (testimony of Attorney General Janet Reno), 425 (testimony of Independent Counsel Kenneth W. Starr).
presidential control represent prominent examples of Nixon’s steadfast insistence on the unitariness of the executive branch.

VI. GERALD R. FORD

When Gerald R. Ford came to the White House, he had every reason to expect that he would be hard pressed to defend the prerogatives of the executive branch. Watergate had effectively destroyed public confidence in the Presidency. Moreover, having never run for national office, Ford lacked the mandate and the broad base of political support needed for vigorous presidential action. More than any other post-World War II President, Ford could have been expected to acquiesce to congressionally-imposed invasions on the unitariness of the executive branch. Ford’s biographer, John Robert Greene, notes:

The 865 days of the Ford presidency tell a story of an administration struggling to create itself, to escape the long shadow of the Nixon administration by offering its own agenda to the American people. The pardon, as we shall see, is the seminal event in the planning of both these objectives as Ford sought to evict the ghost of Nixon past from his White House and to begin anew, with a Ford administration.398

When Ford assumed office, “Political sagacity dictated that [he] fire the Nixon people as quickly as possible and when he installed his own advisers that he steer clear of a Haldeman-like chief of staff.”399 Ford immediately indicated that White House Chief of Staff Alexander Haig could stay on for a short while, but that he would soon be replaced by young turk Donald Rumsfeld.400 Rumsfeld’s strong personality guaranteed that there would be at least some centralized control of White House operations. During 398 JOHN ROBERT GREENE, THE PRESIDENCY OF GERALD R. FORD xii (1995).
399 Id. at 24.
400 Id. at 25.
the one month honeymoon period between Nixon’s resignation and Ford’s pardon of him, “The idea of a strong cabinet” gained favor “[a]s most of the country had come to view the Nixon White House as a fortress where access was forbidden and advice ignored.” 401 Ford made some moves toward a stronger cabinet, but he did not totally buck the modern trend toward strong White House staffs. “The pattern that actually emerged in Ford’s administration fell in between these extremes of policy development. Ford’s style with his cabinet was neither as heavy-handed as Nixon’s nor did it offer a collegial return to cabinet government.” 402

The first two major issues of the Ford presidency emerged one month into his administration when he pardoned both former President Richard M. Nixon and many of those individuals who had evaded the draft during the Vietnam War. These two pardons “destroyed [Ford’s] honeymoon with the American people.” 403 The pardon of the draft evaders was a major decision about the execution of the laws based on Ford’s belief that it was necessary to bring to an end the “‘long national nightmare’ of the sixties.” 404 This pardon helped to “cement Ford’s image as a conciliator,” 405 and it was in accord with previous exercises of the pardon power to bring the American people together after a major war. The question of whether to pardon Nixon had “hung over the administration like the sword of Damocles,” since it had been a major item of discussion at Ford’s first cabinet meeting. 406 Ford felt the pardon was appropriate both because of Nixon’s precarious health—a trial might have killed him—and because he wanted to, in the

401 Id. at 28.
402 Id. at 29.
403 Id. at 35.
404 Id. at 39.
405 Id.
406 Id. at 45.
language of the Preamble of the Constitution, “ensure domestic tranquility.”\(^{407}\)

Obviously, the two pardons together were a major law enforcement decision made by Ford personally about what degree of law enforcement would best serve the interests of the nation. The fact that Ford made these two law enforcement decisions himself as the nation’s chief law enforcement officer is telling support for the theory of the unitary executive.

After the Nixon pardon, congressional power vis-à-vis the executive branch began to grow enormously, continuing a trend that began in the Johnson and Nixon Administrations. The public perception of the time was that there had grown up what was called in Arthur Schlesinger’s words, an imperial presidency,\(^ {408}\) and that the time had come to restore some power to Congress. The “stinging” and “bipartisan” opposition on Capitol Hill to the Nixon pardon began a long process of power flowing away from the White House.\(^ {409}\) “A new day had dawned, and Ford had to work in that new day—clearly the locus of power in the federal government had shifted back from the White House to Capitol Hill.”\(^ {410}\)

After two of Richard Nixon’s Attorneys General were convicted of crimes, it was essential that Ford pick a person of impeccable character to serve in that role. Ford did precisely that by turning to Edward Levi, then the president of the University of Chicago. “Levi made it clear to Ford early in the nominating process that he would not take the job unless Justice was made apolitical.”\(^ {411}\) Ford and Levi together faced many crises,
including the threat of violence attending school desegregation in Boston. “Ford was ready to intercede if violence broke out. He had ordered the Department of Defense to put fifteen hundred troops of the Eighty-second Airborne on an increased state of readiness, which would allow them to be in Boston in nine hours.”412 This shows how seriously Ford took his obligation faithfully to execute the laws.

Early in Ford’s presidency, major scandals broke linking the Central Intelligence Agency to attempted assassinations in Cuba and in Vietnam. Ford responded to this crisis on January 4, 1975, by creating a presidential Commission on CIA activities headed up by Vice President Nelson Rockefeller. Ultimately, Congress could not resist forming its own Committee under Senator Frank Church to investigate the CIA, and that Committee went quite a bit further than the Rockefeller Committee in arguably crippling the CIA. Within the political constraints he was operating under, which were severe, Ford did his best to maintain the CIA’s effectiveness. He also strongly resisted handing over documents to the Church Committee seeking “to give the appearance of cooperation without actually providing the committee with any substantive documentation.”413 Thus did Ford defend executive prerogatives in the extremely trying months after the Watergate scandal and the Nixon pardon.

In April of 1975, Ford’s situation became even direr as it became clear that the governments of South Vietnam and Cambodia were going to fall to the communists unless Congress appropriated money to help those countries defend themselves. Scandalously, Congress cut off all funding whatsoever for the anticommunist efforts in

\[412\] Id. at 89.
\[413\] Id. at 110.
Southeast Asia and even failed to appropriate money to evacuate those Cambodians and South Vietnamese citizens whose lives would be in danger because of their past help for the U.S. war effort in Indochina. Ultimately, Ford had to personally give the order for the evacuation by helicopter from Saigon of as many people as the military could manage to help get out.\footnote{Id. at 140.}

In May 1975, Ford presided as Commander in Chief over the rescue of American passengers and crew on the \textit{Mayaguez}, a ship that was captured by the Cambodians. “Ford’s behavior was calm and rational throughout the crisis and his demeanor spread to his team.”\footnote{Id. at 145.} Ford felt he had a duty as president to rescue the captured Americans and he fulfilled that duty.\footnote{Id. at 144.} Ford took military action without consulting Congress under the War Powers Act,\footnote{Id. at 150.} and when members of Congress complained about his failure to consult them he said, “It is my constitutional responsibility to command the forces and to protect Americans.”\footnote{Id. at 148.} Ford lived up to that responsibility and rescued the \textit{Mayaguez} crew and passengers.

On November 2 and 3, 1975, Ford made some major personnel changes in his administration which showed he was not afraid to remove people when he thought it necessary to do so. First, Ford asked for the resignations of Defense Secretary James Schlesinger and CIA Director William Colby. He also removed the ailing Rogers Morton as Commerce Secretary, and he stripped Secretary of State Henry Kissinger of his second
job as White House National Security Advisor. Colby was replaced at the CIA by George Bush; Rumsfeld replaced Schlesinger at the Pentagon; while the young Dick Cheney replaced Rumsfeld as White House Chief of Staff. All in all, it was a good series of personnel moves, since the incoming figures—Bush, Rumsfeld and Cheney—all proved exceptionally capable. The next day, it was announced that Vice President Nelson Rockefeller would be dropped from the ticket when Ford ran for reelection in 1976. This was a move to reach out to conservatives then gathering around the White House candidacy of Ronald Reagan, since conservatives detested Rockefeller and were certain to be disappointed by Ford’s firing of Schlesinger. With these bold and decisive personnel moves, Ford showed that he and he alone was firmly in control of the executive branch.

There was one other prominent removal during the Ford years: the firing of Agriculture Secretary Earl Butz in the middle of Ford’s reelection campaign. Butz foolishly told off-color jokes to Rolling Stone Magazine correspondent John Dean that were subsequently published in the national press to the great embarrassment of the administration. “On Monday morning Butz met with Ford; around noon with tears in his eyes, he went before the press and resigned. Ford’s assessment of Dean was entirely predictable: ‘a low-down, no-good, son of a bitch. A sniveling bastard.’”

Ford took other steps that demonstrated his willingness to take control of his administration. For example, Ford did not hesitate to direct the actions of subordinate executive officials, at one point directing the Department of Health, Education, and

419 Id. at 161.
420 Id.
421 Id. at 160-62
422 Id. at 183.
Welfare to suspend a rule so that it could be reexamined.\textsuperscript{423} Ford also continued the Quality of Life program begun established by President Nixon, adding the requirement that major rules include an “inflation impact statement” comparing the costs and inflationary effects with the benefits of the rules.\textsuperscript{424} These statements would then be reviewed by the newly formed Council on Wage and Price Stability, although such review would only proceed after the proposed rule had been published in the Federal Register and the Council had no power to mandate changes in the rules.\textsuperscript{425}

Ford also rebuffed congressional attempts to impinge upon the president’s authority to execute the law. Members of the Ford Administration testified against the establishment of independent prosecutors. Attorney General Edward H. Levi testified that the special prosecutor appointed by the judiciary was “constitutionally dubious.”\textsuperscript{426} Assistant Attorney General Michael M. Uhlmann challenged the constitutionality of the proposal as well on the grounds that control of prosecution lay at “the very core of

\textsuperscript{423} See Bruff, supra note 358, at 465 n.67; Frank B. Cross, Executive Orders 12,291 and 12,498: A Test Case in Presidential Control of Executive Agencies, 4 J.L. & Pol. 483, 494 (1988).


\textsuperscript{425} See generally O'Reilly & Brown, supra note 357, at 426-27; Percival, supra note 357, at 138-41; see also Harold H. Bruff, Presidential Management of Agency Rulemaking, 57 GEO. WASH. L. REV. 533, 547 (1989); Cross, supra note 423, at 494; Moreno, supra note 94, at 489; DeWitt, supra note 357, at 770-71. Some scholars have concluded that this program improved the economic analysis and influenced the decisions of some agencies. See COMMISSION ON LAW AND THE ECONOMY OF THE AMERICAN BAR ASSOCIATION, FEDERAL REGULATION: ROADS TO REFORM 85 (1979); Percival, supra note 357, at 140; Charles W. Vernon III, Note, The Inflation Impact Statement Program: An Assessment of the First Two Years, 26 AM. U. L. REV. 1138, 1160-61 (1977). Others have disagreed, arguing that the inflation impact statements amounted to little more than “post-hoc justifications for decisions already reached.” O’Reilly & Brown, supra note 357, at 427; see also Bruff, supra, at 547; Moreno, supra note 94, at 489.

\textsuperscript{426} Provision for Special Prosecutor: Hearings Before the House Comm. on the Judiciary, 94th Cong., 2d Sess. 29-30 (1976); accord id., at 33-34 (arguing that the institution of special prosecutors operating outside of presidential control was of “questionable constitutionality”).
Deputy Attorney General Harold Tyler, Jr., similarly criticized the proposal as “constitutionally inappropriate” because “[u]nlike any other officer of the Executive branch [the special prosecutor’s] removal would be beyond the discretion of the President.”

Ford instead offered a proposal in which special prosecutors would be appointed by the president to three-year terms, confirmed with the advice and consent of the Senate, and subject to the supervision and removal by the Attorney General. The Senate approved Ford’s proposal by a vote of ninety-one to five, but House declined to do so on the grounds that the creation of a permanent position would lead to the instigation of too many special prosecutor investigations. Members of the House instead favored a temporary special prosecutor appointed by a special panel of judges. In retrospect, it is now clear that the House had it precisely backwards. It is the absence of executive control rather than the permanence of the office that represents the greater danger. However, the fact that Congress declined to enact this legislation does not weaken the constitutional import of the president’s insistence that executive functions remain subject to presidential control.

Furthermore, after a slow start, Ford began to challenge the legislative veto as an impermissible invasion of the unitary executive. At first, Ford was only willing to

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428 Statement of Deputy Attorney General Harold R. Tyler, Jr., Concerning S. 495 Before the Senate Judiciary Committee (May 26, 1976), quoted in Eastland, supra note 6, at 53.
431 During the early stages of the Ford Administration, President Ford signed numerous bills containing legislative vetoes without any objection. Dixon, supra note 388, at 428; Watson, supra note 86, at 1016 n.160, 1029.
question the device, issuing a signing statement challenging the legislative veto as improperly “inject[ing] the Congress into the process of administering education laws” and “attempting to stretch the constitutional role of the Congress.” Although Ford acknowledged that “[t]he Congress can and should hold the executive branch to account for its performance, but for the Congress to attempt to administer Federal programs is questionable on practical as well as constitutional grounds.” Accordingly, President Ford “asked the Attorney General for advice on these provisions.”

Two months later, Ford’s opposition to these provisions stiffened when he vetoed a bill because it contained a two-house legislative veto.

Ford objected twice more in 1975, calling the legislative veto “an unconstitutional exercise of Congressional power.” In the latter of these two instances, Ford instructed the Secretary of Health, Education, and Welfare “to treat this provision . . . simply as a request for information about the proposed standards in advance of their

433 Gerald R. Ford, Veto of Atomic Energy Act Amendments (Oct. 12, 1974), in 1974 PUB. PAPERS 294 (objecting that the legislative veto violated Article I, section 7, of the Constitution). As Professor Dixon has noted, this was “one of the more unusual versions of a legislative veto.” Dixon, supra note 388, at 430 n.24. Under the vetoed provisions, the Act would not become effective until after the Joint Committee on Atomic Energy submitted its evaluation of a particular study and the Congress adopted a concurrent resolution. “In effect, Congress was reversing the normal legislative process and asking for presidential approval of substantive legislation before Congress was ready to commit itself to support the legislation.” Dixon, supra note 388, at 430 n.24. President suggested that the bill was “merely the expression of an intent to legislate” rather than actual legislation. Ford, Veto of Atomic Energy Act Amendments, supra, at 294.
promulgation.” Assistant Attorney General Antonin Scalia tirelessly testified before Congress in opposition to the legislative veto. But it was not until 1976 that Ford offered his boldest criticisms of the legislative veto. Ford entered no fewer than six vetoes and five signing statements criticizing the legislative veto. Ford based many of his objections on the unitariness of the executive branch. As Ford at one point noted:

437 See Dixon, supra note 388, at 429-30 n.24 (noting Ford’s growing opposition to legislative vetoes). Ford’s attack on the legislative veto occurred at a time when the House had passed a proposal to subject all agency rules to a legislative veto. 122 CONG. REC. 31668 (1976); see also FISHER, CONSTITUTIONAL CONFLICTS, supra note 339, at 142.
440 Ford also challenged the legislative veto as a violation of Article I, section 7. See, e.g., Ford, Statement on Signing the National Emergencies Act, supra note 439, at 2249.
The exercise of an otherwise valid Executive power cannot be limited by a discretionary act of a committee of Congress nor can a committee give the Executive a power which it otherwise would not have. The legislative branch cannot inject itself into the Executive functions, and opposition to attempts of the kind embodied in this bill has been expressed for more than 50 years.441

Ford later similarly objected that legislative veto provisions purported to involve the Congress in the performance of day-to-day executive functions in derogation of the principle of separation of powers, resulting in the erosion of the fundamental constitutional distinction between the role of the Congress in enacting legislation and the role of the executive in carrying it out.442 Ford repeatedly announced his support for challenging the constitutionality of the practice in court.443


442 Ford, Statement on Signing the International Security Assistance and Arms Export Control Act of 1976, supra note 439, at 1937; see also Ford, Statement on Signing the National Emergencies Act, supra note 439, at 2249 (“Such provisions are contrary to the general constitutional principle of separation of powers whereby Congress enacts laws but the President and the agencies of government execute them.”); see also Bolton, supra note 223, at 12.

443 Ford, Statement on Signing the Federal Election Campaign Act Amendments of 1976, supra note 439, at 1530 (“direct[ing] the Attorney General to challenge the constitutionality of [the legislative veto] at the earliest possible opportunity”); Ford, Statement on Signing the International Security Assistance and Arms Export Control Act of 1976, supra note 439, at 1937 (reserving his right to challenge the constitutionality of a legislative veto provision); Ford, Statement on Signing the National Emergencies Act, supra note 439, at 2249 (noting that the Attorney General was challenging the constitutionality of the legislative veto in the Federal Election Campaign Act).

Despite its stated intentions, the Ford Administration’s brief in Buckley v. Valeo, 424 U.S. 1 (1976), chose to portray the Federal Election Commission as a legislative agency and to argue that as a legislative agency, it could not constitutionally exercise any executive functions. Brief of the Attorney General as Appellee and for the United States as Amicus Curiae at 110-20, Buckley (No. 75-436). This position necessarily forced the Ford Administration to forego any challenges to the legislative veto, since any vetoes over the Commission’s actions could not be cast as an attempt by Congress to control an executive officer or as a method by which Congress could change the law without presidential participation. Id. at 111-12. In accordance with the Administration’s position, the Supreme Court did not reach the issues surrounding the legislative veto. 424 U.S. at 140 n. 176 (per curiam). But see id. at 284-85, 285-86 (White, J., dissenting) (defending the constitutionality of the legislative veto). The Ford Administration did intervene as a plaintiff in a suit brought by former Attorney General Ramsey Clark challenging the constitutionality of the legislative veto. This case, however, was dismissed as unripe. Clark v. Valeo, 559 F.2d 642, 647 (D.C. Cir. 1977) (en banc), aff’d sub nom. Carl v. Kimmitt, 431 U.S. 950 (1977); see also May, supra note 289, at 943.
Thus, even though Ford did at times tolerate the enactment of legislative vetoes,\textsuperscript{444} there can be little doubt that Ford raised sufficient objections and exerted sufficient control over his subordinates to overcome any suggestion that he acquiesced to congressional interference in the execution of the laws. Despite all the handicaps that Gerald Ford faced as an unelected president and as a result of the Nixon pardon, Ford still emerged as a steady defender of the President’s authority to execute the laws.

VII. 

\textsc{Jimmy Carter}

The Administration of Jimmy Carter without doubt represents the nadir of presidential power in the post-World War II era. Apparently unable to articulate a clear vision for the country and beset by the oil and Iranian hostage crises, Carter ultimately proved ill-suited to assume the strong leadership role taken by many of his predecessors.\textsuperscript{445} His political weaknesses, however, did not translate into a willingness to allow control over the execution of the law to be transferred from the White House to Capitol Hill. On the contrary, in spite of its other problems, the Carter Administration appears to have solidly defended the unitariness of the executive branch.

To some degree, the Carter Administration’s ability to resist encroachments on his authority to execute the laws was limited by the shadow of Watergate, as demonstrated by the fate of its constitutional objections to a troika of ethics reform proposals enacted over a two-week span in 1978. The first was the Inspector General Act of 1978,\textsuperscript{446} which

\textsuperscript{444} See Bolton, supra note 223, at 10 n.24; Fisher, \textit{Constitutional Conflicts}, supra note 339, at 142-43; May, supra note 289, at 942 & n.354.

\textsuperscript{445} In fact, Carter has subsequently indicated that he actively sought to reduce the imperial status of the Presidency. Jimmy Carter, \textit{Keeping Faith} 2 (1982).

\textsuperscript{446} Pub. L. No. 95-452, § 3(b), 92 Stat. 1101, 1103.
vested the existing audit and investigative authority in each of the executive departments in an independent Office of Inspector General. Each Inspector General was required to report the results of such audits or investigations to the head of the department and to make general reports to Congress on a semi-annual basis. The statute also required that the president communicates the reasons for removing any Inspector General to both houses of Congress.

John Harmon, the Assistant Attorney General in charge of Carter’s Office of Legal Counsel, denounced this legislation as “making the Inspectors General subject to divided and possibly inconsistent obligations to the executive and legislative branches, in violation of the doctrine of separation of powers.” For example, the provision requiring that the Inspectors General report directly to Congress impermissibly interfered with the President’s authority to control the execution of the laws. As the opinion pointed out:

Article II vests the executive power of the United States in the President. This includes general administrative control over those executing the laws. The President’s power of control extends to the entire executive branch, and includes the right to coordinate and supervise all replies and comments from the executive branch to Congress.

447 § 5(a), (b), 92 Stat. at __, reprinted in 5 U.S.C. app. at 400 (__).
450 Id. (citing Myers v. United States, 272 U.S. 52, 163-64 (1926); Congress Constr. Corp. v. United States, 314 F.2d 527, 530-32 (Ct. Cl. 1963)). The opinion also noted:

[T]he Justice Department has repeatedly taken the position that continuous oversight of the functioning of executive agencies, such as that contemplated by the requirement that the Inspector General keep Congress fully and currently informed, is not a proper legislative function. In our opinion, such continuing supervision amounts to an assumption of the Executive’s role of administering or executing the laws.

Id. By providing for unlimited access to executive branch materials, the bill also risked infringing upon executive privilege. Id. at 18.
Moreover, the requirement that the President provide Congress with reasons for any removal of an Inspector General constituted “an improper restriction on the President’s exclusive power to remove Presidentially appointed executive officers.”

Although the opinion acknowledged the exception created by Humphrey’s Executor and Wiener for quasi-judicial or quasi-legislative officers, “the power to remove a subordinate appointed officer within one of the executive departments is a power reserved to the President acting in his discretion.” Furthermore, the Inspector General Act violated the unitariness of the executive branch by authorizing the Comptroller General to prescribe the audit standards that would apply to the executive branch.

The second piece of legislation was the Civil Service Reform Act of 1978, which grew out of a bill submitted by Carter proposing that the Civil Service Commission be replaced by two newly created agencies. The Commission’s administrative responsibilities would be transferred to the Office of Personnel Management (OPM), while its appellate functions would be vested in the Merit Systems Protection Board (MSPB) and its investigatory functions being lodged in an Office of Special Counsel within the MSPB. While this legislation was pending before Congress, Carter issued a reorganization plan and an executive order largely implementing his legislative proposals.
When Congress enacted the Civil Service Reform Act, it retained the same standard for dismissal that existed in previous statutes, allowing removals “only for such cause as will promote the efficiency of the service.”\textsuperscript{458} It added a list of prohibited personnel practices, including among other things discrimination, political coercion, nepotism, and retaliation against whistleblowers.\textsuperscript{459} In an apparent desire to limit the range of adverse action that would be reversed on appeal,\textsuperscript{460} the Civil Service Reform Act also scaled back some of the procedural protections promulgated by the Civil Service Commission in the aftermath of \textit{Arnett v. Kennedy}.\textsuperscript{461} It also provided for broader judicial review of adverse personnel decisions by giving the courts jurisdiction to overturn MSPB decisions that were arbitrary or capricious, obtained without the applicable procedural protections, or unsupported by substantial evidence.\textsuperscript{462} The statute did contain provisions exempting all officials who were appointed by the president; who were confirmed by the Senate; who served in the foreign service or for the Central Intelligence Agency; or who was determined by the president, a department head, or OPM to occupy positions “of a confidential, policy-determining, policy-making or policy advocating character.”\textsuperscript{463} By exempting all policymaking personnel, this provision in effect limited the scope of the Civil Service Reform Act to purely ministerial officials.


\textsuperscript{460}461 416 U.S. 134 (1974). For an review of these expanded protections, see Buffon, \textit{supra} note 272, at 212-23.

\textsuperscript{461}Id. § 7703(c).

\textsuperscript{462}Id. § 7511(b).
As such, it did not represent a significant derogation from the unitariness of the executive branch.

There were other provisions, however, that were more problematic. Unlike the Civil Service Act of 1883, which made Civil Service Commissioners removable by the president at will, and in contrast to the president’s initial proposal, which was silent on the point and presumably would have allowed for unfettered removal of MSPB members, the version of the Civil Service Reform Act actually adopted provided that MSPB members “may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.”\textsuperscript{464} In addition, the statute extended the same removal protections to the Office of Special Counsel charged with investigating wrongful terminations.\textsuperscript{465} Harmon challenged the removal provisions, pointing out that “the functions of the Special Counsel would be predominantly executive in character. . . . [S]ince, he will be performing largely executive functions, [OLC] believe[s] that Congress may impose no restrictions on the President’s power to remove him.”\textsuperscript{466}

Most importantly, Harmon suggested that the provision of the Ethics in Government Act\textsuperscript{467} that vested the power to remove special prosecutors in a special panel of the D.C. Circuit raised “serious constitutional questions.”\textsuperscript{468} In addition, there seemed

\begin{footnotes}
\item[464] 5 U.S.C. § 1202(d).
\item[465] 5 U.S.C. § 1204.
\item[468] \textit{Special Prosecutor Legislation: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary}, 95th Cong., 1st Sess. 19 (1977). Congress responded in part to this concern by amending the legislation to place the removal power in the Attorney General, but prohibiting such removals except for extraordinary impropriety, physical disability, mental incapacity, or “any other condition that substantially impairs the performance of such special prosecutor’s duties.” § 596, 92 Stat. 1824 (1978).
\end{footnotes}
to be serious questions about the need for such a statute. When allegations of presidential misconduct surfaced regarding a money laundering scheme involving the Carter peanut warehouse, Attorney General Griffin Bell had appointed his own special prosecutors, subject to his supervision and removal, who successfully completed his investigation in an exemplary manner that enjoyed widespread public confidence.\textsuperscript{469} Indeed, Carter’s Attorneys General would emerge as leading critics of the Ethics in Government Act.\textsuperscript{470} Despite these misgivings about each of these statutes, in the aftermath of Watergate Carter had little choice but to overlook these constitutional problems and accept this legislation.\textsuperscript{471} Harmon’s discussion of the provision is a study in lawyerly circumspection, noting that the Justice Department had no objections to the removal provisions.\textsuperscript{472} Harmon noted that under Myers, Congress may not ordinarily impose limits on the president’s power to remove, and it was not altogether clear whether the qualification imposed by Humphrey’s Executor applied to special prosecutors. In light of the extraordinary need to restore public confidence in the government, the Justice Department was willing to permit the experiment of a limitation on the president’s power to remove.\textsuperscript{473}

\textsuperscript{470} See Senate Committee Hearings, supra note 704 at 28 (testimony of former Attorney General Griffin B. Bell); Benjamin R. Civiletti, Post-Watergate Legislation in Retrospect, 34 SW. L.J. 1043, 1051-56 (1981).
However, when the areas involved did not relate so directly to ethical abuses by the executive branch, Carter’s was better able to defend the President’s authority to execute the laws. In 1978, Carter vetoed a bill that would have required three Cabinet officers to report to Congress whenever the President’s budget requests for certain activities were less than the amounts authorized by Congress and to explain why the higher amounts were not requested. Calling it an “unacceptable intrusion” on his obligations and ability to make budget recommendations, Carter refused to comply.474 Moreover, the following year Carter refused to comply with a rider barring him from closing ten specified United States Consulates,475 announcing in a signing statement that he would treat the rider as a “recommendation and not a requirement.”476

Carter did not hesitate to intervene directly in legal matters of personal concern, dictating the Administration’s position in Bakke477 and overruling Bell’s objection to the use of public funds to pay the salaries of persons working in church schools.478 The Carter Administration also centralized its control over federal litigation, emphasizing the “Attorney General’s plenary power over governmental litigation.”479 Towards this end, Carter created the Federal Legal Council to facilitate “coordination and communication

479 4A Op. Off. Legal Counsel 233, 234 (1980). It should be noted that Carter did permit the agencies to present their own views before the Supreme Court. See Devins, supra note 156, at 289.
among Federal legal offices” in order to “avoid inconsistent or unnecessary litigation by agencies.” In addition, the Carter Administration shelved a proposal advanced during the campaign to turn the Justice Department into an independent agency. Bell, who as Attorney General was assigned the task of preparing the necessary legislation, expressed “serious doubt as to the constitutionality of such legislation.” According to Bell, “[t]he first sentence of Article II vests the executive power of the Government in the President and charges him with the general administrative responsibility for executing the laws of the United States. When combined with the Appointments and Take Care Clauses, Bell concluded that “the President is given not only the power, but also the constitutional obligation to execute the laws.” Moreover, the Court made clear in Myers v. United States that “the President’s freedom to remove executive officials cannot be altered by legislation.” This was particularly true for the Attorney General:

The Attorney General is the chief law enforcement officer of the United States. He acts for the President to ensure that the President’s constitutional responsibility to enforce the laws is fulfilled. To limit a President in his choice of the officer to carry out this function or to restrict the President’s power to remove him would impair the President’s ability to execute the laws.

Indeed, the President must be held accountable for the actions of the executive branch; to accomplish this he must be free to establish policy and define priorities. Because laws are not self-executing, their enforcement obliviously cannot be separated from policy considerations. The Constitution contemplates that the Attorney General should be subject to the policy direction of the President. As stated by the Supreme Court: “The Attorney General is . . . the hand of the President in taking care that

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482 Id.

483 Id. at 76.

484 272 U.S. 52 (1926).

485 1 Op. Off. Legal Counsel at 76.
the laws of the United States . . . be faithfully executed.” Removing the Attorney General from the President’s control would make him unaccountable to the President, who is constitutionally responsible for his actions.486

Any limitation on the president’s power to remove the Attorney General, even if self-imposed by executive order, “would be restricting [the president’s] ability to fulfill his constitutional responsibility to ensure that the laws be faithfully executed. That constitutional responsibility for the execution of the laws cannot be waived.”487 Thus, Bell concluded, “there is no method, short of a constitutional amendment, to separate the Attorney General from Presidential control.”488

Furthermore, in the face of continuing congressional interest in the legislative veto,489 Carter also continued his predecessors’ practice of opposing the device as an unconstitutional infringement of the President’s exclusive authority to execute ongoing federal programs.490 Carter protested that the legislative veto had “the potential of involving Congress in the execution of the laws, a responsibility reserved for the President under the Constitution.” Therefore, in signing the bill, Carter noted his “intention to preserve the constitutional authority of the President.”491 A month later,

486 Id. (alterations in original; citation omitted) (quoting Ponzi v. Fessenden, 258 U.S. 254, 262 (1921)).
487 Id. at 77.
488 Id. See generally EASTLAND, supra note 6, at 43-44.
489 During the late 1970s, Congress extended the legislative veto into a wide range of new areas, including the war power, national emergencies, impoundment, presidential papers, and federal salaries. See Fisher, Legislative Veto, supra note 86, at 284. In 1977, the House considered a proposal similar to the one that passed the House during the Ford Administration that would have subjected all agency regulations to a legislative veto. See Dixon, supra note 388, at 432 n.29.
Carter even more explicitly based his objection on the unitariness of the executive branch by adding a key word to the language he used in his signing statement of August 5. The execution of the laws was “a responsibility reserved exclusively to the President under the Constitution.”492

Furthermore, in a general message to Congress issued on June 21, 1978, Carter issued a sweeping condemnation of all legislative vetoes. In Carter’s eyes, legislative vetoes unconstitutionally “inject[ed] the Congress into the details of administering substantive programs and laws.” Such congressional participation in the execution of the laws violated the Take Care Clause by “infring[ing] on the Executive’s constitutional duty to faithfully execute the laws.”493 Although Carter noted that “the Attorney General


493 Jimmy Carter, Legislative Vetoes: Message to the Congress (June 21, 1978), in 1978 PUB. PAPERS 1146, 1147. Furthermore, legislative vetoes unconstitutionally “authorize[d] Congressional action that has the effect of legislation while denying the President the opportunity to exercise his veto,” effectively “circumvent[ing] the President’s role in the legislative process established by Article I, Section 7 of the Constitution.” Carter also objected to legislative vetoes on policy grounds, pointing out that they contributed to administrative delays; tended to politicize the administrative process; and gave agencies incentive to rely on case-by-case adjudication rather than issuing clear, uniform rules. Id. at 1147-48. Carter did acknowledge one major exception to his position: legislative vetoes contained in reorganization acts did “not involve Congressional intrusion into the administration of on-going substantive programs, and it preserves the President’s authority because he decides which proposals to submit to Congress. The Reorganization Act jeopardizes neither the President’s responsibilities nor the prerogatives of Congress.” Id. at 1147; see also 43 Op. Att’y Gen. No. 10 (1977); Dixon, supra note 388, at 431-32 & n.27 (citing Letter from Griffin Bell to President Carter (Jan. 31, 1977), reprinted in H.R. REP. NO. 105, 95th Cong., 1st Sess. 10-11 (1977); Letter from John Harmon to Sen. Abraham Ribicoff (Feb. 14, 1977); Letter from John Harmon to Rep. Joshua Eilberg (Apr. 1, 1977)). Therefore, Carter entered no objection when signing the
[was] seeking a definitive judgment” on the constitutionality of legislative vetoes, Carter noted that “no immediate resolution is in prospect.”\textsuperscript{494} Therefore, Carter urged Congress not to include legislative vetoes in future legislation and informed Congress that he would treat all extant legislative vetoes as “report and wait” provisions. Furthermore, “if Congress subsequently adopts a resolution to veto an Executive action, we will give it serious consideration, but we will not, under our reading of the Constitution, consider it legally binding.”\textsuperscript{495}

As promised, Carter thereafter determinedly opposed the legislative vetoes, refusing to sign at least two bills because they contained legislative vetoes\textsuperscript{496} and announcing in numerous signing statements thereafter his intention to treat legislative vetoes as “report and wait” requirements.\textsuperscript{497} Moreover, the Carter Administration, like

\footnotesize{\textsuperscript{494} Carter, Legislative Vetoes: Message to the Congress, supra note 493, at 1147.}
\footnotesize{\textsuperscript{495} Id. at 1149. To say that the legislative veto is unconstitutional is not to give the President license to ignore the wishes of Congress. The day after Carter’s Message to Congress was issued, Attorney General Griffin Bell and White House Adviser Stuart Eizenstat each emphasized that, although the President could not be bound by a legislative veto as a constitutional matter, as a matter of comity the President nonetheless had every reason to accommodate the interests of Congress whenever possible. Fisher, Legislative Vetoes, supra note 86, at 285; see also 4A Op. Off. Legal Counsel 55, 55, 56, 58 (1980); May, supra note 289, at 981. As Carter discovered throughout his tenure, the President disregards congressional politics at his own risk.}
the Ford Administration, challenged the constitutionality of the legislative veto in court.\textsuperscript{498} These challenges were of more than passing interest to the President. In two separate signing statements, he mentioned his intent to bring a judicial challenge to the legislative veto.\textsuperscript{499} Moreover, after the Ninth Circuit struck down the legislative veto,\textsuperscript{500}
Carter issued a statement applauding the decision and urging the Attorney General to “seek[] Supreme Court review of the decision as soon as possible.”

In fact, the Carter Administration even went so far as to ignore Congress’s attempt to exercise a legislative veto over a series of education regulations. Attorney General Benjamin Civiletti advised the Secretary of Education that the legislative veto provision violated the Constitution and that the Secretary of Education was “entitled to implement the regulations in question in spite of Congress’ disapproval.” Civiletti concluded, “only the executive branch can execute the statutes of the United States.”

To recognize the legislative veto “as legally binding would constitute an abdication of the responsibility of the executive branch, as an equal and coordinate branch of government with the legislative branch, to preserve the integrity of its functions.” As a result, “once a function had been delegated to the executive branch, it must be performed there, and cannot be subjected to continuing congressional control except through the constitutional process of enacting new legislation.”

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502 Like Nixon and Ford, Carter refused to follow the legislative veto procedures required by the War Powers Resolution. However, Carter opposed the provisions as an infringement of his powers as Commander in Chief, rather than his exclusive power to execute the laws. War Powers Resolution, 1977: Hearings on the Operation and Effectiveness of the War Powers Resolution Before the Senate Comm. on Foreign Relations, 95th Cong., 1st Sess. (1977); see also CHECK Ely, 88 Colum. 1381 & n.8; May, supra note 289, at 974-75.


504 Id. at 29. The Executive had a duty to execute the law faithfully. However, the Attorney General pointed out, the “duty to enforce the fundamental law set forth in the Constitution” at times overrides its “duty to enforce the law founded in the Acts of Congress.” Because the legislative veto “intrude[d] upon the constitutional prerogatives of the Executive,” the present case was such a case. Id. at 29.

505 Id.

506 Id. at 27.
Despite Congress’s insistence that the Attorney General abide by the legislative veto provision, the Secretary followed Civiletti’s advice and implemented the regulations. Therefore, although the Carter Administration did tolerate the enactment of a few legislative vetoes without comment, it is clear that Carter did defend the unitariness of the executive branch by firmly opposing the legislative veto.

Carter did not merely react to congressional attempts to control the execution of the laws: he also proactively asserted his control over the executive branch by continuing the Nixon-Ford program of OMB review of proposed regulations. Upon assuming office, Carter ordered agencies to continue to analyze the inflationary impact of regulations and directed them to give more detailed consideration to their economic cost. Carter supplemented these directives the following year with an executive order entitled “Improving Government Regulations” that far exceeded previous regulatory review efforts. This program required that executive agencies include a “Regulatory Analysis”


45 Fed. Reg. 22634, 22742, 23602, 27880 (1980) (codified at 45 C.F.R. §§ 100d, 134, 161c, 161g (1980)); see also May, supra note 289, at 975-76. Congress did not give up without a fight. The House attempted to enforce its legislative veto by adding an amendment to two key appropriations bills providing that “none of the funds appropriated . . . by this Act shall be available to implement, administer, or enforce any regulation” which had been vetoed by Congress. 126 CONG. REC. 19313 (1980) (House enactment of the Levitas amendment to H.R. 7584, _ Cong., _ Sess. (1980)); Id. at 20507 (House enactment of Levitas amendment to H.R. 7591, _ Cong., _ Sess. (1980)). The Office of Legal Counsel responded with an opinion condemning the amendments as an attempt by Congress to place indirect restrictions on the President which, if placed directly, would violate the Constitution. 4B Op. Off. Legal Counsel 731, 733-34 (1980).

507 See FISHER, CONSTITUTIONAL CONFLICTS, supra note 339, at 143 (noting acceptance of legislative vetoes in legislation governing the FTC and the Federal Election Commission); LOUIS FISHER, THE POLITICS OF SHARED POWER 94-95, 106 (1981) (noting acceptance of legislative veto provisions relating to arms sales, war powers, and gasoline rationing); Strauss, supra note 5, at 580 n.20 (noting acceptance of legislative vetoes in legislation governing the FTC); Quint, supra note 490, at 829-30 n.232 (noting OMB support for legislative veto in Impoundment Control Act (citing STAFF OF HOUSE COMM. ON RULES, 96TH CONG., 2D SESS., STUDIES ON THE LEGISLATIVE VETO 2 (Comm. Print 1980))).

508 For a general description of the Carter Administration’s regulatory review program, see Percival, supra note 357, at 142-47; Bruff, supra note 425, at 547-49; DeWitt, supra note 357, at 771-72.

in all proposals of major rules outlining the major alternatives considered by the agency and explaining why the agency chose the particular alternative it did. The order also required that “agencies . . . publish at least semiannually an agenda of significant regulations under development or review.” The order cited no specific authority as its basis, relying simply on his authority as President of the United States. Although the initial draft of the order clearly contemplated that it would apply to the independent agencies as well as the executive departments, Carter decided in the end to avoid a “confrontation with Congress over the applicability of the order to the independent regulatory agencies” and opted instead to simply ask the chairmen of the commissions to comply with the Order’s procedures voluntarily.

Carter supplemented that order by creating the Regulatory Analysis Review Group (RARG) to conduct an intensive review of ten to twenty major regulations a year and to submit its findings during those regulations’ public comment periods. Carter also created a Regulatory Council charged with keeping a calendar of forthcoming significant regulatory proposals and to use it to identify and mediate interagency conflicts. The

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512 Id. § 3, 3 C.F.R. at 154.
513 Id. § 2(a), 3 C.F.R. at _.
514 Exec. Order No. 12,044, 3 C.F.R. 152 (1979 compilation); see also Bruff, supra note 358, at 465 & n.69.
515 The initial draft of Executive Order No. 12,044 was ambiguous as to whether it applied to independent agencies, and the notice accompanying it sought public comment about whether it should be so applied. 42 Fed. Reg. 59,740 (_). Carter was apparently advised that it had the authority to do so. Strauss, supra note 5, at 592-93 n.20; see also Bruff, supra note 358, at 499; AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM 108 (1979). See generally Moreno, supra note 94, at 494-95.
Carter Administration also issued a circular laying out procedures for coordinating and clearing agencies’ legislative recommendations.\(^{519}\) Finally, in 1980 Congress enacted two statutes that further strengthened OMB’s control over agency regulations. The Regulatory Flexibility Act required agencies to analyze the impact of their regulations on small businesses;\(^{520}\) the Paperwork Reduction Act required that OMB review and clear all information collection requests and created the Office of Information and Regulatory Affairs (OIRA) to conduct regulatory reviews.\(^{521}\) In addition, the Executive Office of the President reviewed a large number of the proposed regulations and intervened directly in numerous regulatory decisions.\(^{522}\)

Like the Quality of Life Review of the Nixon and Ford Administrations, President Carter’s program stopped short of centralized supervision of the rulemaking process. Although the President and OMB gave some guidance as to which rules should be subjected to regulatory analyses and how regulatory analyses should be conducted,\(^{523}\) the final decisions on those issues were left to the individual agencies.\(^{524}\) Furthermore, RARG had no authority to block agencies from issuing proposed or final regulations and did not begin its review until after the proposed regulation had been published in the

\(^{519}\) OMB Circular A-19 (July 31, 1972). This circular on its face applied to the independent regulatory commissions, although it should be noted that several of the commissions’ organic statutes provided that they were not subject to OMB circulars. Moreno, supra note 94, at 490.


\(^{522}\) White, supra note 518, at 221; Percival, supra note 357, at 146-47 & n.112; Cross, supra note 423, at 495; Kenneth Culp Davis, Presidential Control of Rulemaking, 56 Tul. L. Rev. 849, 951 (1982).

\(^{523}\) Exec. Order No. 12,044, § 3(a) & (b); Memorandum from Wayne G. Grandquist, Associate OMB Director for Management and Regulatory Policy, to the Heads of Departments and Agencies, Regulatory Analysis (Nov. 21, 1978), cited in Bruff, supra note 425, at 548; see also Cross, supra note 423, at 495 n.62 (citing authorities).

\(^{524}\) Morton Rosenberg, Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues that May Be Raised by Executive Order 12,291, 23 Ariz. L. Rev. 1199, 1200 n.8 (1981); Cross, supra note 423, at 495 & n.63.
Federal Register. Nonetheless, commentators have generally acknowledged that Carter’s regulatory review program did enable the President to increase his control over regulatory policy.

Thus, despite Carter’s acceptance of certain pieces of post-Watergate legislation that impinged on his authority to execute the laws, on balance Carter emerges as a steadfast defender of the unitary executive. The fact that short-term political pressures effectively precluded him from asserting the President’s prerogatives on those few occasions does not rise to the level of acquiescence for the purposes of coordinate construction.

VIII. RONALD REAGAN

Ronald Reagan was, along with Franklin D. Roosevelt, one of the two most important presidents of the Twentieth Century. Just as FDR won World War II and pulled us out of the Great Depression, so too did Reagan win the Cold War and pull us out of the malaise into which the nation had fallen during the Carter years.

525 Percival, supra note 357, at 144-45; Rosenberg, supra note 278, at 1200 n.8; DeWitt, supra note 357, at 772. The fact that RARG review occurred after a rule had already been proposed marked a significant change from Quality of Life Review, since it prevented reviewers from attempting to influence regulations before they were proposed. Percival, supra note 357, at 144-45.

526 WHITE, supra note 618, at 221; Cross, supra note 423, at 495; Richard M. Neustadt, The Administration’s Regulatory Reform Program: An Overview, 32 ADMIN. L. REV. 129, 141-42 (1980); Paul R. Verkuil, Jawboning Administrative Agencies: Ex Parte Contacts by the White House, 80 COLUM. L. REV. 943, 949 (1980). Carter also exerted his authority by denying procurement contracts to companies that failed to follow “voluntary” wage and price guidelines. Exec. Order No. 12,092, 3 C.F.R. 249 (1979 compilation), revoked by Exec. Order No. 12,288, 3 C.F.R. 125 (1982 compilation). Other similar steps followed. The D.C. Circuit eventually upheld Carter’s actions as an exercise of his powers under the general procurement statutes. AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir.) (en banc), cert. denied, 443 U.S. 915 (1979). Although this conclusion was quite a stretch, in the end it demonstrates that Carter’s imposition of wage and price controls was an exercise of statutory authority and not an exercise of the President’s power to control the execution of the laws. See generally Quint, supra note 490, at 791-98.
Although the Reagan presidency’s political importance is unquestioned, its position with regards to the unitary executive remains something of an enigma. While the Reagan Administration was in power, many of its supporters and critics regarded the unitary executive as one of the centerpieces of the Administration’s policy. As Charles Fried, who served as Solicitor General under Reagan, has noted, “The Reagan administration had a vision about the arrangement of government power: the authority and responsibility of the President should be clear and unitary. The Reagan years were distinguished by the fact that that vision was made the subject of legal, rather than simply political, dispute.”

Others have been more equivocal. As Reagan’s first Attorney General, William French Smith, later observed:

If there was one area in which the White House was deficient during my years in office, it was in the protection of presidential power. Decisions there were made on the basis of the substance of individual issues. There was no effective concern or review of the impact that issue or the position taken with respect to it would have on presidential power. Nor was there any effort to identify governmental activities elsewhere that, if developed, would adversely affect the province of the executive. Nor to be candid, was the bully pulpit used to provide leadership or defense of that vital institution.

As with many things, the truth may well lie somewhere in between.\textsuperscript{531} However, regardless of how the debate whether the Reagan Administration defended the President’s authority to execute the laws too strongly or not strongly enough is resolved, it remains clear that it did protect the unitariness of the executive branch to a sufficient degree as to overcome any inference of acquiescence to any deviations from the unitary executive for purposes of coordinate construction.

The Reagan Administration began with “the most conscientious transition in White House history,” headed up by longtime Reagan confidant, Edwin Meese III.\textsuperscript{532} That said, Reagan “could be ruthless when necessary” on personnel actions,\textsuperscript{533} as evidenced by his decision not to give Meese the job he wanted most: White House Chief of Staff, the job he coveted. Instead, that position went to James Baker, formerly of George Bush’s presidential campaign, with Meese receiving a free floating White House position as Counselor to the President. Reagan then made Michael Deaver the third member of his White House troika for the first term, giving him the title of Deputy Chief of Staff.\textsuperscript{534} Meese, Baker, and Deaver struggled for preeminence on the White House staff during Reagan’s first term. This struggle for preeminence left Reagan able to pick and choose from the policy options his three subordinates presented him with. The net result was the augmenting of Reagan’s power and control.

\textsuperscript{531} Miller, \textit{supra} note 333, at 401-02 (“In the Reagan years, the picture was mixed, with a resurgent and aggressive presidency but with Congress not relinquishing the gains it had made.”); see also \textit{id.} at 410-12.

\textsuperscript{532} EDMUND MORRIS, \textsc{Dutch: A Memoir of Ronald Reagan} 419 (1999).

\textsuperscript{533} \textit{id.} at 420.

\textsuperscript{534} \textit{id.} at 421.
Reagan set aside regular time for cabinet meetings on Tuesdays and Thursdays at 2 p.m., but the time was not always used. Reagan was not hesitant in using the removal power vigorously to further his administration’s goals. Early in the first term, Reagan had his first major cabinet removal crisis when it became clear that Secretary of State Alexander Haig was not working out very well. Just as he had been ruthless in picking Baker over Meese as White House Chief of Staff, so too was Reagan ruthless in forcing Haig to resign. In his first year in office, Reagan dramatically settled an air-traffic controllers strike by firing the striking air-traffic controllers to resounding popular applause. During the second term, Reagan subtly forced the resignation of his White House Chief of Staff Donald Regan because of his failure to detect the Iran-Contra affair. Reagan also demonstrated his support for the unitary executive by the manner in which he wielded his removal power to displace three members of the United States Commission on Civil Rights in 1983 and numerous other officials thought to be insulated from presidential control.

Although the courts did not always approve of Reagan’s removals, the fact that Reagan did maintain his power to remove was sufficient to uphold his power to remove for the purpose of coordinate construction.

535 Id. at 426.
536 Id. at 462-63.
537 Id. at 659.
538 Id. at 620-22.
539 The statute creating the Commission was silent about removals and established the Commission “in the executive branch of the Government.” Civil Rights Act of 1957, Pub. L. No. 85-315, § 101(a), 71 Stat. 634, 634. For a full discussion of the debate over the Commission’s supposed “independence,” see Entin, supra note 203, at 770-76.
Reagan also supported the unitary theory of the executive by opposing all three post-Watergate ethics statutes reluctantly accepted by the Carter Administration. First, in 1981, Reagan removed a dozen Inspectors General without complying with the statutory requirement that he inform Congress of the reasons for his removals. Instead, Reagan simply explained that he wanted Inspectors General in whom he had total confidence.542

Second, Reagan pocket vetoed the proposed Whistleblower Protection Act of 1988, which would have amended the Civil Service Reform Act in ways that would have derogated from the unitary executive.543 It would have moved the Office of Special Counsel outside the MSPB and turned it into a freestanding independent agency.544 Other provisions would have given the Office of Special Counsel independent litigating authority that was not subject to coordination by the Justice Department.545 It would also authorize the Office of Special Counsel to transmit information to Congress “without review, clearance, or approval by any other administrative authority.”546

Recalling the concerns first raised by John Harmon,547 Reagan objected that the Act “creates an Office of Special Counsel and purports to insulate the Office from presidential supervision and to limit the power of the President to remove his


For overviews of the history of this legislation from two very different perspectives, see Kmiec, supra note 466, at 340-44; Rosenberg, supra note 278, at 662-88.


Id. § 1212.

Id. § 1217.

See supra notes 466 and accompanying text.
subordinates from office."\textsuperscript{548} Reagan was also concerned about a second provision that “purport[ed] to prohibit review within the Executive branch of views of the Office of Special Counsel proposed to be transmitted in response to congressional committee requests.”\textsuperscript{549} These provisions clearly raised “serious constitutional concerns.”\textsuperscript{550} But Reagan reserved his sharpest criticism for the section of the bill that would have authorized the Special Counsel to challenge the decisions of the MSPB in court. Permitting two executive agencies to resolve a dispute in court “conflict[ed] with the constitutional grant of the Executive power to the President which includes the authority to supervise and resolve disputes between his subordinates.”\textsuperscript{551} Such a provision was antithetical to the unitary theory of the executive branch.

Third, the Reagan Administration in due time came to oppose the Ethics in Government Act as an impermissible infringement on the unitariness of the executive branch. Although the Reagan Administration did not enter any objections when the Ethics in Government Act was first reauthorized in 1983,\textsuperscript{552} by the time Congress revisited the issue again in 1987, the administration began to voice more serious concerns. Assistant Attorney General John R. Bolton challenged the constitutionality of the Act during hearings, arguing that all prosecutors were properly considered executive

\textsuperscript{549} \textit{Id.}  
\textsuperscript{550} \textit{Id.}  
\textsuperscript{551} \textit{Id.}  
\textsuperscript{552} For a complete description of the Act and particularly sharp criticism of Reagan’s pocket veto, see Rosenberg, \textit{supra} note 278, at 662-88; see also Devins, \textit{supra} note 156, at 267-68. For a more sympathetic assessment of Reagan’s actions, see Kmiec, \textit{supra} note 466, at 342-43. Ethics in Government Act Amendments, Pub. L. No. 94-409, 96 Stat. 2039 (1983).
officers who thus had to be subject to the direction and control of the President.\textsuperscript{553} Assistant Attorney General Charles Cooper sounded similar themes..\textsuperscript{554}

Reagan concurred, declaring that “[a]n officer of the United States exercising executive authority in the core area of law enforcement necessarily, under our constitutional scheme, must be subject to executive branch appointment, review, and removal. There is no other constitutionally permissible alternative.”\textsuperscript{555} However, in light of the fact that the matter was being litigated before the D.C. Circuit and “[i]n order to ensure that public confidence in government not be eroded while the courts are in the process of deciding these questions,” Reagan decided to “tak[e] the extraordinary step of signing this bill despite [his] very strong doubts about its constitutionality”\textsuperscript{556} while at the same time pressing its opposition the independent counsel statute in its briefs before the D.C. Circuit and the Supreme Court in the litigation leading up to \textit{Morrison v. Olson}.\textsuperscript{557}

In his brief in the \textit{Morrison} case, Solicitor General Charles Fried argued that the Vesting and Take Care Clauses of Article II demanded that the President be able to control the actions of, and remove, independent counsels. The argument section of Fried’s brief began by saying:

\textsuperscript{553} \textsc{Fisher \& Devins, supra} note 427, at 147, 156-57 (citing \textit{Independent Counsel Amendments Act of 1987: Hearings Before the House Comm. on the Judiciary, 100th Cong., 1st Sess. 429-33} (1987), and quoting \textit{Oversight of the Independent Counsel Statute: Hearings Before the Senate Comm. on Governmental Affairs, 100th Cong., 1st Sess.} 8-9 (1987)).

\textsuperscript{554} Letter from Assistant Attorney General Charles Cooper to Leon Silverman (_), reprinted in \textit{Independent Counsel Amendments of 1987: Hearings on H.R. 1520 \& H.R. 2939 Before the Subcomm. on Admin. Law \& Governmental Relations of the House Comm. on the Judiciary, 100th Cong.} 100 (_).


\textsuperscript{556} \textit{Id.}

Article II, Section 1, of the Constitution declares: “The executive Power shall be vested in a President of the United States of America.” Section 3 of the same Article then charges the President with the corresponding duty: “he shall take Care that the Laws be faithfully executed.” The independent counsel statute violates the plain meaning of those words by taking an important part of the executive power, and of the concomitant duty to see the faithful execution of the laws, away from the President and assigning it to a person unaccountable to the President in her selection and her performance and her tenure. The statute vests executive power other than in the President, in direct contravention of Article II, Section 1’s “grant of power.”

The brief goes on to assert, “Whatever limits Congress may constitutionally impose on the President’s various means of holding other officers to account, it may not deny his power to remove purely executive officers like an independent counsel.” The brief went on to distinguish Humphrey’s Executor and Wiener by saying that those cases concerned entities that were quasi-legislative or quasi-judicial and here the function of prosecuting high level wrongdoing was a core executive function. All in all, the brief was a ringing defense of the unitary executive, which was unfortunately to lead to a disastrous Supreme Court decision. The Court in Morrison v. Olson divided seven to one, with Chief Justice Rehnquist writing for the Court in upholding the constitutionality of the Ethics in Government Act. The worst part of Rehnquist’s decision was his apparent conclusion that even officers performing such core executive functions as prosecution could be insulated from presidential removal. Justice Scalia wrote a forceful dissent in which he berated the majority not only for what he believed was its erroneous interpretation of Article II, but for even failing to follow Humphrey’s Executor.

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558 Morrison v. Olson, Brief for the United States as Amicus Curiae Supporting Appellees at 5-6, Morrison v. Olson (No. 87-1279) (citing Myers v. United States, 272 U.S. 52, 151 (1926)).
559 Id. at 29.
561 Id. at 688-91.
which itself did not purport to apply to core executive functions like prosecution. The Reagan Administration lost the battle in the *Morrison* case. Even though the Administration’s arguments failed to convince a majority of the Supreme Court, the fact that the Administration advanced them is sufficient to overcome any claims that the executive branch acquiesced to the institution of the independent counsel as a deviation from the unitary executive.

Reagan also joined his predecessors in objecting to the legislative veto, which continued to command significant interest on Congress. Although Reagan primarily based his attacks on the bicameralism and presentment requirements of Article I, section 7, Reagan also condemned legislative vetoes “because of the potential for involving the Congress in the day-to-day implementation of the law, a responsibility allocated solely to the President under the Constitution.” As Reagan further noted:

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562 *Id.* at 705-08 (Scalia, J., dissenting). Interestingly, subsequent court decisions have indicated that holdover officials, such as Humphrey, do not fall within the scope of the “for cause” removal provision. *See* Swan v. Clinton, 100 F.3d 973, 988 (D.C. Cir. 1996). It is thus now clear that under modern doctrine, *Humphrey’s Executor* would have been decided the other way.

563 Interestingly, a number of leading scholars, including a number of leading critics of the unitary theory of the executive, have suggested that the issue is far from settled by acknowledging that nothing in *Morrison* precludes a president for removing a member of an independent agency for failure to follow a presidential policy directive. *See* Lessig & Sunstein, *supra* note 10, at 110-11; Strauss, *supra* note 5, at 615; *cf.* Davis & Pierce, *supra* note -, at § 2.5, at 46 (pointing to criticism of *Humphrey’s Executor* in Freytag v. Commissioner, 501 U.S. 868 (1991), as suggesting that the issue has not yet been resolved); Laurence H. Tribe, *American Constitutional Law* § 4-10, at 254 n.45 (2d ed. 1988) (noting the lack of clarity as to what may constitute proper cause for removal).

564 Much as had occurred during the Ford and Carter Administrations, the Senate had passed legislation that would subject all agency rules to a legislative veto. *See* Fisher, *Constitutional Conflicts*, supra note 339, at 142 & n.113.


These provisions can be expected to inject an unnecessarily disruptive element by subjecting proposed programs to disapproval, congressional or even committee, even after they have been examined by the executive branch and found to be compatible with congressionally adopted standards and supportive of the national interests of the United States. 567

The Reagan Administration backed up its rhetoric by successfully challenging the legislative veto in the Courts of Appeals and by pressing the case before the Supreme Court, in which it argued that that the legislative veto impermissibly allows Congress to participate in the execution of the laws. 568 These efforts culminated in the landmark ruling in INS v. Chadha 569 holding that the legislative veto violates bicameralism and presentment requirements of Article I, section 7. The fact that the Supreme Court resolved the case on alternate grounds does not change the import of the Reagan Administration’s assertion of the unitary executive for the purposes of coordinate construction. Indeed, Reagan continued his opposition in the face of Congress’s refusal to recognize the import of Chadha by continuing to pass legislation containing legislative vetoes. Reagan’s signing statements approving this legislation consistently indicated that the unconstitutional provisions would be ignored. 570


568 Brief for the Immigration and Naturalization Service at 44-56, Chadha (No. 80-1832).


The Reagan Administration even revived the objections raised by Wilson and Franklin Roosevelt\(^{571}\) to permitting the Comptroller General to have any role in the execution of the laws. For example, when signing the Gramm-Rudman Balanced Budget and Emergency Deficit Control Act, which gave the Comptroller General the authority to issue the sequestration order that would initiate a series of mandatory budget cuts, Reagan noted that “under the system of separated powers established by the Constitution, . . . executive functions may only be performed by officers in the executive branch.” Thus, Reagan concluded, the “significant role” the bill assigned to the Comptroller General raised “serious constitutional questions,” because the Comptroller General was an agent of Congress who could not properly wield such executive power.\(^{572}\) Although Reagan signed the legislation, he emphasized that he was “in no sense dismissing the constitutional problems or acquiescing in a violation of the system of separated powers carefully crafted by the framers of the Constitution.”\(^{573}\) Therefore, notwithstanding his

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\(^{571}\) See Yoo et al., \textit{supra} note 24, at .

approval of the Act, the Reagan Administration challenged Gramm-Rudman in court, arguing among other things that it improperly encroached upon the President’s Article II power to execute the laws.\textsuperscript{574}

For the same reasons, the Reagan Administration also challenged the provisions of the Competition in Contracting Act (CICA) that permitted the Comptroller General to resolve protests entered by unsuccessful bidders for government contracts.\textsuperscript{575} Reagan “vigorously object[ed] to certain provisions that would unconstitutionally attempt to delegate to the Comptroller General of the United States, an officer of Congress, the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the executive branch.”\textsuperscript{576} Accordingly, Attorney General Smith and OMB Director David Stockman issued orders to the executive agencies not to comply with CICA, and the Administration subsequently refused to comply with a district court order upholding CICA’s constitutionality.\textsuperscript{577} Although the courts did not ultimately accept Reagan’s objections to CICA,\textsuperscript{578} the fact remains that the Reagan Administration protested Congress’s efforts to assign the Comptroller General a role in executing the law as being inconsistent with the unitary executive.


\textsuperscript{575} Ronald Reagan, Statement on Signing the Deficit Reduction Act of 1984 (July 18, 1984), in 1984 PUB. PAPERS 1053; see also Kmiec, supra note 466, at 349 (nothing the Justice Department’s objections to CICA).

\textsuperscript{576} May, supra note 289, at 979, 984 (citing H.R. REP. No. 138, 99th Cong., 1st Sess. 308 (1985)); see also FISHER, CONSTITUTIONAL CONFLICTS, supra note 339, at 130; Rosenberg, supra note 278, at 691.

The Reagan Administration also asserted the President’s authority to control the execution the laws directly. For instance, Reagan also took firm control of the federal government’s legal affairs, expanding the Federal Legal Council, using opinions issued by the Office of Legal Counsel to centralize control of governmental litigation in the Attorney General, and even assuming a role in the positions that his Administration would take before the Supreme Court. The Reagan Administration also repudiated several informal, nonstatutory understandings regarding the division of responsibility between the executive departments and the independent agencies and even challenged one such agency’s efforts to file amicus brief in federal appellate court. In fact, the Reagan Administration went so far as to question the very constitutionality of these agencies supposed “independence.”

The Reagan Administration also asserted the President’s authority to control the execution the laws directly by continuing and expanding upon the regulatory review program initiated by his predecessors. Executive Order 12,291 directed all executive agencies to employ cost-benefit analysis in implementing their regulations. The order

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580 Id. at 284; Harvey, supra note 156, at 1585.
581 Devins, supra note 156, at 268.
583 As Attorney General Meese noted, “Federal agencies performing executive functions are themselves properly agents of the executive. They are not ‘quasi’ this or ‘independent’ that. In the tripartite scheme of government, a body with enforcement powers is part of the executive branch of government.” See Verkuil, supra note 5, at 789 (quoting Stuart Taylor, A Question of Power, a Powerful Questioner, N.Y. TIMES, Nov. 6, 1985, at B6); see also id. at 779 n.4 (noting that Meese suggested that “the entire system of independent agencies may be unconstitutional”); Miller, supra note 333, at 411 & n.66 (noting that Meese questioned the constitutionality of independent agencies).

For a complete description of the Reagan regulatory review program, see Percival, supra note 357, at 147-54; see also Bruff, supra note 425, at 549-51; Cross, supra note 423, at 496-98; DeWitt, supra note 357, at 773-76.
further required them to submit all rules to OMB for prepublication review and to prepare Regulatory Impact Analyses (RIAs) of all major rules explicitly laying out the anticipated costs and benefits of the rule, the alternatives considered, and an explanation, if appropriate, of the reasons why the most cost-effective means of achieving the anticipated benefits was not adopted. OMB would review the proposed rules and the RIAs to maximize the “aggregate net benefits to society.”

Reagan supplemented Executive Order 12,291 with Executive Order 12,498, which empowered OMB to take formal control of the regulatory planning process by requiring agencies to submit to OMB a “draft regulatory program” describing “all significant regulatory actions” to be undertaken that year. OMB would then resolve any inconsistencies between the draft regulatory program and the Administration’s policies and would consolidate them into the Administration’s overall regulatory plan. These two orders extended the White House’s control over the agencies to a greater degree than ever before by dictating substantive criteria that agencies had to employ in issuing regulations and by permitting OMB to postpone indefinitely the publication of regulations of which it disapproved. Reagan did not invoke any particular statutory authority for issuing these orders, instead relying solely on “the authority vested in [him] as President by the Constitution and laws of the United States of America” as had so

587 See Percival, supra note 357, at 149-50. The Reagan Administration, like the Carter Administration, considered including the independent regulatory commissions within its program of regulatory review, but declined to do so. See PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW: CASES AND MATERIALS (1996).
many of his predecessors. Reagan specifically disclaimed any intent to direct agency
decisionmaking, noting that nothing in the order “shall be construed as displacing the
agencies’ responsibilities delegated by law.” Even opponents of the unitary executive
theory recognized that the regulatory review program did in fact have a direct impact on
regulatory outcomes and represented one of the most sweeping invocations of the unitary
executive yet seen.

During his second term, Reagan designated Meese to lead the Justice Department
by appointing him Attorney General. Meese became very firmly committed to the theory
of the unitary executive as well as to the authority and duty of all three branches to
interpret the Constitution. Meese explicitly questioned the constitutionality of
independent agencies in a major speech, which was widely noticed at the time. He
also made a speech defending departmentalism—the notion that all three branches of the
federal government are co-equal interpreters of the Constitution—that was worthy of
Thomas Jefferson or Abraham Lincoln. Meese’s so-called Tulane speech defending
deference must be given to the authority of the President to control and supervise executive policy
1981) (“Within the range of choice allowed by statute, the President may direct his subordinates’
choices.”).

See supra notes 112, 261, 311 and accompanying text; Yoo et al., supra note 24, at _.
Exec. Order 12,291, § 3(f)(3), 3 C.F.R. 127, 130 (1982 compilation); see also
Memorandum from U.S. Department of Justice, Office of Legal Counsel (Feb. 13, 1981), reprinted in Role
of OMB in Regulation: Hearing Before the Subcomm. on Oversight and Investigations of the House
Comm. on Energy and Commerce, 97th Cong. 486 (1981) (indicating that the OMB’s then-proposed
oversight role was “advisory and consultative” and did not authorize it to reject an agency’s judgment as to
matters delegated to it).

See Percival, supra note 359, at 990-93; Rosenberg, supra note 524, at 1200-01.
Howard Kurtz, Agencies’ Authority Challenged: Justice Department Seems to Side with
Conservatives on Regulatory Power, WASH. POST, Jan. 3, 1986, at A17; Stuart Taylor, Jr., A Question of
Power, A Powerful Questioner, N.Y. TIMES, Nov. 6, 1985, at B8.
departmentalism is every bit as ringing as Abraham Lincoln’s similar speech responding to *Dred Scott*. 594

Reagan was decisive when it came to matters of foreign policy. When the question arose whether to invade and liberate the tiny Caribbean nation of Grenada, Reagan tersely ordered “Do it.” 595 In the key arms control negotiation of his presidency with Gorbachev at Reykjavik, Iceland, Reagan took personal charge of the negotiations, and when Gorbachev tried to force him to abandon the Strategic Defense Initiative, Reagan dramatically walked out of the Reykjavik talks. 596 Jimmy Carter’s National Security Adviser, Zbigniew Brzezinski was later to mention Reagan’s walkout at Reykjavik as the key moment when the Cold War was won. 597 Even after the disastrous Iran-Contra scandal broke Reagan took the decisive action of appointing a three member board of inquiry headed up by former Senator John Tower to thoroughly investigate the scandal and get to the bottom of what happened. Reagan was in short a very decisive leader who always knew what direction he wanted policy to go in.

Another strong point of the Reagan presidency was ability to use the bully pulpit of the presidency in a series of striking speeches to call attention to his policy views. In one striking speech, Reagan called the Soviet Union an “Evil Empire” which he predicted would be buried on the ash heap of history. 598 In another important foreign policy address, Reagan stood in front of the Berlin Wall and called on Mikhail Gorbachev, the

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594 Calabresi & Yoo, supra note 21, at 719-20.
595 M ORRIS, supra note 532, at 501.
596 Id. at 599.
597 Id. at 658.
598 Id. at 474.
leader of the Soviet Union to “tear down this wall.” These speeches clearly accelerated the demise of the Soviet Union and gave hope to the long oppressed peoples of Eastern Europe and of the Baltic states. Together with Reagan’s support for anti-communist insurgencies in Afghanistan, Angola, and Nicaragua and together with his Strategic Defense Initiative, Reagan’s speeches helped to bring about the fall of communism.

Our review of the historical record thus reveals that Reagan represented a steadfast proponent and supporter of the unitariness of the executive branch. Thus even if one agrees with Attorney General Smith that the Reagan Administration could have gone to greater lengths to protect the prerogatives of the Presidency, it is clear that Reagan’s efforts on behalf of the unitary executive were at least sufficient to override any suggestions that the Reagan Administration followed a sustained and systematic pattern of acquiescence to congressionally-imposed deviations from the unitariness of the executive branch.

IX. GEORGE H.W. BUSH

More than almost any other President except for William Howard Taft, George Herbert Walker Bush staunchly defended the unitariness of the executive branch. Thanks in large measure to his exceptionally able White House Counsel, C. Boyden Gray, and his superb staff, Bush defended the unitariness of the executive branch with almost academic rigor.

See Devins, supra note 600, at 1043 (“Bush, more than any other president, embraced the ‘unitary executive’ theory of White House control over government operations.”); Lund, supra note 529 (detailing the Bush Administration’s efforts to defend presidential prerogatives).
The Bush administration began with the somewhat astonishing decision that after eight years of Ronald Reagan, it was time to clean house. John Robert Greene, Bush’s biographer, reports that “[f]ar from the ‘friendly takeover’ that many members of the press, and later, one influential scholarly book viewed it to be, Bush sounded as if he were taking the office away from a president of the other party.” Greene notes that superficially the cabinet seemed to belie this since seven Reagan cabinet members continued in the Bush administration, but since “Bush had absolutely no intention of dispersing power back to the departments,” what really mattered was his complete overhaul of the White House staff. Greene notes that “As the administration carried on, cabinet meetings became more infrequent. Though he made it clear to his staff that any member of his cabinet could see him at any time, Bush reserved the policy-making role for his White House staff.” Key staff appointments went to the smart but overly-clever Richard Darman and to National Security Advisor Brent Scowcroft. Scowcroft made it clear at the press conference announcing his appointment that “I want to have a new look. We’re going to formulate our policies.”

Early on in his administration Bush encountered a major battle with the Democratically controlled Senate over the nomination of former Senator John Tower to be the new Secretary of Defense. Tower had been very supportive of Bush’s career in Texas politics, and Bush stuck with him loyally and doggedly to the very end. When Tower’s nomination was finally rejected on a 53 to 47 vote, it became the first cabinet nomination rejection for a cabinet-level post since the 1940’s.

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602 Id. at 49.
603 Id. at 50.
604 Id.
nominated to fail since the last years of the Eisenhower administration in 1959. Bush immediately recovered by appointing the exceptionally capable Dick Cheney to be Secretary of Defense in place of Tower, and Cheney was easily confirmed. Bush’s willingness to support Tower against all the odds sent an important signal to subordinates in the executive branch that loyalty would be a two-way street in the first Bush Administration.

Bush was a vigorous, hands-on leader, and his attention to detail was appreciated by the public after concerns in Ronald Reagan’s later years over his inattention to detail. As Greene reports:

Despite Americans’ latent affection for Ronald Reagan, long before 1988 they had become troubled with his hands-off, detached approach to presidential leadership. In George Bush they found Reagan’s polar opposite. Bush’s style of executive leadership was characterized by indefatigable energy. Indeed the words “energetic” and “hyperactive” damn Bush with faint praise; by any definition he was a workaholic. . . . Bush’s staff continually complained (or boasted, depending on whom they were talking to) about the long hours and the phone calls in the middle of the night from a boss who just wanted to talk.

George Bush was clearly in charge of his administration and was very attentive to details. Almost immediately after his inauguration, Bush expressed his concerns about “the erosion of federal power.” In response to these concerns, Bush embarked upon the most aggressive defense of the President’s prerogatives the republic had ever seen, as Bush used a plethora of vetoes and signing statements to protect against any invasions of the constitutional authority of the Presidency that he perceived. For example, Bush

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605 Id. at 57
606 Id. at 141.
607 See Lund, supra note 529, at 36.
608 Id. at 41-42, 44. Professor Lund has suggested that Bush’s signing statements were so scrupulous about the separation of powers that at times they became “almost comical.” Id. at 44.
charged that permitting executive agencies to present to Congress views differing from those of the administration infringed upon his “constitutional responsibility to supervise my subordinates and to ensure that the executive branch speaks with one voice.”

Therefore, Bush indicated that he would “interpret these provisions in a manner consistent with my constitutional authority, as head of a unitary executive branch, to resolve disputes among my subordinates before their views are presented to the Congress.” Bush also protested that statutes purporting to prohibit the President from changing any decisions made by executive officials “must be interpreted in light of my constitutional responsibility, as head of the unitary executive branch, to supervise my subordinates.” Bush raised similar objections to statutes that attempted to guide the manner in which he controlled the executive branch. As Bush noted, “When a member

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610 Id.; see also George Bush, Statement on Signing the President John F. Kennedy Assassination Records Collection Act of 1992 (Oct. 26, 1992), in 1992-93 PUB. PAPERS 2004, 2005 (objecting that a provision requiring an agency to report simultaneously to both the President and Congress “would intrude upon the President’s authority to supervise subordinate officials in the executive branch”); George Bush, Statement on Signing the Housing and Community Development Act of 1992 (Oct. 28, 1992), in 1992-93 PUB. PAPERS 2060, 2061 (noting that section authorizing executive official to submit “reports, recommendations, testimony, or comments” to the Congress without prior approval by ‘any officer or agency of the United States’ raised “constitutional difficulties”).
611 George Bush, Statement on Signing the Energy and Water Development Appropriations Act, 1991 (Nov. 5, 1990), in 1990 PUB. PAPERS 1561, 1562; see also George Bush, Statement on Signing the Omnibus Budget Reconciliation Act of 1989 (Dec. 19, 1989), in 1989 PUB. PAPERS 1718, 1719 (objecting that insulating subordinate officials of the Department of Health and Human Services from presidential review deprives the President “of his constitutional authority to supervise their actions”); George Bush, Statement on Signing the Bill Modifying the Boundaries of the Alaska Maritime National Wildlife Refuge (Nov. 21, 1990), in 1990 PUB. PAPERS 1664, 1664 (noting that use of “independent’ appraisers, who would not be subject to supervision by the President” was “contrary to Article II of the Constitution”).
612 When faced with a provision purporting to determine how the President would resolve a dispute between the Secretary of Energy and the Administrator of AID, Bush concluded that the provision must be interpreted “consistent with my inherent constitutional authority as head of the executive branch to supervise my subordinates in the exercise of their duties, including my authority to settle disputes that occur between those officials through means other than those specified in the statute.” George Bush, Statement on Signing the Energy Policy Act of 1992 (Oct. 24, 1992), in 1992 PUB. PAPERS 1662, 1663; see also George Bush, Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1993 (Oct. 6, 1992), in 1992 PUB. PAPERS 1766, 1767 (objecting that provisions
of the executive branch acts in an official capacity, the Constitution requires that I have
the ultimate authority to supervise that officer in the exercise of his or her duties." 613
Clearly, if any President aspired to a “zero tolerance” policy with regards to
infringements on the unitary executive, it was Bush.

The Bush Administration also backed up these words with action. It ignored the
failure of the Reagan Administration’s challenges to the Comptroller General’s role in
executing the Competition in Contracting Act614 and ignored the fee-recovery provision
of the Act for similar reasons.615 Furthermore, the Bush Administration pressured
Congress into enacting a version of the Whistleblower Protection Act that omitted the
constitutionally objectionable features that led Reagan to pocket veto the initial
version.616 Specifically, the revised Whistleblower Protection Act dropped the previous
attempt to give the Office of Special Counsel independent litigating authority. As Bush
noted in his signing statement, this change

addresse[d] the chief constitutional concerns raised by earlier versions of
this legislation. The most substantial improvement in the bill is the
deletion of provisions that would have enabled the Special Counsel, an
executive branch official, to oppose other executive branch agencies in
court. Under our constitutional system, the executive branch cannot sue
itself.617

613 Bush, Statement on Signing the Housing and Community Development Act of 1992 ,
supra note 610, at 2061.
614 See supra notes 575-578 and accompanying text.
615 A federal court did not reach the merits of the issue, dismissing the case on ripeness
note 289, at 979 n.549.
Kmieć, supra note 466, at 343-44.
Statement].
The amendment also resolved one of the other problems with the original legislation by providing that any materials submitted by the Office of Special Counsel to Congress would be submitted “concurrently” to the President, dropping the clause providing that such materials would be submitted without the President’s review.618 Bush’s signing statement construed these provisions in a manner consistent with the unitary executive by stating, “I do not interpret these provisions to interfere with my ability to provide for appropriate prior review of transmittals by the Special Counsel to the Congress.”619

Bush also asserted his control over the executive branch by continuing the regulatory review program established by Executive Orders 12,291 and 12,498 during the Reagan Administration. Bush supplemented these Executive Orders by creating an interagency task force known as the Council on Competitiveness, which was charged with coordinating regulatory policy and mediating disputes arising between OIRA and the agencies during the regulatory review process.620 Through this mechanism, the Bush White House was able to exert its control over the entire executive branch in an extremely effective manner. For example, in one incident Bush partially overruled both OMB and the Food and Drug Administration (FDA) approving a modification to food labeling requirements proposed by the FDA over OMB’s objections, but changing its substantive scope of the FDA’s proposed rule by exempting restaurants in partial

618 § 3(a)(13), 103 Stat. at 28.
620 See Peter M. Shane, Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking, 48 ARK. L. REV. 161, 165-73 (1995); see also Herz, supra note 357, at 223-26; Percival, supra note 357, at 154-55; DeWitt, supra note 357, at 776-78. Bush also issued executive orders requiring agencies to consider the effect proposed regulations would have on the family and on federalism. See Exec. Order 12,606, 3 C.F.R. 241 (1993 compilation); Exec. Order 12,612, 3 C.F.R. 252 (1987 compilation). See generally Moreno, supra note 94, at 492-93.
accommodation of OMB’s concerns.\textsuperscript{621} It would be a mistake to construe Bush’s willingness to compromise as suggesting that the decision was anyone’s but the president’s to make. As FDA Commissioner Daniel Kessler acknowledged, “If the decision went against, I could no disobey an order from the President. For me as apolitical appointee, the only response to defeat was to leave.”\textsuperscript{622} Indeed, when Deputy Chief of Staff Bob Zoellick informed Kessler of the final outcome, he flatly stated, “This is the President’s decision.”\textsuperscript{623} It is true that Bush found himself unable to mandate OMB’s preferred solution. Bush noted somewhat surprisingly, “I can’t just make a decision and have it promptly executed, that the Department can’t just salute smartly and go execute whatever decision I make.”\textsuperscript{624} Some critics of the unitary executive have mistakenly taken this statement as a reflection of limitations on the president’s sole authority to execute the law.\textsuperscript{625} Closer inspection reveals any such conclusions to be erroneous. Bush’s inability to impose OMB’s proposal did not reflect any substantive restrictions on the president’s authority to execute the law, but rather on the procedural requirements imposed by the Administrative Procedure Act: changes of the magnitude proposed by OMB would have to be subjected to the notice and comment requirements of the Administrative Procedure Act, which would delay the decision by at least six to eight weeks and leave the final decision to the Clinton Administration.\textsuperscript{626}

\textsuperscript{621} Id. at 71.  
\textsuperscript{622} DAVID KESSLER, A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY 67 (2001).  
\textsuperscript{623} Id. at 70.  
\textsuperscript{624} Id. at 68.  
\textsuperscript{625} See Percival, supra note 359, at 994-95.  
\textsuperscript{626} KESSLER, supra note 622, at 68.
Bush also attempted to assert his control over the independent agencies when he directed the U.S. Postal Service to withdraw its suit against the Postal Rate Commission “pursuant to the President’s authority as Chief Executive and his obligation to take care that the laws are faithfully executed.” 627  Bush backed up his order by threatening to remove members of the Postal Service’s Board of Governors who refused to go along with his order.628  That the courts eventually refused to back up Bush’s order629 does not blunt the fact that the Bush Administration’s position did represent a strong assertion of the unitariness of the executive branch.

Confronting from day one a Democratic majority in both the House and the Senate, Bush realized from the start that he was going to have to wield his veto power to great effect, if he wanted to play a role in policy-making.  Bush was to achieve astonishing success in using the veto.  In “four years Bush vetoed forty-four bills, and his veto was upheld forty-three times.”630  The only Bush veto ever to be overridden was on the Cable Television Protection and Competition Act of 1992.631  Greene reports, “As a result of his successes with the veto, Bush was able to use the threat of it to affect how legislation was constructed.  As of 25 July 1991, the White House Press Office had recorded thirty-eight threats of a presidential veto of legislation; the vast majority of the legislation on the list did not ever become law.”632  In this way, Bush was able “to put a

627 Memorandum of President George Bush to Postmaster General Marvin Runyon (Dec. 11, 1992), quoted in Devins, supra note 600, at 1045.
628 See Devins, supra note 600, at 1043-46; Lund, supra note 529, at 79-82.
629 The D.C. Circuit ruled against the Bush Administration’s arguments on all counts, enjoining the removal of the members of the Board of Governors and holding that the Postal Service had the authority to bring suit against the Postal Rate Commission despite the President’s contrary wishes. Mail Order Ass’n v. United States Postal Serv., 986 F.2d 509, 527 & n.9 (D.C. Cir. 1993).
630 Id. at 62.
632 GREENE, supra note 601, at 62.
conservative cast on legislation that was, in its original form at least, marked by the liberal slant of the Democratic Congress.\footnote{Id.} Perhaps the most important example for our purposes is the Ethics in Government Act, which was scheduled to expire in 1992. In an April 3 speech, Bush indicated that he would veto any extension of the independent counsel statute unless significant changes were made.\footnote{George H.W. Bush, Remarks to the Federalist Society of Philadelphia in Philadelphia, Pennsylvania (Apr. 3, 1992), \textit{in} 1992 PUB. PAPERS 532, 535.} At a luncheon with reporters, Attorney General William Barr reiterated the Bush Administration’s dissatisfaction with the Ethics in Government Act and confirmed the likelihood of a veto of the proposal then pending before Congress.\footnote{See Sharon LaFraniere, \textit{Barr Urges “Fundamental Changes” in Independent Counsel Statute}, WASH. POST, Apr. 8, 1992, at A5.} This veto threat, when combined with a filibuster organized by Senate Republicans, doomed the reauthorization legislation and caused the Ethics in Government Act to lapse.\footnote{See Peter M. Shane, \textit{Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers}, 11 YALE L. \\& POL’Y REV. 361, 390 (1993).}

There was one major removal of the Bush years, and it involved Governor John Sununu, Bush’s first White House Chief of Staff. Sununu was brilliant, hard-working, and a real street fighter, but he ultimately became a big liability to Bush. George W. Bush and Andrew Card, Sununu’s Deputy, ultimately persuaded Sununu that Bush wanted him to resign, and he finally did so on December 3, 1991. There is no question the resignation was a forced one for the angry Sununu did not want to leave.

“treat them as having no legal force or effect in this or any other legislation in which they appear.” 638 Although the Bush Administration did enter into at least one informal agreement with Congress that would have much the same effect as a legislative veto, 639 as noted earlier such informal arrangements did not raise the same constitutional concerns as true legislative vetoes. 640

But even an Administration as conscientious about protecting presidential power as Bush’s did on occasion disregards its duty to protect the unitariness of the executive branch. When Congress enacted a statute permitting members of Congress to exercise control over the management of Washington National and Dulles Airports, the Bush Administration failed to challenge its constitutionality before the Supreme Court when given the opportunity to do so. 641 The Bush Administration did not suffer for its mistake,
as the Supreme Court nonetheless struck down the legislation in part because it represented an impermissible exercise of executive power by members of the legislative branch.\footnote{Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 275-76 (1991).} The Bush Administration’s failure to defend the unitary executive in this one regard simply underscores the propriety of requiring that a presidential practice be systematic, unbroken, and long standing before it can form the basis for inferring acquiescence for the purposes of coordinate construction. It should not undermine the other, ample evidence that President Bush determinedly defended the President’s authority to execute the laws throughout his Administration and that he almost invariably acted to protect the unitariness of the executive branch against any and all congressional attempts to encroach upon it.

X. WILLIAM JEFFERSON CLINTON

Although Bill Clinton has emerged as one of the most controversial presidents of the Twentieth Century,\footnote{See Lindgren & Calabresi, supra note 294, at 591-92 (rating Clinton the most controversial president in history on the grounds that the ratings of Clinton in a survey of historians, legal scholars, and political scientists exhibited the greatest variability).} all agree that Clinton’s intelligence and knowledge of policy-making details was very impressive. Joe Klein, Clinton’s biographer, notes that the president’s abilities awed his staff:

The awe was inspired by Clinton’s intelligence—particularly, his encyclopedic knowledge of policy questions—his perseverance and his ability to charm almost anyone under any circumstances; he was, without question, the most talented politician of his generation. At close range, his skills could be breathtaking: He was always the center of attention; he filled any room he entered. . . . [Clinton’s] staff was intensely loyal, with a deep sense of political mission. There had not been a truly successful
Democratic administration in a very long time; Clinton was the first Democrat to win reelection to a second term since Franklin Roosevelt.\textsuperscript{644} Klein adds that Clinton “seemed to know everything there was to know about domestic social policy.”\textsuperscript{645} Others echo these conclusions with regard to Clinton’s knowledge of policy making details. Klein quotes one observer as saying that Clinton was “[j]ust remarkable. You call him up and ask, ‘Who’s doing interesting things in housing?’ And he can tell you what everyone is doing—every last housing experiment in every state.”\textsuperscript{646} Harold Varmus, Clinton’s Director of the National Institutes of Health, remembered Clinton grilling “AIDS researchers for several hours, asking questions so detailed and sophisticated that most of the participants were shocked by his mastery of the issue.”\textsuperscript{647} Clinton seemed to promise so much with “his intelligence and remarkable political skills, . . . his detailed knowledge of almost every government activity, . . . his very presence.”\textsuperscript{648} In sum, there can be no doubt about the force of Clinton’s intelligence or about his mastery of the details of policy-making.

In addition, Clinton was an unusually hard-working president who was deeply immersed in the policy-making details of his Administration. Clinton demanded total control over the workings of the executive branch—and this attitude filtered into his decisions in appointing and dismissing as well as controlling subordinates:

Clinton’s problems stem not from his oft-reported love of detail, but also from his desire to reach down into his administration to make minor decisions best left to others. Consider the delays in filling important jobs in the administration. Clinton demanded that he be involved in “signing off on the appointment of every assistant secretary, and sometimes deputy

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\textsuperscript{644} JOE KLEIN, THE NATURAL 3-4 (2002).
\textsuperscript{645} \textit{Id.} at 26.
\textsuperscript{646} \textit{Id.}
\textsuperscript{647} \textit{Id.} at 188-89.
\textsuperscript{648} \textit{Id.} at 216.
\end{flushright}
assistant secretaries.” The desire to be involved in every level of administration and in the many detailed debates of his policies reflects more than a quest for excellence; it suggests a need for control. The element of control has been little noticed in Clinton’s psychology but is evident in his presidency. By setting up a freewheeling staff system without clear lines of authority, by allowing lines of authority to be blurred, and by attempting to act as his own chief of staff, Clinton not only retains a large measure of control but remains the focus and the center. By appointing a cabinet that reflects both strong left-of-center leanings (Donna Shalala, Henry Cisneros, Robert Reich) and strong moderate leanings (Lloyd Bentsen, Janet Reno), Clinton has done more than ensure he will get conflicting views; he has set himself as the center, as the person to be convinced, the person toward whom all debate is addressed.649

Much like Lyndon Johnson, Clinton wanted no disagreement, indeed, no independent forces within his executive department.

Both Bill and Hillary “have a greater need than is good for them to have people around them whose loyalty—and lack of independence—wasn’t in question.” When it came to selecting his first chief of staff, “Friend after friend of Clinton said Clinton didn’t want a Jim Baker (Reagan’s strong, and cunning Chief of Staff). He wanted someone with whom he was utterly comfortable, whom he could completely trust, who had no agenda of his own, and who wouldn’t get in his way” because “to his own great detriment, Clinton wanted to be his own Chief of Staff.”650

Clinton even violated his own policies in order to achieve a staff that deferred to his executive authority. “After his election, Clinton began his administration’s transition by announcing it would be guided by a stringent set of conflict-of-interest guidelines. Yet almost immediately they were relaxed to allow the president’s close friend Vernon Jordan to join the transition team as an adviser.”651 In addition, Clinton did not hesitate to exercise his authority to remove executive officials. In October 1993, following a major battle in Somalia and a major blunder in Haiti, National Security Advisor Anthony

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649 Id. at 260 (citations omitted) (quoting ELIZABETH DREW, ON THE EDGE: THE CLINTON PRESIDENCY 99 (1994)).
650 Id. at 264 (quoting DREW, supra note 649, at 130, 235).
651 Id. at 278.
Lake and Secretary of State Warren Christopher both offered to resign. As it turned out, Defense Secretary Les Aspin, who was “less prompt with his tender, was the one who was asked to leave.” The effective dismissal of Les Aspin was probably the most visible removal of the Clinton Administration.

In addition to determining the composition of his administration, Clinton employed a wide array of institutional arrangements to ensure that he retained control over the execution of the law, which have been capably documented in a recent article by Dean Elena Kagan. For example, Clinton preserved the system of OMB regulatory oversight instituted during the Reagan and Bush Administrations largely intact. Specifically, Clinton continued to require agencies to participate in a regulatory planning process and to submit major regulations for OMB review.

After the criticism leveled by Democrats at OMB involvement in the regulatory process, that Clinton would continue this program might be regarded as something of a surprise. Clinton did institute some changes in the program to mitigate the more deregulatory bent of the Reagan-Bush program of regulatory review. Although Clinton’s scheme continued to evaluate rules through the lens of cost-benefit analysis, it broadened the inquiry to allow consideration of other factors, such as “equity,” “distributive impacts,” and “qualitative measures.” In addition, the Clinton program regularized many of the procedures surrounding regulatory review, requiring disclosure

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652 Id. at 73.
653 See Kagan, supra note 25.
657 § 1(a), 3 C.F.R. at 639.
of all ex parte contacts and written communications between OIRA and the agency and placing limits on the time available for OMB review. In addition, the executive order implementing the scheme listed as one of its goals the “reaffirm[ation of] the primacy of Federal agencies in the regulatory decision-making process” and averred that “the regulatory process shall be conducted with due regard to the discretion that has been entrusted to the federal Agencies.”

What did not change was the commitment to the unitariness of the executive branch underlying the institution of OMB review. Clinton’s executive order clearly put the president in the position of resolving any interagency disputes that emerge from OMB review. “At the end of this review process, the President, or the Vice President acting at the request of the President, shall notify the affected agency . . . of the President’s decision with respect to the matter.” Centralized regulatory planning and oversight continued to give the president a powerful tool for exercising control over his administration, and casing the president as the person to resolve any conflicts “constituted a striking assertion of executive authority.” Indeed, although centralized regulatory review was criticized as a largely deregulatory-oriented institution during the Reagan and Bush Administrations, the experience under the Clinton Administration revealed that its importance transcended mere partisan politics. Instead, it is driven by the more fundamental and enduring issue of the proper balance of power within the federal government and the most effective way to ensure effective execution of the law.

659 § 6(b)(2), 3 C.F.R. at 646-47.
660 Pmbi., 3 C.F.R. at 638.
661 § 7, 3 C.F.R. at 648.
662 Id
663 Kagan, supra note 25, at 2289.
In some ways, Clinton expanded the regulatory review process far beyond that employed by Reagan and Bush. For example, unlike Reagan, who asserted that he had the authority to include the independent agencies within OMB review, but declined to do so as a matter of discretion, Clinton required the independent agencies to participate in the regulatory planning process. Policies proposed by the independent agencies that were in conflict with other agency action or “the President’s priorities” would be required to participate in “further consideration.” Clinton’s belief in the president’s authority over the independent agencies was also evident in his response to legislation turning the Social Security Administration into an independent agency headed by an Administrator who was removable only for “neglect of duty or malfeasance in office.” When signing the bill into law, Clinton noted that the removal provisions raised significant constitutional questions. Clinton also sent letters to independent agencies requesting that take action on particular issues, although it has been suggested that these communications more resembled requests than orders from the head of the administrative state. As Kagan notes, the inclusion of the independent agencies within the regulatory planning process “signified a strong commitment to presidential oversight of administration” that exceeded even that asserted under Reagan.

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664 See supra note 587.
665 § 4(c), 3 C.F.R. at 642.
666 § 4(c)(4)-(6), 3 C.F.R. at 643.
669 Kagan, supra note 25, at 2308-09.
670 Id. at 2288; see also Pildes & Sunstein 29 (arguing that the inclusion of the independent agencies within the Clinton regulatory review scheme was driven in part by “an especially strong commitment to centralized presidential oversight of the large policy judgments made by independent agencies”).
Clinton also demonstrated his support for the president’s authority to implement the laws by issuing directives to other federal officials about how they should exercise their discretionary authority across a wide range of areas.\(^{671}\) In short, “[t]he President . . . asserted his right as head of the executive branch to determine how its internal processes and constituent units were to function.”\(^{672}\) Although both Reagan and Bush had employed this device in the past, Clinton took it to a completely different level. Not only did Clinton issue far more such directives than his predecessors;\(^{673}\) Clinton’s interventions went far beyond the more managerial issues that had previously been the subject of such directives, such as the administration of the national park system, the armed forces, and federal contracting. Instead, Clinton’s orders had a broad impact on nongovernmental actors and rights customarily viewed as private.\(^{674}\) Such authority was extremely helpful with respect to issues that transcended the classic departmental boundaries or required significant coordination.\(^{675}\) Presidential authority became all the more important after the Democrats lost control of Congress.\(^{676}\) Clinton’s domination of the lower agencies “said something significant about the nature of the relationship between the agencies and the President—to say that they were his and so too were their decision.”\(^{677}\)

\(^{671}\) See Kagan, supra note 25, at 2282-84, 2292, 2303-06 (detailing instances of presidential direction of federal policy in a wide range of areas, including health care; firearms regulation; nondiscrimination with respect to sexual orientation, parental status, or genetics; labor policy; energy and environmental policy; child support; youth smoking; and family leave).

\(^{672}\) Id. at 2292.

\(^{673}\) Kagan identifies only nine instances in which Reagan directed heads of domestic policy agencies on a matter of substantive regulatory policy. Bush issued four such directives. Clinton, in contrast, issued 107 such orders. Id. at 2294-95.

\(^{674}\) Id. at 2291-92.

\(^{675}\) Id. at 2306.

\(^{676}\) Id. at 2312.

\(^{677}\) Id. at 2290.
Clinton’s close association with regulatory policy was apparent not only in his willingness to assert control over the agencies, but also in the manner in which he communicated about those policies with the American people. As Kagan notes:

In this administration, . . . nothing as too bureaucratic for the President. IN event after event, speech after speech, Clinton claimed ownership of administrative actions, presenting them to the public as his own—as the product of his values and decisions. He merged in public, and to the public, as the wielder of ‘executive authority’ and, in that capacity, the source of regulatory action.  

The manner in which Clinton used the bully pulpit to control the direction of his administration and to mobilize public support for his regulatory program “sent a loud and lingering message: these were his agencies; he was responsible for their actions; and he was due credit for their successes” Indeed, so great was Clinton’s domination of his administration that one Senator accused Clinton of “debasing the constitutional structure.” Using language reminiscent of similar criticisms leveled at Andrew Jackson, Abraham Lincoln, and Andrew Johnson, Congressman J.C. Watts criticized Clinton for “pretty much . . . acting as the king of the world.”

Another major initiative launched by Clinton was the attempt to reinvent government to be smaller and more efficient. Vice President Albert Gore was charged
with being the point man on the “Reinventing Government” reform portfolio.683 Klein describes Gore’s involvement in the project as follows:

The Reinventing Government project was perfect for [Gore], very worthy if eminently vice presidential: Presidents usually have more important things to worry about than how the government actually works. But Reinventing Government was a particular favorite of New Democrats, who loved the idea of a direct assault upon the ancient paradigm of federal bureaucracy. . . .684

Many aspects of this program would prove quite successful. The federal workforce would be reduced by about 350,000 and an estimated $157 billion saved. Equally important, 16,000 pages of bureaucratic regulations would be tossed—including some of the more famous government snafus, like the purchasing regulations at the Pentagon that resulted in $700 toilet seats and $150 hammers.685 Ultimately, however, the plan to “reinvent government” became sidetracked by political exigency. Clinton’s efforts to reinvent government would eventually be undone by his desire for new programs in health care and housing. That Clinton was unable to marshal the resources to carry through on this initiative should not be taken as any belief that he lacked the authority to do so.

The Clinton Administration ended in January of 2001 with quite a bang. President Clinton chose to depart office after “granting 177 presidential pardons and commutations of sentences on his last night in office.” As Klein reports

There was a libidinous crudeness to all of this. It was a final act of self-indulgence, a total loss of control. Other presidents had granted last minute pardons, had signed last-minute executive orders, had staged bathetic farewell tours—but the rapacious enormity of these conceits and absolutions seemed to recapitulate Clinton’s most loathsome qualities.
And the Marc Rich pardon, at once incomprehensible and instructive, was the worst of all.686 The only bright spot about the pardons was that they illustrated the extent to which, that for better or worse, the Constitution puts the President squarely in charge of the law enforcement process.

Although there is always room for disagreement as to the substance of Clinton’s policies, in retrospect his commitment to the unitariness of the executive branch cannot be gainsaid. As Clinton himself noted towards the end of his presidency, “I think if you go back over the whole reach of our tenure here, I have always tried to use the executive authority.”687

XI. THE CLINTON IMPEACHMENT AND THE DEATH OF THE ETHICS IN GOVERNMENT ACT

The Clinton years also witnessed one of the most climactic moments in the history of the unitary theory of the executive: the demise of the Ethics in Government Act and the institution of impendent counsels. The events began when Clinton directed Attorney General Janet Reno to investigate the mounting allegations of improprieties regarding the Arkansas Whitewater Development Corporation. On January 20, 1994, Reno appointed Robert Fiske, a moderate Republican and prominent member of the New York Bar who had served as U.S. Attorney for the Southern District of New York during the Carter Administration, as special counsel to investigate Whitewater.

686 Id. at 204, 196.
687 President’s News Conference (Dec. 8, 1999).
While the investigation was underway, Congress repassed the Ethics in Government Act, which had lapsed during the Bush Administration. The three-judge court designated under the statute to oversee the independent counsels immediately dismissed Fiske on the grounds that because he had been picked by the Administration to investigate Whitewater, he was insufficiently independent. In a fateful move, the three-judge court instead tapped Kenneth Starr, a former federal circuit judge and Solicitor General during the Bush Administration. Starr’s inquiry kept expanding as more and more new subjects opened up for him to investigate, including firings in the White House Travel Office and even the suicide of Deputy White House Counsel Vince Foster.

Eventually, the Starr investigation collided with a sexual harassment suit brought against Clinton by Paula Jones, who alleged that Clinton had exposed himself to her and had demanded oral sex after seeing her managing the registration desk at a conference. Jones sued Clinton, who claimed an executive privilege to the effect that a sitting president is not subject to civil suit for events that took place before he took office. This issue went before the Supreme Court, and the Clinton Solicitor General’s office argued that the Court should find a privilege such that Jones’s suit would be postponed until after Clinton left office. The Administration’s brief began with the claim that:

To require that the President defend against private civil lawsuits in state and federal courts during his term of office would intrude impermissibly upon the President’s performance of his constitutional duties, in violation of separation of powers principles. In both constitutional and practical terms, the demands placed upon the President under Article II are unceasing. A sitting President cannot defend himself against litigation seeking to impose personal financial liability without diverting his energy and attention from the exercise of the “executive Power” of the United States. A judicial order requiring the President to participate in the

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688 See supra notes 636 and accompanying text.
defense of a private civil suit would therefore place the court in the position of impairing a coordinate Branch of the government in the performance of its constitutional functions.  

The Supreme Court ruled unanimously against Clinton, although Justice Stephen Breyer wrote what can best be described as a Clinton-friendly concurrence. One great point of amusement about the Court’s opinion in *Clinton v. Jones* was Justice Stevens’s statement, hilarious in retrospect, that the case was “highly unlikely to occupy any substantial amount of [Clinton’s] time.”

In the wake of the Supreme Court’s decision in *Clinton v. Jones*, Jones’s attorneys deposed the President, asking him about his not-so-secret affair with Monica Lewinsky. When confronted with the Lewinsky allegations, Clinton denied under oath having a sexual relationship with Lewinsky, which in turn led Starr to investigate the perjury and obstruction of justice charges that formed the basis of Clinton’s impeachment by the House of Representatives on December 19, 1998 and subsequent acquittal by the Senate on February 12, 1999.

Although some scholars have predicted that the Clinton impeachment would weaken the presidency in the same manner as the failed impeachment of Andrew Johnson, other scholars have pointed out that such arguments overlook a fundamental difference between the two impeachments. Although there was certainly a partisan

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691 *Id.* at 710 (Breyer, J., concurring in the judgment).
692 *Id.* at 702.
694 The most extended statement of this position is Keith E. Whittington, *Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments*, 2 U. PA. J. CONST. L. 422 (2000). See also Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction’s Political Court*, 91
element to both impeachments, as Keith Whittington has eloquently demonstrated, “The
Johnson impeachment was centrally about presidential power,” particularly with
respect to which branch would control Reconstruction and Johnson’s conception of the
president as the direct spokesperson for the people and the sole head of a unitary
executive branch. The impeachment was thus in no small part a battle between
Congress and Johnson over the proper role of the presidency in the constitutional order.
Indeed, it is no accident that the “high crime” that provided basis for the impeachment—
the removal of Secretary of War Edward Stanton in contravention of the Tenure of Office
Act of 1867—was unique to the presidency and could not have been committed by any
other individual. Nothing less than the very structure of the federal government hung
in the balance.

In stark contrast to the Johnson impeachment, the Clinton impeachment focused
on the particular individual holding the office of president and not the presidency itself.
Indeed, as Whittington notes, “The Clinton impeachment was so unsatisfying in part
because it seemed so constitutionally unimportant.” Neither the president nor
Congress used the impeachment process as a platform for advancing a vision of the
president’s place within the constitutional order. As a result, it is unlikely to have

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GEO. L.J. 1, 6 (2002) (“[U]nlike the other instance—the impeachment of Bill Clinton—at the center of the
Johnson impeachment was a fundamental power struggle between the two branches on the most critical
issues of the day.”); Laura Kalman, The (Un?)Bearable Liteness of E-Mail: Historians, Impeachment and
to Johnson’s.”).

Whittington, supra note 694, at 426.

Id. at 427-31.

Id. at 438-39.

Id. at 443.

Id. at 459.

Id. at 455.
significant implications for the distribution of power between the legislative and executive branches.\textsuperscript{701}

In the end, the most important consequence of these events for the theory of the unitary executive was that it led to the Clinton Administration’s abandonment of its prior defense of the Ethics in Government Act. Clinton was not the only person dogged by an independent counsel investigation. Fully five members of Clinton’s Cabinet were investigated by special prosecutors.\textsuperscript{702} When the Act came up for renewal, the Clinton Administration dropped its support for the Act. The first indication of this change in position appeared in Deputy Attorney General Eric Holder’s testimony during House subcommittee hearings on reauthorization.\textsuperscript{703} Clinton’s Attorney General, Janet Reno, offered similar testimony before the Senate Committee on Governmental Affairs about the Act:

After much reflection and inquiry, we [at the Justice Department] have decided—reluctantly—to oppose reauthorization of the Independent Counsel Act. . . . In 1993, as many of you know, I testified in support of the statute. . . . However, after working with the Act, I have come to believe—after much reflection and with great reluctance—that the Independent Counsel Act is structurally flawed and that those flaws cannot be corrected within our constitutional framework . . .

Our Founders set up three branches of government: a Congress that would make the laws, an Executive that would enforce them, and a judiciary that would decide when they had been broken. The Attorney General, who is appointed by the President and confirmed by the Senate, is publicly accountable for her decisions. . . .

In contrast, the independent counsel is vested with the full gamut of prosecutorial powers, but with little of its accountability. He has not been confirmed by the Senate, and he is not typically subject to the same sorts of oversight or budgetary constraints that the Department faces day

\textsuperscript{701} Id. at 450-59. \\
\textsuperscript{702} Id. at 88. \\
in and day out. Accountability is no small matter. It goes to the very heart of our constitutional scheme. Our Founders believed that the enormity of the prosecutorial power—and all the decisions about who, what, and whether to prosecute—should be vested in one who is responsible to the people. That way—and here I am paraphrasing Justice Scalia’s dissent in *Morrison v. Olsen*—whether we’re talking about over-prosecuting or under-prosecuting, “The blame can be assigned to someone who can be punished.” It was for this reason that the American republic survived for over 200 years without an Independent Counsel Act.704

Both the first (Archibald Cox) and the last (Kenneth Starr) of the modern independent counsels asked Congress to let the statute die.705 Senators Howard Baker, Robert Dole, and George Mitchell706 as well as a bipartisan array of former Attorneys General707 and independent counsels708 also called for restoring control over prosecution of senior government officials to the control of the executive branch.

The Clinton Administration’s opposition to reauthorization dealt a final death blow to the Ethics in Government Act. Republicans still upset about Lawrence Walsh’s investigation of Iran-Contra joined with Democrats outraged by the Starr investigation of Clinton to bring an end to the independent counsel statute. The statute was allowed to

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705 See id. at 719, 725 (testimony of Independent Counsel Kenneth W. Starr); Cox & Heymann, *supra* note 9.


707 See Senate Committee Hearings, *supra* note 704, at 28 (testimony of former Attorney General Griffin B. Bell); House Subcommittee Hearings, *supra* note 703, at 139 (testimony of former Attorney General William P. Barr), 146 (testimony of former Attorney General Benjamin R. Civiletti).

708 See Senate Committee Hearings, *supra* note 704, at 56 (testimony of former Independent Counsel Joseph E. diGenova); 204 (testimony of former Independent Counsel Robert Fiske), 330 (testimony of former Independent Counsel Lawrence E. Walsh), 364 (testimony of former Assistant Prosecutor, Whitewater Investigation Julie Rose O’Sullivan). Former independent counsels were not unanimous in their opposition. See id. at 64 (testimony of former Special Prosecutor Arthur H. Christy), 76 (testimony of former Independent Counsel Curtis Emery Von Kann), 283 (testimony of former Associate Independent Counsel John Q. Barrett).
lapse, and subsequent regulations gave the attorney general the authority to appoint and supervise special counsels charged with investigating top government officials.

The abruptness with which support for the Act collapsed was somewhat shocking. At the end of 1997, the statute still enjoyed broad support, although many commentators and legislators believed some adjustments might be necessary. By the end of 1998, political support had almost completely evaporated.\(^{709}\)

Thus, as we predicted,\(^{710}\) the rise and fall of the Ethics in Government Act ultimately paralleled the rise and fall of the Tenure of Office Act of 1867 chronicled in our prior work.\(^{711}\). Both statutes were enacted by imperial Congresses at a time of great presidential weakness: the Andrew Johnson Administration in one case and the post-Watergate Carter Administration in the other. Both statutes lasted roughly twenty years, during which time they worked very badly. Both statutes were then finally repealed in a show of bipartisan determination to return to the system of presidential removal power which the Framers so wisely bequeathed us.

**CONCLUSION**

We thus come to the end of our four-part survey of the presidents from George Washington to Bill Clinton to determine the constitutional practices with respect to presidential control over the execution of the law. Just as we found in each of the preceding periods, we conclude that every president between 1945 and 2001 defended the unitariness of the executive branch with sufficient ardor to rebuff any claims that

\(^{709}\) See Gormley, *supra* note 19, at 101-03.

\(^{710}\) See Calabresi & Yoo, *supra* note 17, at 1462.

\(^{711}\) See Calabresi & Yoo, *supra* note 21, at 746-58, 760-63, 778-82, 791-95.
institutions such as independent counsels and independent agencies have been foreclosed as a matter of history. From Harry Truman’s removal of General Douglas MacArthur to Bill Clinton’s removal of Les Aspin, each president during in this period has proved to be a vigorous defender of the unitary executive. The consistency with which presidents have asserted their sole authority to execute the law is made all the more important by the Supreme Court’s recognition in *INS v. Chadha*\(^7\) that the fact that every president since Woodrow Wilson had objected to the legislative veto was sufficient to prevent the issue from becoming an established aspect of our constitutional order. Clearly, the same reasoning dictates that the issue remains open as a historical matter and must be resolved on the basis of legal and normative arguments.

The main controversy during this fourth quarter of American history that bore on the unitary executive was over the constitutionality of the special prosecutor regime set up by the ethics in government act. The important point to note about that controversy is that, notwithstanding the Supreme Court’s approval of the institution of independent counsels in *Morrison v. Olson*,\(^7\) the Ethics in Government Act was allowed to lapse in June of 1999 after both Democrats and Republicans had grown to appreciate its flaws. This rejection of the Ethics in Government Act some twenty years after it was first enacted is quite reminiscent of the repeal of the Tenure of Office Act under Grover Cleveland, which also occurred some twenty years after that statute was enacted. In both case, Congress was tempted to experiment with unconstitutional limits on the president’s removal power, and in both cases the unconstitutional regime did not work out and was

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eliminated. The story of the rise and fall of both the Tenure of Office Act and the Ethics in Government Act are eerily similar and stand as stark reminders of the dangers that can occur when the power to execute the law is placed outside of presidential control.

That the unitary executive would emerge from this era as an open constitutional question is rendered all the more remarkable in light of the radical expansion of presidential power during this era. This serves a stark refutation of those who have argued that the increase in executive authority justified sanctioning greater legislative intervention in the execution of the law.714

We do not expect, however, that the demise of the independent counsel law will forestall further controversy surrounding the unitariness of the executive branch. Indeed, many of these issues have begun to play themselves out once again during the Administration of George W. Bush. The question about the proper scope of presidential control over the execution of the law arose when creating the new Cabinet-level Department of Homeland Security. Given the sensitive nature of the antiterrorism work to be conducted by the Department, Bush was adamant that the president have the unilateral power to remove Department officials at will. Disagreement by Senate Democrats led to an impasse that would ultimately be settled by the 2002 midterm elections, in which the Republicans successfully gained control of the Senate. It is thus likely that we have not yet seen the last of the debates surrounding the unitary executive. It is our hope that in reviewing the history of presidential practices with respect to the execution of the law, this project will help provide the historical context in front of which the relevant legal and normative issues can be discussed.

See supra note Error! Bookmark not defined. and accompanying text.

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